6192 a. 1.

A GENERAL ABRIDGMENT OF Law and Equity,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES;

WITH NOTES AND REFERENCES TO THE WHOLE.

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FAVENTE DEO.

THE SECOND EDITION.

VOL. IX.

London:

PRINTED FOR

G. G. J. AND J. ROBINSON, T. PAYNE, E. AND R. BROOKE, T. WHIELDON AND J. BUTTERWORTH;

AND L. WHITE, Dublin.

M.DCC.XCII.

A

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Diſmes,

Diſmes, [or Tithes.]

(B. a) Modus Decimandi. In what Caſes a Man may *preſcribe in Modo Decimandi*; and how.

Modus decimandi *is*, when lands, tenements, and hereditaments have been given to the parſon and his ſucceſſors, or an annual certain ſum, or other profit, always time out of mind, to the parſon and his ſucceſſors, in full ſatisfaction and diſcharge of all the tithes in kind in ſuch a place. 13 Rep. 40. Trin. 7 Jac. in the caſe of modus decimandi. ——— See (Y) pl. 1, 2. S. C.

[1. ADMITTING that tithes of graſs de jure ought to be made into hay by the pariſhioner, yet it ſeems a *pariſh may preſcribe*, without any conſideration given to the parſon *to pay* the *tithes* of this *in graſs-cocks, before any tedding* thereof. Contra, BARHAM v. GOOSE. Hill. 14 Ja. B. R. per Curiam, præter Houghton, who ſeemed e contra then, becauſe this preſcription is non decimando for this part.]

[2. *So* it ſeems *a pariſhioner may make ſuch preſcription.* Contra, H. 14 J. B. R. BARHAM AND GOOSE, per totam Curiam, becauſe it is in non decimando for this part.]

[3. *So* a *pariſh may* preſcribe without any conſideration, to pay tithes of graſs-cocks *after tedder* and making thereof in weekes and wainrows, *and putting into graſs-cocks*, then out of the graſs-cocks *to ſet out the tithes, and not to make it into perfect hay.*]

[4. Contra, 15 Ja. B. R. between POPPINGER AND JOHNSON, a prohibition denied. But nota, that only Houghton moved it as doubt to him, to which no anſwer was given, but the prohibition denied notwithſtanding.] See (Y) pl. 2. S. C.

[5. If a man *preſcribes, that if he hath under* 10 *fleeces of wool*, that *he ſhall pay one penny* to the parſon *for each in lieu of tithes, and that if he hath more*, (*) *that he ſhall deliver* to the parſon *the tenth part* of his wool, *upon his conſcience*, without fraud and covin, *ſine viſu vel tactu* of the parſon; this is not a good modus, becauſe it is *unreaſonable*. M. 12 Ja. B. per Curiam, between WILSON and the Biſhop of CARLISLE. Vide the ſame caſe, Hobart's Reports, 149.] Hob. 107. pl. 130 S.C. * Fol. 648.

[6. If a man *preſcribes to pay* to the parſon *for the tithes of the tenth ſheep, as it falls out, and the tenth ſwarth*, this is not any modus, becauſe he does not preſcribe to pay other things than what was due, but a full tenth. M. 13 Ja. B. between BARKER AND BOSWELL, per Curiam.]

Hob. 250. pl. 330. Hill. 12 Jac.—— Hill. 16 Jac. in caſe of Hide v. Ellis, S. P. obiter.

[7. A man may *preſcribe to pay the tenth acre of wood ſtanding*, and *ſo* to pay the *tenth acre of graſs ſtanding* for the tithe of hay. Hobert's Reports, caſe 328.]

8. A man cannot preſcribe *in the negative to be quit of tithes, but in the negative with an affirmative*, viz. *that he and all*, &c. *have uſed to be quit of tithes*. Br. Preſcription, pl. 17. cites 7 H. 6. 32. and 8 H. 6. 3.

[2] Gibb. 120, 121. Monſon v. Chapman, S. C. & S. P. accordingly.

9. Moduſes *were* real compoſitions by parſon, patron, and ordinary, the written evidence of which is loſt; but the law preſumes by the long uninterrupted uſage that there was ſuch; agreed unanimouſly by Ld. Chancellor, and Reynolds and Forteſcue, judges aſſiſtants. Barnard. Rep. in B. R. 292, 293. Hill. 3 Geo. 2. in Canc. Munſon's caſe.

10. If tenants, time out of mind, have uſed to pay a certain price for a tithe lamb, ſo that the *cuſtom is fully ſettled*, though the *parſon incroach more*, or the tenant pay the lamb in ſpecie, this does not break the cuſtom; but if one has paid 1d. for a lamb for 50 years, and *after pays tithe in ſpecie* before the cuſtom is ſettled, though he pay his 1d. again for 20 years, he cannot preſcribe in modo decimandi. Savil. 13. pl. 34. Hill. 23 Eliz. in Scacc. Fleming v. the Tenants of Dudly, and there ſaid to be ſo reſolved. Mich. 25 Eliz. in Cam. Scacc. Beake v. Maine.

11. Parſon libelled againſt A. for tithes. A. for a prohibition ſhewed, that within the ſaid pariſh of D. there is a *hamlet* in which A. inhabited, that the ſaid inhabitants within the ſaid hamlet had had time out of mind a *chapel of eaſe* within the ſaid hamlet, becauſe the ſaid hamlet was diſtant from the church of the ſaid pariſh; and *with part of their tithes have found a clerk* to do divine ſervice within the ſaid chapel; and alſo had paid a *certain ſum to the ſaid parſon and his predeceſſors for all manner of tithes*, and it was held a good *preſcription*, and a prohibition was granted. 4 Le. 24. pl. 77. Trin. 26 Eliz. B. R. Saer v. Bland.

12. Where a man preſcribes 1*s. for the tithes of all willows cut down by him in the pariſh of D.* it is not good; for thereby if he cuts all the willows of other men alſo, he ſhould pay but 1s. for all. But he ſhould have preſcribed for all willows cut down by him *on his own land*, and then it had been good. But as it is laid it is unreaſonable. Godb. 60. pl. 73. Mich. 28 & 29 Eliz. B. R. Anon.

13. A modus was ſuggeſted in this manner, viz. *that the proprietors and occupiers of ſuch a manor, or any parcel thereof, ſhould pay a groat to the parſon for herbage tithes*; adjudged an ill modus, becauſe if a man had but two or three feet of ground in the manor, he was to pay a groat; but it ſhould have been laid, *that the proprietors and occupiers of ſuch a manor for themſelves and their farmers had uſed to pay* 4*d.* 1 Vent. 3 Mich. 20 Car. 2. B. R. Anon.

14. A preſcription to pay 5s. to the *pariſh clerk* in lieu of the tithes of certain land is not good, becauſe he is dative and removeable. Cro. E. 71. pl. 26. Mich. 29 & 30 Eliz. B. R. Savell v. Wood.

But if the parſon be tied to find ſuch a clerk, and ſuch a ſum has

been uſed to be paid to the pariſh clerk in diſcharge of the parſon, it had been a good preſcription, and ſo by way of compoſition. Le. 94. pl. 122. S. C.———Mo. 908. pl. 1274. S. C. & S. P. accordingly.

15. Libel for tithe of corn, hay, &c. the defendant ſuggeſted a preſcription *to pay a third part of the* 10*th in one part of the land, and in another part, a moiety of the* 10*th for all manner of tithes*; the court inclined that it was a good preſcription, and a prohibition was granted. Godb. 120. pl. 139. Hill. 29 Eliz. Rooke's caſe.

16. The parſon of North-Lynn libelled for tithes; the defendant *ſuggeſted, that he is an inhabitant of South-Lynn, and preſcribed in the inhabitants there, having paſtures in North-Lynn, to pay tithes in kind to the vicar of South-Lynn, where he is not reſident*; *and that the vicar hath paid to the parſon of North-Lynn*, &c. *two pence for every acre*. The whole court was againſt the prohibition; for modus decimandi ſhall never come in debate upon this matter; but who ſhall have the tithes, whether the vicar of South-Lynn, or the parſon of North-Lynn? Beſides, the preſcription is not reaſonable. Le. 128. pl. 175. Trin. 30 Eliz. B. R. Gateſield v. Penn. [3]

17. The defendant alleged a cuſtom, *that the parſon ſhould have* for his tithe corn *the tenth land ſown with any manner of corn, and that he ſhould begin always at the firſt land next the church*, &c. The *parſon ſhewed*, that the defendant by *fraud and covin* ſowed every tenth land which belonged to the parſon very ill, and with ſmall quantities of corn, and did not dung or manure it as he did the other nine parts, ſo that it produced not half in proportion of what the other nine lands did. And the opinion of Wray J. was, that the cuſtom was againſt common reaſon, and ſo void. But if it be a good cuſtom, then the parſon ſhall have an action on the caſe. Le. 99, 100. Paſch. 30 Eliz. B. R. Stebbs v. Goodlack.

Mo. 913. S. C. ſays, that the ſuit by the parſon in the ſpiritual court being for tithes in kind, viz. of every tenth cock by reaſon of the covin, a prohibition was granted notwithſtanding the

covin, becauſe the fraud is to be remedied in an action on the caſe at the common law.——S. C. cited Arg. and there it is ſaid, that the defendant at firſt got a prohibition on account of the cuſtom, but the parſon afterwards had a conſultation, Wray Ch. J. ſaying, that this cuſtom was againſt common reaſon. 2 Wms.'s Rep. 569. cites 1 Le. 99.———[But I do not obſerve this matter there.]

18. The defendant ſurmiſed *that he was an inhabitant of S. and that* time out of mind *every inhabitant there, who had paſtures in N. had paid tithes for them to the vicar of S. and that the vicar of S. had paid to the parſon of N.* 2*d. for every acre*; and the court held, that prohibition lay, and that plaintiff ſhould declare, and the defendant (in the prohibition) might demur if he will; for it is as if he preſcribed to pay 2d. for every acre. Cro. E. 136. Trin. 31 Eliz. B. R. Coteford v. Peace

S. C. cited Arg. 2 Wms.'s Rep. 571. in caſe of Chapman v. Monſon.

19. In a prohibition, the plaintiff *preſcribed to pay the* 10*th ſheaf of grain growing on* 60 *acres after it was reaped, in full ſatisfaction*

Roll. Rep. 273. S. P.

of all grain being upon the ſaid 60 *acres*, and which hath been accepted, &c. The court held this preſcription not good, for it is no more than to pay ſo much for the 10th part when the owner pleaſeth; becauſe he may chuſe whether he will make the corn into ſheaves or not, or as much into ſheaves as he will, and ſo for the 10th part he may not have the 3d part, which is not reaſonable. And. 199. pl. 234. Trin. 31 Eliz. Adams's caſe.

20. Libel for tithe of calves, &c. the defendant ſuggeſted a *cuſtom* in the pariſh of B. *to pay for the milk of every cow* 2d. *in ſatisfaction of calves.* The *proof was, that there was ſuch a cuſtom* in the pariſh *for all the land except five farms*, and for this cauſe it was held that he had failed in his preſcription; for it may be theſe lands were parcel of the five farms; but had it been proved that the lands were not parcel, it had been otherwiſe; and therefore a conſultation was granted. Cro. E. 206. pl. 41. Mich. 32 & 33 Eliz. B. R. Bennet v. Shortwright.

21. Preſcription to be diſcharged *of locks of wool* ought to be ſhewn of locks *caſually loſt*. Mo. 911. pl. 1283. Mich. 37 & 38 Eliz. B. R. in a nota there.

Ibid. Coke Ch. J. cited one Shipden's caſe, that ſuch a modus decimandi generally for the park is not good, if it be diſparked, but it ſhall be particularly for all the acres contained in the park.

22. A prohibition was prayed on a ſuit in the ſpiritual court for tithes in kind of a *park now converted into tillage*, upon a ſurmiſe de modo decimandi, to pay a buck and a doe for all tithes, and allowed per Cur. and agreed, 1ſt, Though they are feræ naturæ, yet they may be given for tithes. So to pay pheaſants, &c. 2dly, Though they are not tithable of themſelves, yet they may be given for modus decimandi, as a great tree may be given for tithe of trees tithable. * 3dly, That that is a diſcharge to the very ſoil, and the park is only a liberty, and the owner may furniſh it with game when he pleaſes. Noy, 148. Sharp v. Sharp.

*[4]

22. Whether a modus decimandi may *accrue after endowment* of a vicarage? Quære, but prohibition denied on producing endowment by vicar, by which it ſeems it cannot. See Godb. 180. pl. 254. Trin. 8 Jac. C. B. Anon.

23. In a prohibition the plaintiff declared, *that he for ten years laſt paſt held and occupied* 100 *acres of land in the pariſh of S. lying within, and being part of a park there, called Ungar-Park, and that he, and all the occupiers of the ſaid park, time out of mind, have uſed to pay to the parſon of S.* 4*l. yearly, in full ſatisfaction and diſcharge of all tithes of the ſaid grounds, which* 4*l. the parſon had ſo accepted. After verdict for the plaintiff, it was moved in arreſt of judgment, that the park was not alleged to be antiquus parcus*, and ſo to bear preſcription, and that the preſcription was laid in the occupiers, when it ſhould have been in the owners of the park, nor by way of cuſtom in the place; but reſolved, that this was no matter of intereſt and inheritance, but only in part of diſcharge; for every modus is a diſcharge of the natural tithes, and ſo works by way of diſcharge. Hob. 118. pl. 148. Hill. 13 Jac. Shelton v. Mountague.

24. If

24. If a modus be *for hay in Bl. Acre*, and the party *ſows it with corn* ſeven years together, that does not deſtroy the modus, but whenſoever it ſhall be made into hay the modus ſhall *revive*; and when it is ſown with corn, the parſon ſhall have tithe in kind. Godb. 194. Trin. 10 Jac. C. B. Brown's caſe. Roll. Rep. 121. In pl. 4. Arg. S. P. where the hay belonged to the vicar, the corn to the parſon. ——— S. C. cited 2 Show. 462. Arg. ——— S. C. cited Equ. Ab. 368. ——— When no one year can paſs without ſome certain duty, this is a *permanent* modus, though it be that the ſame piece of ground being ſown ſhall pay the great tithes to the parſon, and being converted into meadow ſhall pay the ſmall tithes to the vicar. Arg. Gibb. 120. cites Godb. 194. [pl. 278. Trin. 10 Jac. C. B.] Brown's caſe, and Cro. E. 136.

25. A libel was for ſubſtraction of tithes upon the ſtatute of 2 E. 6. the defendant ſuggeſted, that as to that farm, whence the tithes in queſtion aroſe, there was a *cuſtom to take back thirty ſheaves* of the tithe-corn growing on ſuch a farm; per Cur. it ought to be averred to be a great farm, and if there were but thirty tithe-ſheaves in all, the owner ſhall not have them; becauſe that would be an unreaſonable cuſtom, and day given to the other ſide to ſhew cauſe why the prohibition ſhould not be awarded. Godb. 234. pl. 324. Mich. 11 Jac. C. B. Jucks v. Cavendiſh.

26. If there was a preſcription, time out of mind, for a modus decimandi, if this modus be *not paid for a certain time*, yet this alters not the preſcription for this modus, but he may pay it when he will. Per Coke Ch. J. 2 Bulſt. 240. Trin. 12 Jac. Price v. Maſcall. If the preſcriber lets the land to farm, and the *farmer pays tithes in kind*, this does not deſtroy the preſcription as to the leſſor. Roll. Rep. 176. per Coke Ch. J. in S. C.

27. Preſcription, time out of mind, for modus decimandi for land when it was a *park*, it ſhall continue for payment of this modus only after that ſuch a park be diſparked and converted to another more profitable uſe; per tot. Cur. 2 Bulſt. 240. Trin. 12 Jac. Price v. Maſcall. Roll. Rep. 176. pl. 14. S. C. & S. P. held accordingly by Coke Ch. J. the preſcription being to pay ſo much money. ——— The difference is, when the preſcription is to pay *money* for all the tithes of ſuch a park, and it be diſparked, there peradventure tithes ſhall not be * paid; but where it is to pay the *ſhoulder of a buck* or a doe at Chriſtmas for all tithes of the park, there, if diſparked, tithes ſhall be paid as of other land; per Popham Ch. J. Cro. E. 467. (bis) pl. 25. Paſch. 38 Eliz. B. R. in caſe of Bedingfield v. Freak. ——— Mo. 909. pl. 1277. S. C. and ſame diverſity. ——— Ow. 74.. S. P. by Popham.

28. If an *orchard*, for which there is a modus, be *plowed*, and afterwards it be *made an orchard again*, the modus ſhall be paid. Arg. 2. Show. 462. in caſe of Hill and Harris, cites it as agreed. 1 Roll. 121. Cooper v. Andrews. * [5] Roll. Rep. 121. Hill. 12 Jac. in caſe of Hooper v. Andrews.

29. Preſcription that the *parſon had two acres of meadow given in diſcharge of all tithes of hay ground*, viz. of all the meadow in the pariſh, if any *arable land* be *converted into meadow*, it extends not to diſcharge that. Hutt. 58. cites 14 Jac. Conyer's caſe.

30. A cuſtom in the pariſh of B. *that all lambs engendered, fallen, and bred upon any one tenement or living in the ſaid pariſh, though they belonged to ſeveral perſons, were reckoned together, as* if they were one man's, that the tenth, or tithe-lamb of them ſo counted together, hath been paid for tithe; the court held, that all cuſtoms againſt common right are triable at common law; and that this

cuſtom is unreaſonable, becauſe it may happen, that one man may have but one lamb, and that may be taken for tithe, and they that have more ſhall pay nothing. Hob. 329. pl. 405. Mich. 18 Jac. Barker v. Cocker.

31. The king's *leſſee* ſhall hold diſcharged, though his feoffee ſhall not. Hetl. 60. Mich. 3 Car. C. B. Comins's caſe.

Litt. Rep. 151. Toddard v. Tiler, S. C. in totidem verbis.

32. Libel for tithes *of milk and calves;* the defendant ſuggeſted a *modus, that every inhabitant, &c. ſhall pay 4d. for every cow, and 2d. for every calf;* iſſue was taken upon the modus, and at the trial the *proof was, that the tithes were never paid in kind, but that every inhabitant, &c. ſhould pay 6d. and ſome 7d.* ſo that this was not the proof of the ſuggeſtion, and a conſultation was granted; but if a *modus* had been ſuggeſted *to pay* 20*s.* and the *proof* had been *that* 40*s. was uſually paid*, that had been good, it being to intitle the court to juriſdiction; but in the principal caſe no modus is proved; ſo, it is merely uncertain. Hetl. 100. Trin. 4 Car. Goddard v. Tiler.

By the common law the parſon cannot have the tithes of *fiſhes taken in the ſea*, becauſe it is not within any pariſh, and then, when the parſon by the cuſtom ought to have the tithes of them, he ought to take them according to cuſtom, and that the tenth of the moiety may be a good diſcharge of the whole; and the parties went to iſſue upon the cuſtom in Cornwall. Noy, 108. Hill. 1 Jac. Holland v. Heale.

33. A cuſtom to pay the *20th fiſh*, in ſatisfaction of the tithe *of all fiſh taken in the ſea*, is good, for the tithe thereof is payable only by cuſtom, it may by that cuſtom be leſs than a tenth; adjudged. Lev. 179. Paſch. 18 Car. 2. Sheppard v. Primroſe.

Sid. 278. pl. 2. Sheppard v. Penrows, S. C. & S. P. agreed, but adds a quære, if it had been that he ſhould pay the 12th part *after ſlitching*, &c. and it ſeems that it had been good.

36. But a cuſtom to pay the *twelfth ſheaf, in ſatisfaction of the tithe of all ſheaf corn*, is not good, becauſe the tenth of the corn is due de jure; per Cur. Ibid.

37. A *modus* was alleged in this manner; *that the proprietors and occupiers of ſuch a manor, or parcel thereof, ſhall pay a groat to the parſon for herbage-tithes.* The court held that this could not be, for if a man had but two or three feet of ground in the manor he ſhould pay a groat; but it ought to have been laid, *that the proprietors and occupiers of ſuch a manor, for themſelves and their farmers, had paid 4d.* Vent. 3. Mich. 20 Car. 2. B. R. Anon.

[6]

The caſe was, that the prior of, &c. was ſeiſed of a *portion of tithes* in, &c. *and of the manor of, &c. ſimul & ſemel*, and that in the reign of H. 1. he *granted the*

38. A parſon libelled againſt J. S. for tithes, who in a declaration for a prohibition ſuggeſted a *compoſition by deed made in* 1125, which was excepted to, for being before R. II.'s time, was before time of memory, and ſo no iſſue could be taken, or could it be tried. 2. That if they did veſt by the grant, yet that they reveſted in the parſon *by the council of Lateran in* 1215, or elſe by the diſſolution of monaſteries. 3. Becauſe it was not ſhewn that the *biſhop was party;* it was anſwered, that the concurrence of the biſhop was not neceſſary; for as this caſe was, he had nothing to do with it, it being *a priory*, which had an abſolute eſtate, which a *patron* hath not. And, per Cur. the ſole objection againſt this preſcription is, becauſe it ſhews the reaſon of the *preſcription*, if they

they had *relied on the deed* it might be otherwiſe. The court of Lateran can affect nothing in this matter, &c. and judgment affirmed. 2 Show. 439. pl. 403. Mich. 1 Jac. 2. B. R. James v. Trollop.

manor to W. F. in theſe words, viz. dedit W. F. Norburiam *in feodo*, and afterwards *pro decimis dominii & duabus carucatis terræ, he ſhould pay to the prior* 5 *s. per ann.* and the family of the F.'s had ever ſince held the lordſhip diſcharged of tithes, paying 5 s. a year to the prior and his ſucceſſors until the diſſolution, and ſince to the king. It was objected, that the land whereof the tithes were demanded was parcel of the demeſnes of the manor; but per Cur the lord at that time might have enfeoffed another to hold of himſelf, and ſo it might have been *part of the demeſne when the prior granted it, and be afterwards granted and held of the manor*, and as to an objection that the modus was not good, becauſe *not paid to the parſon*, the court ſaid it might well enough be paid as a modus *to one who has a portion of tithes*, and that then he has quid pro quo. Skin. 51. S. C.

39. Whenever a modus *runs high*, it is a ſtrong preſumption that it is no modus; per Holt Ch. J. And the court refuſed a *prohibition*, becauſe it appeared (as the modus was pretended to be) that it *was of nigh the full value*. 11 Mod. 60. pl. 37. Trin. 4 Ann. B. R. Startup v. Doderidge.

40. A modus was ſet forth *to pay on or about ſuch a day* ſo much, &c. it is ill, for the day muſt be alleged certain. And the bill further was, that the pariſhioners of, &c. *conſtantly paid, or ought to pay*, ſo much which ſhould have been conſtantly paid, *and* ought to pay. 8 Mod. 375. Trin. 11 Geo. and cites it as lately reſolved in the caſe of Harriſon v. Clerk. Gibb. 121. cites 2 Roll, 265.

41. Though every modus muſt be ſuppoſed to have a reaſonable commencement, which the court admitted; yet as to the neceſſity of *ſhewing now that the modus is reaſonable*, that ſeemed not to be ſo clear; for theſe moduſes having been *from time immemorial*, none can know but that there were ſuch circumſtances in thoſe ancient times as might have made ſuch a compoſition reaſonable, though not diſcoverable now; and that it was ſufficient to ſatisfy us now that parſon, patron, and ordinary, might then bind the revenues of the parſon, but though ſuch inſtrument be loſt, yet the modus is not. Per Ld. C. King, aſſiſted by Reynolds and Forteſcue J. 2 Wms.'s Rep. 572. Hill. 1729. in caſe of Chapman v. Monſon.

42. *But* if an *inſtrument* had been *made* by patron, parſon, or ordinary, *to a layman to diſcharge his farm of all tithes*, (though it would be good ſo long as the inſtrument could be ſhewn,) and the ſame ſhould once be loſt, this being a privilege in non decimando, the *privilege would be loſt by loſs of the deed*; ſo far the law went in favour of the church; per Ld. C. King, aſſiſted by Reynolds and Forteſcue J. 9 Wms.'s Rep. 573. Hill. 1729. in caſe of Chapman v. Monſon.

43. A bill was brought to eſtabliſh a modus, which was, that *in conſideration the pariſhioners, at their own expence, made tithe-graſs into hay, the inhabitants were to pay no tithes for dry and unprofitable cattle.* It was proved, that the pariſhioners had not paid ſuch tithe time out of mind, but not that ſuch non-payment was in conſideration as aforeſaid. On the other ſide it was proved, that foreigners living out of the pariſh made the tithe-graſs into hay, as well as the inhabitants, and yet paid tithe-herbage, which Ld. C. [7]

King thought a material objection againſt the cuſtom, and made it ſeem to be the uſage of the pariſh for the pariſh to make their graſs into hay of courſe; and likewiſe that the pariſhioners did not divide the graſs into ten parts, when cut down, nor till made into hay, ſo that the parſon could not have any opportunity of making the tithe-graſs into hay himſelf; and diſmiſſed the bill with coſts, but without prejudice as to any litigation at law. 2 Wms.'s Rep. 521. Paſch. 1729. Fox v. Ayde.

44. A modus, that the pariſhioners *making tithe-graſs into hay ſhould excuſe not only the herbage of the ſame ground, but alſo all tithe-herbage for all other land depaſtured by him within the pariſh*, though it might be a great parcel of paſture land, and though the ſame might be fed all the year, is ſuch a modus as would be too much for a court of equity to eſtabliſh. 2 Wms.'s Rep. 523. Paſch. 1729. per Ld. C. King. Fox v. Ayde.

45. A modus was laid to be, *that every perſon not inhabiting within the pariſh of B. occupying any meadow or paſture land within the pariſh of B. had time, &c. paid 4d. an acre* yearly, and ſo proportionably for any greater or leſſer quantity. And this was held by Ld. C. King, aſſiſted by Reynolds and Forteſcue J. to be a good modus, and certain enough. 2 Wms.'s Rep. 565. 572. Hill. 1729. Chapman v. Monſon.

46. Every modus *muſt be certain*, otherwiſe no *length of time* will make it good. Admitted by Ld. C. King, aſſiſted by Reynolds and Forteſcue J. 2 Wms.'s Rep. 572. Hill. 1729. in caſe of Chapman v. Monſon.

(C. a) Modus Decimandi.

[*Good. What is.*]

[1. IT is a good modus decimandi, that, *in conſideration the pariſhioners hath time out of mind, &c. paid tithe-wool of all his ſheep which he hath ſhorn, as well of thoſe as he bought two days before the ſhearing, as of others that he had kept through the whole year, he hath uſed time, &c. to be diſcharged of tithe-wool of ſuch ſheep that he ſold two days before the ſhearing*; for by the ſpiritual law they ſhould have tithes of him, and de reſiduo pro rata which he ſold before ſhearing, and therefore, in conſideration that he here pays tithes of thoſe which he bought ſo ſmall a time before the ſhearing for the whole year, which is not due by the ſpiritual law, it is therefore good. M. 14 Ja. B. adjudged.]

[2. It is a good modus *for the tithes of calves to pay a calf for the tithe if he hath ſeven in one year, and if he have under ſeven, to pay an halfpenny for every calf* for the tithe, *and if he ſells any calf, that he ſhall pay the tenth of that for which he ſells it.* M. 14 Ja. B. R. between LEE AND COLLINS reſolved, and a prohibition granted.]

[3. It

[3. It is a good modus for tithe *of eggs*, *to pay in Lent* 30 *eggs for all tithe of eggs*. M. 14 Ja. B. R. between LEE AND COLLINS, a prohibition granted thereupon.]

S. C. cited per Cur. 2 Salk. 656. pl. 2. Mich. 10 W. 3.

B. R. in caſe of Hill v. Vaux, that he is bound to pay if he has hens or not, and he muſt pay them at a certain time.—Ld. Raym. Rep. 360. S. C cited by Holt Ch. J. accordingly; but if the cuſtom was that he ſhould *pay* 30 *eggs of his own hens*, the cuſtom would be ill.

[4. It is not a good modus *to pay every tenth pound of wool for the tithes of wool*, if he doth not *ſhew that he hath paid ſomething, if his wool does not amount to ten pound*, for otherwiſe it is in non decimando if it be under ten pound. M. 7 Ja. B. between DELMAN AND BARTON, per Curiam, for the tenth part of this is due.]

5. Note, by the ſerjeants, that in the *ſpiritual court*, they *will not admit any plea in diſcharge* againſt tithes, quod nota. Br. Diſmes, pl. 11. cites 8 E. 4. 14.

6. In preſcribing *to be diſcharged of locks of wool*, it ought to be ſhewn of *locks caſually loſt*; nota. Mo. 911. in pl. 1283. Mich. 37 & 38 Eliz. B. R.

7. Prohibition was ſued upon a cuſtom *to pay an halfpenny for the wool of ſheep ſold after ſhearing*, and before Mich. and adjudged a good cuſtom. Mo. 911. pl. 1283. Mich. 37 & 38 Eliz. B. R. Anon.

8. A cuſtom was alleged *to pay tithe-wool at Lammas-day*, and ſays, that he ſet it out at that day. It was objected that this is not good; for that this is not modus decimandi, but for the time only which is to be tried in the ſpiritual court; but the court held it good; for it is de jure when it is clipped, but by preſcription it may be ſet out altogether at another day, and that is good; per Cur. Cro. E. 702. pl. 21. Mich. 41 & 42 Eliz. B. R. Green v. Hun.

Mo. 910. pl. 1280. S. C. & S. P. cited to be adjudged.

9. Libel, &c. by the vicar of D. for tithes, the defendant ſuggeſted a modus to pay ſo much to the parſon of D. in diſcharge of his tithes. The whole court agreed, that a *modus to pay ſo much to the parſon will not diſcharge him from paying tithes to the vicar*; and therefore a conſultation was granted. 3 Bulſt. 220, 221. Mich. 14 Jac. Wintell v. Child.

10. A cuſtom was ſuggeſted, that if one has *lambs under the number of ſeven*, he ought *to pay an halfpenny for every lamb* in lieu of all tithes of lambs, *if he has but ſeven the parſon* to have the ſeventh, and *ſhould pay* 3*d.* if he had eight he ſhould pay 2d. if he had ten, the parſon ſhould have the tenth, without paying any thing. Agreed that this being a cuſtom which they refuſed to allow of in the ſpiritual court, that a prohibition ſhould be awarded. Cro. C. pl. 2. Paſch. 10 Car. B. R. Anon.

11. Cuſtom to pay *tithes in kind for ſheep if they continue in the pariſh all the year; but if* they are *ſold before ſhearing time, then to pay but an halfpenny for every one* ſo ſold. This was held an unreaſonable cuſtom. Mar. 79. pl. 128. Paſch. 17 Car. C. B. Weeden v. Harding.

12. *A vicar libelled for tithes of willow faggots.* The *defendant ſuggeſted* for a prohibition *a modus of paying 2d. per ann. to the rector for all tithes of willows.* The court held, that a modus to the rector is a good diſcharge againſt the vicar. Mod. 216. pl. 3. Trin. 28 Car. 2. C. B. Anon.

* [9] Keb. 602. pl. 76. Baudink v. Buſhell, S. C. held accordingly; and Keeling ſaid, that there is no precedent

13. Prohibition was prayed upon a cuſtom alleged, *that all perſons who had lands in ſuch a village, but lived out of the village, ſhould pay 4d. per ann. only, in ſatisfaction of tithes.* But this was held an unreaſonable cuſtom, that foreigners ſhould have greater privilege than thoſe * who dwelt in the village, and are at greater charge in reſpect of their reſiancy, and ſo the prohibition was denied. Lev. 116. Mich. 15 Car. 2. B. R. Bawdry v. Buſhell.

of any modus ſo variable and dancing. —— Modus for *foreigners to pay 4d. per acre yearly for herbage and tithe-hay* held good, per King C. and two judges. Gibb. 120. Hill. 3 Geo. in Canc. Monſon v. Chapman. —— But *theſe two caſes were expluded, and the court held it a good modus*, and ſaid, that all moduſes were at firſt upon an agreement between the parſon, patron, and ordinary, and by ſome deed or inſtrument in writing, in the nature of a contract or agreement, which though now loſt, yet being run out into a preſcription continues good; that here is no uncertainty in the modus, for the parſon is always ſure to have the 4d. per acre, or elſe the tithes in kind, nor is there any burthen on the reſt of the pariſhioners by one or two going out of the pariſh, and a leaping or *dancing modus is* where the modus itſelf varies, and is ſometimes more, or ſometimes leſs, which is not the preſent caſe, and decreed accordingly by the Lord Chancellor, aſſiſted by Mr. J. Reynolds, and J. Forteſcue. Ld. Chancellor ſaid, the caſe in Keble might perhaps be the occaſion of this ſuit. Abr. Equ. Caſes, 369. Trin. 1730. Chapman v. Ep. of Lincoln. —— Ld. C. King diſapproved of the reaſon in Lev. 116. that the *inhabitants* ought to be *more favoured* in a modus *than foreigners*, becauſe liable to repairs and veſtments of the church; whereas by the reſolution in JEFFREY'S CASE, 5 Rep. 66. b. a foreigner occupying lands within the pariſh, though living out of the pariſh, is liable to repairs, and even ornaments, and ſaid it was a ſudden opinion upon a motion. 2 Wms.'s Rep. 565 to 567. Hill. 1729. S. C. by name of Chapman v. Monſon, and e contra. —— Ibid. 574. Ld. C. King, aſſiſted by Reynolds and Forteſcue J.'s, diſliked that caſe in Lev. 116. and it was then ſaid, that in the ſame pariſh in which the modus was inſiſted upon in Lev. 116. the very modus, notwithſtanding that opinion, had been obſerved, and tithes paid in kind, which ſhewed that no regard was had to that opinion, and the parſon not adviſed to rely upon it. —— Gibb. 121. in caſe of Monſon v. Chapman, that caſe in Lev. 116. was denied to be law.

14. A cuſtom was alleged, that *all perſons in the pariſh who had ſheep on their grounds on Candlemas-day, ſhould upon full payment of full tithes for ſuch ſheep* which were there on that day, *be diſcharged of tithes of all ſheep* that afterwards ſhould be *upon their ground in that year;* but this was held an unreaſonable cuſtom. Mod. 229. pl. 18. Trin. 28 Car. 2. C. B. Moor v. Field.

15. A prohibition was prayed upon a ſuggeſtion of a modus *to pay for all tenants and occupiers of the land in diſcharge of tithes;* but upon the firſt motion of the preſcription in the occupiers was doubted by the court; though at length, inaſmuch as it goes only in diſcharge, and not in claiming of an intereſt; the prohibition was granted upon conſideration of the caſe of Cowper v. Andrews. Hob. [39.] and ibid. 188. [118. 148.] Shelton v. Montague, and 1 Cro. Baker v. Breteman. 3 Lev. 386. Hill. 5 W. & M. in C. B. Stopp v. Peacock.

16. 11 & 12 *W.* 3. *cap.* 16. *ſ.* 1. *enacts, that every perſon who ſhall ſow hemp or flax ſhall pay to the parſon, vicar, or impropriator of ſuch pariſh or place, yearly 5s. for every acre of hemp and flax, before the ſame be carried off the ground; for the recovery whereof the parſon, &c. ſhall have the uſual remedy.*

S. 2. This act ſhall not extend to charge any lands diſcharged by any modus decimandi, ancient compoſition, or otherwiſe.

Made perpetual by 1 *Geo.* 1. *cap.* 26.

17. A modus to pay 2*s. in the pound out of the rent reſerved from time to time* is no modus. Ld. Raym. Rep. 696, 697. Mich. 13 W. 3. Byne v. Doderidge.

18. Bill was brought to eſtabliſh a *modus* which was laid thus; *for payment of ſuch a ſum of money,* [while the lands are in the hands of the proprietors,] *but if in the hands of any other perſon, to pay tithes in kind, or the money, at the election of the parſon.* Ld. Chancellor ſaid, that he would never eſtabliſh a modus againſt a parſon, without a trial at law, if he deſires it; but this modus is clearly ill, for a modus cannot be deſultory. Sel. Caſes in Canc. in Ld. King's Time, 52, 53. Mich. 11 Geo. Webber v. Taylor.

19. Note; the court unanimouſly agreed, that *the ſame land may at one time pay tithe in kind, and at another time a modus, where there are different circumſtances;* the only thing eſſential to a modus is, that the ſame land ſhould not pay tithe in kind and a modus both, where there are the ſame circumſtances. Barnard. Rep. in B. R. 293. Hill. 3 Geo. 2. in Munſon's caſe. [10]

20. Bill ſet forth that there was a cuſtom in the pariſh of B. *that all perſons occupying paſture and meadow there, ſhould be diſcharged of tithes in kind by paying* 4*d. an acre, unleſs they were inhabitants of that pariſh, or of the pariſh of* ———. The plaintiffs were occupiers of paſture and meadow ground in this pariſh, but inhabitants in the pariſh of W. And whether this modus was good or not, was the queſtion. Reynolds and Forteſcue J. aſſiſted the Chancellor in determining this queſtion. They all unanimouſly agreed, that moduſes were real compoſitions by parſon, patron, and ordinary, the written evidence of which is loſt; but the law preſumes there was ſuch by the long uninterrupted uſage. Undoubtedly, they ſaid, there would have been no diſpute about this modus if it had been without reſtrictions; and as *the reſtriction is for the benefit of the parſon,* they thought the reſtriction could make no difference. They all allowed, however, that ſomething muſt be due from the modus, and that too every year; for as *no preſcription can be in a non decimando generally and at all times, ſo neither can it be for ſo long a time as a year together.* They ſeemed to allow too, that a *modus would not be good where it depends upon the will of the occupiers, whether it ſhould be more or leſs.* But here they ſaid, the rule for the payment of this modus is as uncertain as the rule for the payment of any other modus poſſibly can be; the only variation is as to the perſons paying the modus, and that they ſaid was never in objection. Accordingly the Chancellor was going to decree for the modus, but though the proof was very clear to ſupport it, he gave the defendant's counſel a day to talk with their client whether they would have the modus tried or not, as it did concern the inheritance. Barnard. Rep. B. R. 292, 293. Hill. 3 Geo. 2. in Chancery. Munſon's caſe.

Gibb. 119. Monſon v. Chapman, S. C. held accordingly.

(D. a) Modus Decimandi.

What ſhall be a *good* Modus Decimandi.

[1. IT is a good modus decimandi, if, *in conſideration that he hath uſed*, &c. *to make the tithes of the firſt moath into hay for the parſon, at his labour and coſt, he hath been diſcharged of tithes of the after-moath.* Tr. 36 El. B. R. JOHNSON AND KEBBLETHWAYTE, 37 El. * JOHNSON AND AWBERRY; in theſe two caſes it was ſo reſolved, and a prohibition † granted. P. 41 El. B. R. P. 11 Car. Banco Regis, LANGFORD'S CASE reſolved, and a prohibition granted.]

* Cro. E. 660. pl. 7. S. C. adjudged a good preſcription, that they had uſed to make the hay of the firſt moaths into cocks, and to ſet forth the tenth cock for the vicar. ——— Mo. 910. pl. 1280. Awberie's caſe, S. C. but mentions the making the firſt moath into hay, and adjudged good. ——— S. C. cited per Cur. by the name of Awbrey v. John, as adjudged. Cro. J. 42. pl. 7.

† Cro. C. 403, 404. pl. 2. Anon. S. P. and ſeems to be S. C. and a prohibition granted.

[11]

See pl. 1. and the notes there.

‡ Fol. 649.

[2. It is a good modus decimandi, that, *in conſideration of the cutting of the graſs, and ſpreading and putting it into wenrews*, ſcilicet, tedding, *and after making the tithes of the parſon of the firſt moath into graſs-cocks at his own* (‡) *coſts* and charges, he hath been *diſcharged of tithes of the after-graſs.* Mich. 42 & 43 El. JOHNSON AND POPPINGER; 1 Jac. EELES AND VACHIN; 3 Jac. EELES AND WINTERBOLT. In all theſe caſes prohibitions were granted in B. R. and Mich. 14 Jac. Johnſon moved for a conſultation upon the ſaid prohibition granted in the 43 El. againſt Poppinger, but it was denied. Paſch. 41 El. B. R. between AUBREY AND JOHNSON; Paſch. 11 Car. B. R. LANGFORD'S caſe, a prohibition granted upon ſuch ſurmiſe for the after-moath. Paſch. 14 Car. B. R. between MANNING AND CLAPHAM, a prohibition granted for the fatting of ſheep upon the after-paſture.]

——S. P. adjudged accordingly. Hob. 250. pl. 330. Hill. 16. Jac. Hide v. Ellis. — And Ibid. ſays the like judgment was given upon the like cuſtom Paſch. 2 Jac. B. R. Rot. 192. or 292. Hall v. Simmonds. ——— Cro. J. 42. pl. 7. Mich. 2 Jac. B. R Hall v. Fettyplace. S. P. adjudged a good cauſe of diſcharge of tithes of the latter mowth, and prohibition ordered to ſtand. ——— Mo. 758. pl. 1048. S. C. but takes a difference between making it into little cocks and into great cocks, that the laſt is a good preſcription but not the firſt; and that a preſcription to carry it into his barn for the parſon is good, and for this cites Johnſon's caſe. ——— A preſcription was laid for the after-graſs in conſideration that every one ſhall preſerve primam tonſuram, by which the parſon ſhall have the better tithe, and therefore to be diſcharged of the after-crop for the tithe of it, and this is called (rewine) is good; for by this the parſon has the greater benefit. 2 Bulſt. 238, 230. Trin. 12 Jac. 239. the 4th point in caſe of Price and Maſeall. ——— Roll. Rep. 38, 39. S. C. & S. P. adjornatur.

[3. It is a good modus decimandi, that, in conſideration *of the making the tithe-graſs of the parſon of certain land into perfect hay at his coſts*, he hath been *diſcharged of tithe of the paſture of the ſaid land for the whole year after.* Paſch. 16 Jac. B. between NICHOLS AND HOOPER, reſolved, and a prohibition granted.]

[4. It is a modus decimandi, that, in conſideration *that they who ſow the land ought to reap it, and bind and ſever the tenth part from*

from the nine, and ſet it up in hillocks or heaps, that the parſon ſhall *not have any tithe of this land the next year following; the land lying ley*, and not tilled nor converted into meadow, for of common right the pariſhioner is not bound to gather and ſet up the tithe in hillocks, &c. but it is a good manner of tithing to throw the ſhocks out. Hill. 6 Jac. B. pl. 13. per Curiam.]

[5. It is a good modus, that, in conſideration *that he hath time*, &c. *wound up the tenth fleece of his wool at his ſhearing for the parſon, at his coſt* and charges, *and paid it to the parſon*, he hath been *diſcharged of tithes of the necks of his ſheep* when he ſhore them about their necks for their preſervation *two weeks before Michaelmas, and two weeks after* Michaelmas. Mich. 14 Jac. B. R. between JOYS AND PARKER, parſon of NORTHMOLTON in DEVON, reſolved, and a prohibition granted, becauſe the parſon ſued for the tithe of this necking; for it appears, that the ſhearing at this time of the year cannot be for the benefit of the wool.]

Cro. J. 575. pl. 3. Jowes v. Parker, S. C. but S. P. does not appear. —3 Buſt. 242. Foſſe v. Parker, S. C. but S. P. does not appear. --2 Brownl. 32. Arg. cites S. P. adjudged, Paſch. 36 Eliz. Jeſſop's caſe.

[6. It is a good modus, that, in conſideration *the parſon and his predeceſſors time out of memory, &c. have been ſeiſed in fee of certain meadow within the vill of D. and taken the profits thereof, in full ſatisfaction and diſcharge of all tithes of hay within the ſame town, time out of memory*, &c. for it ſhall be intended that this meadow was given at the beginning, in full ſatisfaction of all the hay within the ſame town. Mich. 16 Jac. B. R. between MOOR AND BULLOCK, adjudged upon a prohibition, this matter being moved in arreſt of judgment.]

Cro. J. 501. pl. 10. S. C. adjudged accordingly. —Libel, &c. for the tithe-wood in F. the defendant ſuggeſted a cuſtom in the pariſh, *that all the parſons of the ſaid church, time out of mind, habuerunt & gaviſi fuerunt, ſuch land parcel of the manor of F. in recompence of all tithe of wood in the ſaid pariſh*, &c. But *did not aver that the lands whereof the tithes are demanded were parcel of the manor*; but adjudged, that the preſcription was good, for it might be, that at the beginning all the land within the pariſh was parcel of the manor, and the land of the allotter, and that ſuch a part was allotted to the parſon in lieu of tithe-wood. Cro. E. 587. pl. 19. Mich. 39 & 40 Eliz. B. R. Somerton v. Cotton. ——— S. C. cited Arg. Cro. E. 785.

In the principal caſe of Moor v. Bullock, it was moved in arreſt of judgment that the ſurmiſe was not good; for he ſhewing that he was ſeiſed in fee, that is, as parcel of his glebe, it cannot be in recompence of the tithes; or ſhewn that he and his predeceſſors time whereof, &c. have had the occupation of that cloſe, and the profits thereof in lieu of tithes; and not to ſay that he was ſeiſed, which ſhall be intended as parcel of the glebe; ſed non allocatur, for it is a better form to ſay that he was ſeiſed in fee; for it is ſo antient that it cannot be ſhewed when, or by whom it was given; but having had it always in lieu of tithes, it is good enough, and ſhall be intended to be given before time whereof, &c. in recompence of the tithes. Cro. J. 501. pl. 10. Mich. 16 Jac. B. R. Moore v. Bullock.

The ſuggeſtion for a prohibition was, *that the parſon had* 20 *acres of paſture, and a cloſe of* 10 *acres of wood, in ſatisfaction of all the tithes demanded*; the witneſſes examined according to the ſtatute 2 Ed. 6. cap. 13. *proved that the parſon had the* 20 *acres of paſture, but not the* 10 *of wood*; and yet the prohibition was granted, becauſe it appears that the libel was unjuſt; for though the pariſhioner had failed of his full proof, yet there was enough to bar the parſon of his tithes in kind, and he need not ſhew how, or by what title the parſon had the land; for *if it was not in ſatisfaction of tithes, the parſon ought to ſhew that himſelf*. Mo. 911. pl. 1284. Hill. 42 Eliz. B. R. Auſtin v. Piggot. ——— Cro. E. 736. pl. 4. S. C. the ſubſtance is proved that he held land in ſatisfaction. ——Cro. J. 501. in pl. 10. S. C. cited that the preſcription was held good.

[7. It is a good modus decimandi, *that he hath paid the tenth of the wool of all ſheep that he had before Lady-day, and ſheered or ſold, or put in any other pariſh, or hath paid the value of the tenth thereof,*

to

to be in full ſatisfaction as well of all the wool of ſuch ſheep, as of all other ſheep brought within the pariſh after Lady-day, for it is not reaſonable that the tithes he hath paid ſhould be a diſcharge for all the other pariſhioners; but this was intended to be a diſcharge of all the ſheep of the party himſelf brought within the pariſh after Lady-day; but this was not ſo expreſſed, and this had been a good cuſtom. Mich. 9 Car. B. R. between MARKET AND KNIGHT, adjudged upon demurrer, and ſo ruled in another caſe the ſame term upon a trial at bar.]

In a prohibition plaintiff ſuggeſted that time out of mind the owner of the land had found *ſtraw for the body of the church*, in diſcharge of all tithes of hay. Coke moved, that it is no cauſe of diſcharge, for the parſon was not chargeable with it, nor had any benefit by it, but if he had alleged that he gave the ſtraw to the parſon, and he beſtowed it in the body of the church, or that the parſon had a ſeat in the body of the church, it had been otherwiſe; and thereupon conſultation was granted. Cro. E. 276. pl. 7. Paſch. 34 Eliz. B. R. Scory v. Barber.

[8. It is not a good modus *that he ought to be diſcharged of tithes, in conſideration that he hath uſed time out of memory*, &c. *to employ the whole profits of the land in the reparation of the body of the church, and to find all neceſſaries for the church*, for this is not a recompence to the parſon. Paſch. 37 Eliz. B. between LONGLEY AND MEREDINE, adjudged.]

Fol. 650.

[9. *But* it is a good modus to be diſcharged, *becauſe he hath uſed*, &c. *to employ the profits for the reparation of the chancel*; for the parſon hath a benefit by this. Paſch. 37 Eliz. B. ſaid to be adjudged in B. R.]

* Noy, 15. Parry v. Chauncey, S. C.

‡ Cro. C. 393. pl. 4. Meade v. Thurman. S. C. the court granted a prohibition. —— Jo. 357. pl. 9. S. C. but that is of a libel for green tares, cut for feeding labouring horſes, and prohibition was grounded not upon this general ſuggeſtion, but upon the cuſtom of the pariſh, that no tithe was paid in this caſe. —— 2 Le. 27. pl. 30. Mich. 30 Eliz. B. R. Perry v. Somes, S. P. and held by the whole court, that it was a good preſcription as to the green tares.

[10. It is not a good modus, that, in conſideration *that the pariſhioner having arable land hath ploughed it, and hath had headlands, green ſlips, or doles, parcel or appurtenant to their huſbandry-houſes or lands, that in conſideration the pariſhioner would plough and ſow his land with ſome kind of grain, and mow it, and make it up into ſhocks, pooks, and ſever it from the ninth part, and prepare it for carriage for the parſon, the pariſhioner hath uſed to be diſcharged of the payment of any tithe ſowed, growing upon the headlands*, &c. *of ſuch arable land, and then ſowed, applied, and converted for the nutriment of his cattle of huſbandry employed in the tillage of the ſaid arable land*, that is not a good modus, becauſe of common right the pariſhioner ought to cut and prepare the grain, and ſet out the tithe. Mich. 3 Ja. B. R. between *PERRY AND CHAUNCEY, adjudged upon demurrer, and a † conſultation granted. But Hill. 10 Car. B. R. between ‡ MEAD AND THURLAND, a prohibition granted per Curiam, where the ſuit was for tithes of hay, growing upon ſuch head-lands, where by cuſtom not uſed to be paid.]

† [13]

[11. It is not a good modus, that in conſideration *that the pariſhioner having barley, the greateſt part whereof he hath cut down and tied into ſheafs, and ſet in cocks, of which the parſon had the tenth cock, that he hath uſed to leave a ſmall parcel of the barley to ſtand, to the intent to cut it down after for bands for the rakings vo-*

luntarily ſcattered, and to be diſcharged of the tithes of this ſmall parcel of barley when he cuts it. Hill. 8 Car. B. R. between SAUNDERS AND PARAMOUR, per Curiam a prohibition denied.]

[12. If a pariſhioner *preſcribes*, that *whereas the greateſt part of the land within the pariſh, and within the pariſhes next adjoining thereto, is arable land, ſo that for want of graſs they ought to provide other ſuſtenance for their plough-cattle, and becauſe he hath uſed to cut and tie into ſheafs the grain ſowed there, and to put them into ſhocks, of which the parſon had the tenth ſhock, by which the parſon hath the benefit of the labour of the plough-cattle, and in conſideration thereof the pariſhioner hath time out of memory*, &c. *uſed to be diſcharged of the tithes of green tares before they come to perfection*, [*and*] *in ſmall parcels in the time of harveſt, or before, and given to his plough-cattle for their ſubſiſtence*; this is not a good modus, becauſe if he cuts them down, he ſhall pay tithes for them, as well as if they had come to their perfection. Hill. 8 Car. B. R. between SAUNDERS AND PARAMOUR, per Curiam, a prohibition denied, ſcilicet, Hill. 10 Car. B. R. between MEAD AND THURLAND, a *prohibition granted* per Curiam in ſuch caſe, this *being alleged by way of cuſtom.*] See pl. 10. S. C. and the notes there.

[13. It is not a good modus, that, in conſideration *that he hath expended his hay for his huſbandry-cattle*, to be *diſcharged of tithes of hay*. M. 3 Ja. B. R. and there cited. Sir * WARNER's caſe, adjudged.] * Cro. J. 47. pl. 17. Mich 2 Jac. B. R. Webb v. Warner, S. C. adjudged.——Mo. 683. pl. 941. Paſch. 44 Eliz. B. R. Anon. S. P.——A ſuggeſtion was of a cuſtom, *that if any pariſhioner fed his ſheep with his graſs till June* or Auguſt, *that then he might mow the coarſe graſs with which they fed the ſheep in the winter*, whereby the parſon had uberiores decimas of the ſheep, &c. It was inſiſted that this was a plain non decimando, and cited the principal caſe here in Roll. Abr. 650. pl. 13. and the court held it a void cuſtom, and ſo a prohibition was denied. Ld. Raym. Rep. 677. Trin. 13 W. 3. Selby v. Clerk.

[14. It is a good modus for an *inn-keeper*, that, in *conſideration that he and all*, &c. *have paid tithe-hay and grain growing upon the land belonging to the ſaid inn, and have paid tithe for all their own cattle feeding upon the land*, that they have been time, &c. *diſcharged of the tithes of the horſes of their gueſts agiſted in the ſaid land when they travel by the ſaid inn*; for ſome have ſaid, that this was but a perſonal tithe, and others have ſaid, that no tithes ſhould be paid for ſuch *agiſtment* by the common law, without any modus, between GABEL AND RICHARDSON reſolved, and a prohibition granted.]

[15. It is a good modus to be *diſcharged of the tenth ſwarm of bees* for tithe, *in conſideration of the payment of the wax and honey to maintain them in winter, and find caps for them*, inaſmuch as they are feræ naturæ of themſelves, and require great care † and labour to keep them when they ſwarm. Dubitatur, Hill. 10 Car. B. R. LANGFORD's caſe. Paſch. 11 Car. in this caſe moved again, and then a prohibition granted. But ſome of the judges ſaid, the modus was not good, ſcilicet, but only the duty which the law gave; but they held, that *no tithes were due of the tenth ſwarm, becauſe* they are *feræ naturæ.*] Cro. C. 403. pl. 2. Anon. but ſeems to be S. C. adjudged. † [14]

[16. It

Preſcription that all the occupiers of L. have uſed to pay to the parſon, proprietor of the tithes, *all their hay in ſhocks*, which hath been *in lieu of all broom, and other benefits of the tenement* was held an unreaſonable ſuggeſtion; for a modus of one kind will not ſerve for another. 2 Keb. 212. pl. 48. Paſch. 19 Car. 2. B. R. Brown v. Haywood.

[16. It is not a good modus to *preſcribe to pay one tithe for another.*]

Cro. E. 475. pl. 3. S. P. in S. C.—Mo. 909. pl. 1278. S. C. & S. P.—Gouldſb 147. pl. 66. S. C. & S. P.

[17. *As* it is not a good modus to preſcribe to pay *for every milch-cow 2d. and for every calf 1d. in ſatisfaction for all tithes of all manner of cattle*, for this ſhall not diſcharge dry cattle, for this is but one tithe for another. Mich. 3 Jac. B. R. is cited by Coke to be ſo adjudged. between * SHERRINGTON AND FLEETWOOD, which caſe was Trin. 38 Eliz. B. R.]

——— S. C. cited 2 Bulſt. 238.———2 Salk. 657. pl. 3. Mich. 3 Ann. in the Exchequer, in caſe of the A. Bp. of York v. the Duke of Newcaſtle; the court admitted the payment of tithe of one ſpecies, or payment of a modus for one ſpecies of tithe could not be a diſcharge as to another ſpecies. ———But if he had preſcribed that he had paid 1 d. for all cows and beaſts agiſted, that peradventure had been good; and ſays this diverſity was ſo ruled in Dr. Lewis's caſe, and of that opinion were all the court here.———See Ld. Raym. Rep. 242. in caſe of Norton v. Briggs.

Mo. 454. pl. 623. Monday v. Lovice, S. P. and ſeems to be S. C. and the court held accordingly.

[18. *So* if a man preſcribes *to pay one heifer for all tithes*; this ſhall not diſcharge the tithes of other cattle, but he ſhall pay them in kind. Trin. 38 Eliz. B. R. per Curiam.]

Mo. 909. pl. 1279. S. C. & S. P. accordingly, becauſe the cheeſe is made by labour and charge.——

[19. It is a good modus *in conſideration of the payment of the tenth cheeſe made from the firſt of May, until the laſt of Auguſt*, that he hath been *diſcharged of the tithe of milk*, for this is not a tithe in kind of parcel in diſcharge of the whole; for *no tithe in kind is due of cheeſe*, but only of milk, and ſo a good conſideration. Paſch. 40 Eliz. between AUSTEN AND LUCAS, adjudged.]

Cro. E. 609. pl. 15. S. C. held accordingly; but to pay the tenth quart of milk is not good; becauſe that is only for what is due. But Popham ſaid, that to pay the tenth quart of milk at the parſonage houſe, or at any other place, is good enough.——S. C. & S. P. cited Marg. Raym. 278.——S. C. cited, 2 Salk. 554. pl. 20. Trin. 4 Ann. B. R. in caſe of FOY v. LISTER, which was on a modus ſuggeſted to pay *every 10th day's milk from April till November ſkimmed and made into cheeſe in lieu of all tithes of milk*, a prohibition was granted to try the modus and ſettle the matter.———6 Mod. 261. LEICESTER v. FOY, S. C. The court did not like the modus as ſeeming very ſevere on the vicar, but to ſettle the point, which they thought of great conſequence, they granted a prohibition, directing them to declare forthwith.

Savil. 100. S. C. by the name of Savil v. Adams.——Mo. 278. pl. 433. S. C.——

20. One cannot make a preſcription to pay *parts of the tithes in kind for all tithes of the ſame nature*; as to pay an apple for the tithe of all his apples, and ſo of the like. Per ſome of the judges. And. 199. pl. 234. Trin. 31 Eliz. Adams's caſe.

S. C. cited in the caſe of Monday v. Lovice, Mo. 454.

21 A cuſtom *to pay an halfpenny for the wool of ſheep ſold after ſhearing and before Michaelmas*, was adjudged a good cuſtom. And ovis, or ſheep, is nomen æquivocum, and extends to weathers as well as to ewes. Mo. 911. pl. 1203. Mich. 37 & 38 Eliz. B. R. Anon.

[15] 22. A preſcription for a modus decimandi, that *in regard he paid for milch kine 1d. he preſcribed to be diſcharged of the tithe of milch kine, and alſo of all the dry cattle*; but this was held to be

contrary

contrary in itſelf; for a modus of one kind to be diſcharged of another kind, and the Court held that good. 2 Bulſt. 231. Trin. 2 Jac. Arg. cites Mich. 37 Eliz. Lewis v. Gilbourn

23. It is not a good preſcription *to pay tithe-corn in ſatisfaction of all tithes of the land.* Mo. 454. pl. 623. Trin. 38 Eliz. cites it as adjudged in C. B. in Ridiard's caſe.

24. The *lord of the manor* of B. in the pariſh of B. *preſcribed,* that he and his anceſtors, and all thoſe whoſe eſtate, &c. had uſed from time to time whereof, &c. *to pay the parſon of D.* the now plaintiff, *and his predeceſſors 6l. per ann. for all manner of tithes growing within the ſaid pariſh, and that by reaſon thereof he and all whoſe eſtates, &c. lords of the ſaid manor had uſed time whereof, &c. to have decimam garbam or decimum cumulum garbarum ſeu granorum of all of his tenants within the ſaid manor.* Reſolved, that it was a good preſcription, and that a modus decimandi by the lord for himſelf and all the tenants of his manor, to bar the parſon from demanding tithes in ſpecie, is good, for it might have a lawful beginning, viz. that before it was a manor all the lands were in the lord's hands, and that was paid for the tithe thereof; and then when he conveys parcel thereof to others, it ſhall be diſcharged as it was in the lord's hands. And as to the decimam garbam, &c. he has it as a profit apprender as parcel or appurtenant to his manor not as tithes. Cro. E. 599. pl. 5. Hill. 40 Eliz. B. R. Pigott v. Hearn.

Mo. 483. pl. 685. S. C. & S. P. agreed by all the juſtic s.— S. C. cited Mo. 589.— S. C. cited 2 Rep. 45. a. in a nota by the reporter.— 2 Saund. 142. cites S. C.

25. It is a good preſcription that he has uſed *to pay 1d. called a hearth-penny, in ſatisfaction of tithes of all combuſtible wood.* Mo. 910. pl. 1280. cites 41 & 42 Eliz. B. R. Green v. Hundle.

Cro. E. 702. pl. 21. Green v. Hun, S. C. adjudged to be a good preſcription.

26. Surmiſe that he uſed *to pay the tenth ſheaf of corn, the tenth rock of hay, the tenth fleece of wool, the ſeventh calf, &c.* and that it was *in ſatisfaction of all tithes of all dry cattle, and for all other tithes of corn, hay and cattle.* The Court held this ſurmiſe not ſufficient; for that which he uſed to pay is but tithes in kind, and therefore cannot be in ſatisfaction for the tithes of other things than themſelves. Cro. E. 716. pl. 26. Mich. 42 & 43 Eliz. C. B. Ingoldſby v. Johnſon.

27. Pariſhioner ſuggeſted that he had all the *tares,* &c. that he ſowed and *cut green to give to his horſes,* tithe-free; and a prohibition was granted, niſi. Freem. Rep. 72. pl. 87. Hill. 1672. Stone v. Peacock.

28. Libel, &c. *for tithes of rough hay growing on the fenny lands* of M. the defendant *ſuggeſted that there were 2200 acres of fenny land within the pariſh, and 600 acres of meadow, and that the pariſhioners paid tithe of hay and corn growing upon the meadow and arable lands, and ſo much for every cow and calf, and becauſe they had not ſufficient graſs to keep their cattle in winter, they uſed to gather this hay, called fenny fodder, for the ſuſtenance of their cattle for the better increaſe of huſbandry, and for that reaſon had been always freed from tithes;* adjudged that this ſurmiſe is not ſufficient; for one

Mo. 683. pl. 941. Paſch. 44 Eliz. B. R. Anon. S. P. adjudged accordingly, and ſeems to be S. C.

may not preſcribe in non decimando, and they alleging that they beſtowed it upon their cattle is not any cauſe of diſcharge. Cro. J. 47. pl. 17. Mich. 2 Jac. B. R. Webb v. Warner.

29. *Payment* of tithes *to the parſon is ſufficient diſcharge againſt the vicar*, becauſe of common right all tithes belong to the parſon, and the vicarage is derived out of the parſonage, ſo as no tithes de jure belonging to the vicar, but only upon endowment [16] or preſcription, which ought to be ſhewn ex parte, the vicar and the Court cannot intend it; for the vicarage is a diminution and an impairing to the parſonage, whereof the Court will not take notice without monſtrance of the parties; reſolved. Yelv. 86. Paſch. 4 Jac. B. R. Grene v. Auſtin.

Cro. J. 116. pl. 4. S. C. but S. P. does not appear.

30. Where the owner of the land *pays tithes of hay*, he is thereby *diſcharged of common right, as to tithe of agiſtment of the ſame land in the ſame year;* becauſe the ſame land ſhall not anſwer the ſame year, but only one tithe, and the agiſtment is only profit by the mouth of the beaſts of the ſame land whereof the parſon before had tithes of hay; reſolved. Yelv. 86, 87. Paſch. 4 Jac. B. R. Grene v. Auſten.

31. Whether a modus decimandi may *accrue after endowment of a vicarage?* The reporter thinks it may. Godb. 180. pl. 254. Trin. 8 Jac. C. B. Anon.

Win. 1. Paſch. 19 Jac. Reynolds v. Poole, S. C. adjornatur. Ibid. 44.

32. If a man preſcribes *to pay a buck and a doe yearly out of a park in diſcharge of all tithes of the park*, and the park is diſparked, the modus is gone; agreed per Cur. and that which is by name of park is for the land, and is annexed to the land by the name of a park. Hutt. 57, 58. Mich. 10 Jac. Pool v. Reynolds.

Mich. 20 Jac. C. B. Pope v. Reynolds, S. C. a prohibition was granted, and adjudged that the prohibition ſtand.

33. *But* if a man preſcribes *to pay a buck and a doe out of the park* it would alter the caſe; but it is general, and had been paid after the diſparking, viz. the 10 Eliz. Hutt. 57, 58. Mich. 10 Jac. Pool v. Reynolds.

See 2 Bulſt. 239. S. C. Arg.

34. A libel was for tithes *of broom*, the defendant preſcribed that for the rooting of the broom, and ſowing the land the following year with corn, which is of greater benefit to the parſon, and alſo becauſe the broom is of little value, and good to cover houſes, they have uſed to be diſcharged of tithes of broom, which it was urged was in effect non decimando, and conſequently not good; but it was anſwered, that the rooting it is a great charge to the party, and the ſowing the land with corn is more benefit to the parſon, and therefore the preſcription not good; Coke Ch. J. ſaid he thought the *land which has broom* is not within the ſtatute of 7 E. 6. for it is not *barren land*, and therefore if converted into arable is tithable; for the ſtatute ſpeaks of barren heath or waſt land. Roll. Rep. 39. pl. 6. Trin. 12 Jac. B. R. in caſe of Maſcall v. Price.

35. *Lord of a manor preſcribed to have the tithes within the manor, for that he and all thoſe whoſe eſtates he has, have uſed to maintain a chaplain* in the church of Dinn. Exception was taken becauſe he

did

did not allege that the church of Dinn was within the ſame pariſh with the manor, and ſo no conſideration, nor does he allege *the maintenance of the chaplain for ſo long time as he claims the tithes, viz. time out of mind,* nor did he prove *the maintenance of the chaplain within the laſt ſix months* as he had ſuggeſted, but only the reſidue, whereas this is the principal matter which makes his preſcription good; and upon this laſt point a conſultation was granted per Curiam; and Coke Ch. J. ſaid it ſhould be granted for all the other exceptions alſo, but as to them the other juſtices ſaid nothing. Roll. Rep. 2. pl. 3. Paſch. 12 Jac. B. R. Boocher v. Rogers.

36. A libel was for tithe-hay; the defendant ſuggeſted a *cuſtom to pay a load of hay for all tithes of hay growing and renewing on the land where, &c.* It was argued that this preſcription was good, and that it was not tithes in kind, becauſe it is *alleged that defendant uſed to make the graſs into hay* by his labour, and that it ſeems the parſon de jure ought to do this himſelf, for that the tithes are to be ſet out for the parſon when it is cut and is only graſs, and conſequently this is a good modus decimandi; but Curia e contra, and prohibition was denied. Roll. Rep. 172, 173. pl. 3. Paſch. 13 Jac. B. R. Cumberland's caſe. [17]

36. Libel, &c. for tithe-wood, &c. The defendant ſuggeſted for a prohibition that the libel was for tithes of beeches above 80 years old, and that the parſon had a *conſideration for tithe-wood, viz. certain wood in the lord's wood, time out of mind, and never had any tithe-wood;* per Cur. this ſhall be intended a compoſition for tithe-wood; and a prohibition was granted. Roll. Rep. 355. pl. 6. Paſch. 14 Jac. B. R. Lapthorn's caſe.

37. Cuſtom to make the tithe up *in cocks,* upon pariſhioners refuſal the parſon may ſue in Court Chriſtian for not making it into cocks. Lat. 125. Paſch. 2 Car. Layton's caſe.

But not in that caſe, for not ſetting out. Lat. 125. in S. C.

38. The Earl of Devonſhire had a *manor in the pariſh of C.* in Buckinghamſhire, *which extends to Latmos, where there is a chapel of eaſe,* and the *vicar of C. libels for tithes* againſt one of the tenants of the manor; and Henden moved for a prohibition, for the earl *preſcribed that he* and all his tenants ſhould *be acquitted of all the tithes* of land *within Latmos, paying* 10*l. per ann. to the chaplain* of Latmos; and he ſaid that ſuch a preſcription is good, as it was adjudged in Bowles's caſe; and a prohibition was granted. Hetl. 52. Mich. 3 Car. C. B. The Vicar of Cheſham's caſe.

Litt. Rep. 61. S. C. in totidem verbis.

39. A libel was for *odd ſheaves,* to which it was ſuggeſted, that the pariſhioners, for the better dividing the corn, have *uſed to be at the charge of making it up in ſhocks,* and when made into ſhocks *they ſet out a ſtack for tithes;* and becauſe they have been at this pains, they have been diſcharged for tithes of odd ſheaves as will not make a ſtack. This was held a good cuſtom, and a prohibition granted, becauſe they do more than of common right they ought to do. Latt. 226. Mich. 3 Car. Anon.

40. Conſideration of *making hay* to be diſcharged of payment for *greenſlips, headlands, &c.* good, becauſe it is more than they are bound to do. Hetl. 147. Mich. 5 Car. C. B. Wood and Carvener v. Simmonds.

41. The court refuſed to grant a prohibition on ſuggeſtion of a modus *to pay 4s. for every day's plowing of wheat, and 2s. for every day's plowing of barley*, for the uncertainty; *but* if the modus had been *ſo much for every day's work, with averment that it is certainly known, and how much it contains, it might be.* But by Hyde, wheat could ſcarcely be ſo much worth time out of mind. Keb. 612. pl. 86. Mich. 15 Car. 2. B. R. Took v. Ledgierd.

2 Lutw. 1043. 1052. Morton v. Briggs, S.C. accordingly, and a conſultation was awarded.

42. A prohibition was granted to a ſuit for tithes *of cows, calves, herbage and paſture*, upon *ſuggeſtion of a cuſtom that every pariſhioner* from time whereof, &c. *had uſed to pay 1d. for every cow having a calf, and for every cow not having a calf 1d. halfpenny as far as five cows, for five cows 1s. 3d. for ſix cows 2s. 6d. and for ten cows 2s. 8d. in plena ſatisfactione omnium decimarum vaccarum et vitulorum, et herbagii, et paſturæ.* The plaintiff declared in attachment upon this prohibition, and upon traverſe of the cuſtom, a verdict was found for the plaintiff in the prohibition; upon which Lutwych, Serjeant, moved in arreſt of judgment in Eaſter term laſt paſt. 1. That this cuſtom was void, for it is laid to be a diſcharge of tithe of all cows, which it is not; for nothing is laid for the tithe of the ſeventh, eighth and ninth cows, and payment for the ſixth cannot be payment for the ſeventh, &c. 2. This cannot be a diſcharge of the tithes of herbage and agiſtment; for tithes of one thing cannot be a diſcharge of tithes of another, and
[18] tithes are payable of both; then ſince the cuſtom is laid intire, it is void in the whole; and cites 3 Cro. 446. 475. and of this opinion was the whole Court, and therefore judgment was arreſted, and a conſultation granted, unleſs cauſe ſhould be ſhewn this Trinity term. Ld. Raym. Rep. 242. Trin. 9 W. 3. Norton v. Briggs.

Carth. 461. S. C. the Court was of opinion, that the cuſtom was void.—12 Mod. 206. S. C. but S. P. does not fully appear.

43. Modus to pay a whole *meal's milk ſuch a day, and every ninth and tenth night and morning after, till a young lamb yeaned be heard to bleat*, in lieu of tithe of milk is ill; for by this modus the parſon may have nothing; as ſuppoſe a lamb be heard to bleat before the 9th of May. 2 Salk. 656. pl. 2. Mich. 10 W. 3. B. R. Hill v. Vaux.

——Ld. Raym. Rep. 358. S. C. and per tot. Cur. the cuſtom is ill, and it is a plain non decimando; for ſuppoſe a lamb bleats at the end of December, or at the beginning of January, the parſon ſhall loſe his tithes for four months and more; and the ruſe for prohibition was diſcharged.

44. A modus was laid to be *ten fleeces of wool and two lambs for all tithe*, the Court was divided whether good or not. 2 Salk. 656. Mich. 3 Ann. in Scacc. Archbp. of York v. the Duke of Newcaſtle.

Cro. E. 446. Griſman v. Lewis.—Lane 17. Skelton v. Airie, S. P.

45. Payment of tithe of *one ſpecies*, or payment of a *modus for one ſpecies of tithe*, cannot be a diſcharge as to another ſpecies. 2 Salk. 657. pl. 3. Mich. 3 Ann. in Scacc. Archbp. of York v. the Duke of Newcaſtle.

46. Modus

46. Modus to pay 2*s. in the pound of the improved rent* is ill, for that is to riſe and fall as the land is let, and the parſon cannot know it, and a modus ſhould be as *certain* as the duty that is deſtroyed by it; Holt dubitante. 2 Salk. 657. pl. 4. Paſch. 4 Ann. B. R. Startup v. Doderidge.

Per Holt Ch. J. a modus muſt be of ſomething certain that may be demanded in the ſpiritual court, and here ſuppoſe the *land be let out at a fine, and* 5*s. rent*, what becomes of the modus or of the parſon? and a cuſtom cannot be laid *in a rent which is alterable at pleaſure* of parties, and beſides, the cuſtom would amount to a plain non decimando. See the great caſe in Roll's Abridg. 378. to pay 2*s.* for all tithes. Hob. 192. and he ſaid if the caſe of Perkins and Perkins came in queſtion again, he would deſire to hear it argued, for he was not ſatisfied with the judgment of it. 12 Mod. 563, 564. Mich. 13 W. 3. Vines v. Doderidge.

47. Objection was to a *modus* that it was too great and *too near the value of tithes in kind*; preſcriptions had their beginning before R. 1. when it is probable that 12d. or 8d. might have been the value of the inheritance, therefore decreed in the Exchequer to be a compoſition and not a modus, but reverſed; for *churches might have been endowed with more than the value of the tithes.* MS. Tab. March 5th, 1707. Pole v. Gardener.

49. Parſon leaſed his tithes by parol for a year to A. B. and C. at 2s. 6d. per acre, who *lett every land-holder his tithes at* 3*s. per acre.* The *money* which the leſſee receives of the land-owners ſhall be *accounted* a modus. 8 Mod. 63. Mich. 8 Geo. The King v. Fairclough.

50. A modus *that the inhabitants of ſuch a tenement, with the lands uſually enjoyed therewith, had been accuſtomed to pay ſuch a modus for tithe-corn*, was held by the maſter of the rolls to be quite *uncertain*, for the houſe may fall, or be uninhabited, and then no modus will be payable, and nothing can be more uncertain than lands uſually enjoyed with the tenement, ſince lands let with a farm-houſe may probably be after ſhifted. 2 Wms.'s Rep. 462. Trin. 1728. Charlton v. Brightwell.

51. Modus to be diſcharged *of herbage-tithes, in conſideration of making graſs into hay*, and ſetting it up in ſhocks for the parſon, is not good. Gibb. 52. Paſch. 2 Geo. 2. in Canc. Fox v. Ayde.

(E. a) To *what* Thing the *Modus* ſhall *extend.* [19]

[1. IF a man *preſcribes to pay* to the parſon *a certain thing as a modus* decimandi, *for all the demeſnes of his manor of D. and after erects a windmill upon part* of the ſaid demeſnes, he ſhall not pay any tithes for this mill, but *the modus grain for the demeſnes ſhall go in diſcharge of this alſo which is built upon the land diſcharged.* Trin. 39 Eliz. B. R. between Russel and Moore, per Curiam, and a prohibition granted.]

[2. If a man *preſcribes* in modo decimandi *for hay and graſs in* 40 *acres* of land, and the *tenant converts it into a hop-yard, or* into *tillage*, the modus is gone, for when the modus is ſpecial for hay and graſs only, by converſion of this to other uſes, the modus

Noy, 148. in caſe of Sharp v. Sharp, cites Hill. 6 Jac.

C. B. the vicar of Clare's caſe in Suffolk, who ſued for tithe of hops, and that there a prohibition was granted, and ſeems to be S. C.

is gone. H. 6 Ja. B. between SHARP AND COULT, per Curiam.]

If there was a preſcription, time out of mind, for a modus decimandi for land,

[3. If a man *preſcribes to pay 6s. 8d. for all manner of tithes of a park*, and after the *park is diſparked, and converted into tillage and paſture* land, the modus is gone by the alteration aforeſaid. SPURDAM'S CASE, adjudged and cited by Coke. Hill. 6 Jac. and there agreed per Curiam.]

when it was a park, this preſcription ſhall have continuance clearly for the payment of this modus only, after that ſuch a park be diſparked, and converted to another more profitable uſe; per Coke Ch. J. The whole Court agreed with him herein. 2 Buiſt. 240. Trin. 12 Jac. in caſe of Price v. Maſcoll.

Noy, 148. in caſe of Sharpe v. Sharpe, Coke Ch. J. cited one Shipden's caſe, that a modus decimandi to pay a buck and a doe generally for the park is not good if it be diſparked; but it ſhall be particularly for all acres contained in the park.

[4. [*But*] if a man preſcribes to pay 6s. 8d. *for all manner of tithes ariſing from ſo many acres* of land *which contain the park*, though the *park be diſparked*, and the land converted into tillage, &c. yet the modus ſhall continue, becauſe *the preſcription is in the ſoil, and not in the park.* SPURDAM'S CASE adjudged; cited per Coke, Hill. 6 Ja. B. and there agreed per Curiam.]

Roll. Rep. 120. pl. 4. S. C. the court divided.——

* Fol. 652.

Mo. 863. pl. 1186. Cooper v. Andrews, S. C. the Court divided.——Godb. 137. pl. 329. S. C. adjornatur.——Hob. 39. pl. 47. S. C. with a long argument by the Ch. J.——Win. 46. Arg. cites Mich. 10 Jac. Rot. 1223. S. P. that the firſt opinion of the Court was, that the defendant ought to plead in certain how that was diſparked; and † 2dly, It was doubted whether the modus, as to the 2s. was gone, in regard that the ſhoulder of the deer is gone by the diſparking.——S. C. cited Hutt. 58. and ſays that it never was adjudged.

[5. If a man preſcribes *to pay yearly 2s. for every acre of 140 acres, which were once a park, and alſo the ſhoulder of every third deer* that ſhould be *killed within the park, in diſcharge* and ſatisfaction *of all tithes*, and after the *park is diſparked*, by which the tithe (*) of the deer is gone, which is part of the conſideration, yet it ſeems *the 2s. for every acre ſhall diſcharge the land.* Dubitatur. Hill. 12 Jac. B. between HOOPER AND ANDREWS, quod vide my Reports, 12 Jac. and Hobart's Reports, 54. Et vid. Mich. 5 Jac. B. between SHAW AND SHARP.]

† [20]

6. Inhabitants of A. a hamlet within the pariſh of B. had a *chapel of eaſe* within the ſaid hamlet, becauſe the ſaid hamlet was diſtant from the church of the ſaid pariſh, and preſcribe that *with part of their tithes they have found a clerk* to do divine ſervice within the ſaid chapel, *and alſo had paid a certain ſum of money to the parſon of B. and his predeceſſors for all manner of tithes*, and held a good preſcription. 4 Le. 25. pl. 77. Trin. 26 Eliz. B. R. Saer v. Bland.

Noy, 148. Sharpe v. Sharpe, S. P. and the ſuggeſtion allowed per

7. R. was ſeiſed of Hadley *park*, and of all the tithes thereof, and *paid* for the tithes but *one buck in the ſummer, and a doe in the winter, for* 30 *years paſt.* The park was diſparked, and turned into arable land. Carus and Catlin ſaid, that he need not pay other tithes

tithes but a buck and doe, for although they be not titheable, yet may they be paid by compoſition, and he may not take them, but they are to be delivered to him; and in like manner, partridges and pheaſants in a garden are not titheable, yet may they be paid in lieu of tithes, and ſhall be brought dead to the parſon, and although there be no park, yet may he give a buck out of another park, and perhaps it may be made a park again. Ow. 34, 35. Trin. 31 Eliz. Ld. Rich's caſe.

Cur. and agreed firſt, that altho' they are feræ naturæ, yet they may be given for tithes; ſo to pay pheaſants, &c.

2dly, Although they are not tithable of themſelves, yet they may be given for a modus decimandi; as a great tree may be given for tithe of trees tithable. 3dly, That that is a diſcharge to the very ſoil, and the park is not but a liberty, and the owner may furniſh it with game when he pleaſes. ——— The Court much doubted, whether one that had a park, and uſed to pay one ſhoulder of a deer for all manner of tithes, and the park is diſparked, ſhould pay tithes in kind or not. Brownl. 31. Paſch. 10 Jac. Anon.

8. In the caſe of a *park* in Norfolk, the parſon preſcribed pro modo decimandi to be paid 3s. 4d. for all tithes ariſing out of the ſaid park, and though the park was afterwards converted into arable, yet no other tithes ſhall be paid; per Coke Arg. But Popham ſaid, it had been adjudged otherwiſe in WROTH'S CASE in the Exchequer; but that the law is clearly as has been ſaid, and that *the difference is when the preſcription is to pay ſo much for all tithes, or when it is to pay a ſhoulder of every buck or doe at Chriſtmas;* for there if the park be diſparked, tithes ſhall be paid; for tithes are not due for veniſon, and therefore they are not tithes in ſpecie. Ow. 74. Paſch. 38 Eliz. B. R. in the Dean and Chapter of Norwich's caſe.

9. Where the cuſtom is to pay a *ſum* for *all grounds* of ſuch a farm, and *woody ground is converted into meadow*, the cuſtom ſhall not extend to the meadow; per Montague Ch. J. 2 Roll. Rep. 162. Paſch. 18 Jac. B. R. cites the caſe of Coney v. Larke in C. B.

10. Where the cuſtom is for every houſe to pay a *garden-penny*, this will extend to beans or hops if they do not grow in ground newly added to the garden. Litt. Rep. 151. Trin. 4 Car. C. B. Alfrey v. Mills.

Hetl. 94. Paſch. 4 Car. C. B. per Hutton J. if a man has an ancient garden, for which he paid a penny, and that is inlarged, tithes in ſpecie ought to be paid of that inlargement.

11. Modus for a *corn mill*, two *new mill-ſtones* are added; per Holt Ch. J. it ſeems reaſonable the parſon ſhould have the tenth toll-diſh; adjornatur. Show. 281. Mich. 3 W. & M. Gumley v. Falkingham.

Per Cur. the modus is not deſtroyed by the addition of the new pair of ſtones. Carth. 215. S. C. ——— 4 Mod. 45. Grimly v. Fawlkingham, S. C. and a prohibition was granted.

12. A modus was, that the *whole crop of two acres was given in diſcharge of all tithes of hay* within the pariſh; it was lately determined in the Exchequer that it was extended only to the old meadow ground. Arg. Gibb. 53. Paſch. 2 Geo. 2. B. R.

[21]

13. A modus *paid to the parſon may bar the vicar of ſmall tithes claimed by him;* for originally, and of common right all the tithes, as well ſmall as great, were the parſon's, and the modus, if good,

muſt have been time out of mind, and have commenced when the parſon was ſeiſed of all, and the after endowment of a vicarage ſhall not deprive the pariſhioners of a modus they were entitled to before. 2 Wms.'s Rep. 522. Paſch. 1729. by Ld. C. King. Fox v. Ayde.

(F. a) To what Thing it [the Modus] ſhall extend. *Mills.*

See (R) pl. 1. and the notes there.

[1. IF a man be *diſcharged of two ancient griſt water-mills* for one modus, ſcilicet, *for* 6*s.* 8*d. yearly paid* to the parſon, *and after*, by continuance of time, by the act of God, *the water-courſe which uſed to run to the mills is diverted, and runs in another place a little diſtance off from the ancient mills*, and thereupon *the owner* of the mills *pulls down one* of the ancient mills, *and rebuilds it upon the ſtream in the new courſe*, he ſhall be diſcharged of tithes of this new mill for the ſaid 6*s.* 8*d.* for this is altered by the *act of God*. Mich. 11 Car. B. R. between JOHNSON AND DANDRIDGE, per Curiam reſolved, and a prohibition granted accordingly.]

[2. *But* in the ſaid caſe, if the ancient water-courſe be changed *by the act of the party himſelf*, who is the owner of the mill, he ſhall pay tithes thereof as for a new mill, and the ſaid ancient modus ſhall not diſcharge it. Mich. 11 Car. B. R. in the ſaid caſe of JOHNSON AND DANDRIDGE, per Curiam reſolved.]

[3. If *for two ancient meſſuages, and* two ancient *water-grain-mills*, time out of memory, &c. there *hath uſed to be paid to* the parſon 20*s. per annum, in lieu of all tithes iſſuing out of the ſaid meſſuages and mills*, and after *the owner* of the meſſuages and mills *erects two new grain-mills within the ſaid meſſuages*, it ſeems the modus will not diſcharge theſe new mills from the payment of tithes, becauſe the *tithes of a mill is not merely predial, but mixed with the perſonalty, and is more of the perſonalty than of the predialty*. Mich. 13 Car. B. R. GOODWIN AND SMITH, concerning TORRINGTON mills in the county of Devon, upon a demurrer. Juſtice Berkly and Curia ſeemed to incline, that the modus ſhould not extend to theſe new mills; but they did not reſolve it, becauſe the iſſue was taken upon the modus as to the two meſſuages and ancient mills; and at the niſi prius the plaintiff in the prohibition was nonſuit, by which he was nonſuit as to the demurrer alſo, and for this cauſe a conſultation was granted for the whole.]

[4. If a man be *ſeiſed of eight acres of paſture, and of meadow, for the tithes of which there has been paid, time out of memory*, &c. 5*s.* 6*d.* and after the *owner thereof erects thereupon a corn-mill*, he ſhall pay no tithe for the corn-mill, becauſe the land was diſcharged per modum decimandi. Co. Magna Charta, 490.]

[22]

Show. 281. Gumley v. Falkingham,

5. In a prohibition to a libel for tithes of a *corn-mill*, the plaintiff ſuggeſted a modus, &c. The *defendant confeſſed the modus, but alleged*

alleged that a new pair of mill-ſtones were added to the old mill, and ſo prayed that the prohibition might go only to the tithes of the ancient mill; but it was ſaid e contra, that the modus extends as well to the new mill-ſtones as to the old, for if theſe break, the modus goes to the new, ſo that if they are laid down elſewhere under the ſame roof, the preſcription will extend to all, becauſe the mill is the ſubſtance to which it chiefly relates; the preſcription is to the mill in general, and it is but accidental whether there are one or two pair of mill-ſtones therein, it is ſtill but unum molendinum, and muſt be ſo demanded in a præcipe, and a prohibition was granted. 4 Mod. 45. Trin. 3 W. & M. in B. R. Grimley v. Falkingham.

S. C. adjornatur.—Carth. 215. Gumble v. Falkingham, S. C. and per Cur. the modus is not deſtroyed by the addition of the new pair of ſtones.—Brownl. 32. Anon. is, that if you have but one pair of ſtones, and pay a rate-tithe for the mills, and then you add another pair of ſtones, new tithes ſhall be paid in kind.

(G. a) [Modus.]

To what Thing it ſhall *extend for a collateral Reſpect. Fraud.*

[1. IF a man *preſcribes to pay an halfpenny for every lamb which he ſhall ſell before the firſt day of May, without other tithe of them*, and after by fraud to deceive the parſon, he *ſells the lambs but a day before May*, this is not a diſcharge by the cuſtom of tithing. Mich. 17 Jac. B. per Curiam.]

2. Libel, &c. for tithes, the defendant ſuggeſted a cuſtom in the pariſh of Letcombe, *that the parſon ſhould have for his tithes the 10th land ſowed with any manner of grain, to be reckoned at the firſt land next the church*; the parſon replied, that the *defendant by fraud ſowed every 10th land which belonged to the parſon as above very ill, and with ſmall quantity of corn, and did not dung and manure it as he did the other nine parts*, by means whereof the other nine each of them yielded eight cocks, but the tenth yielded but three cocks. Wray Ch. J. held, that this cuſtom was againſt common reaſon, and therefore void; but if it be a good cuſtom, then the parſon ſhall have an action on the caſe. Le. 99. pl. 127. Paſch. 30 Eliz. B. R. Stebbs v. Goodlack.

Mo. 913. pl. 1290. S. C. a prohibition was granted, notwithſtanding the covin, becauſe the fraud is to be remedied in an action on the caſe at the common law.

3. A cuſtom was for the vicar to have tithes *for all peas and beans ſet, drilled, or ſowed in rows in gardens*, or like manner, afterwards a new *improvement was found out to uſe a plow inſtead of a ſpade*, yet ſuch peas and beans ſhall pay tithes. MS. Tab. January 23, 1717. Auſtin v. Nicholas.

Fol. 653.

(H. a) *Who* ſhall *preſcribe* in Non Decimando.

Mo. 425. pl. 593. Hill. 38 Eliz. B. R. Wright's caſe, S. C. held, that temporal perſons cannot preſcribe in non decimando, but in modo decimandi they may.

[1. *A Layman cannot* preſcribe in non decimando *without ſpecial matter*, though he be capable of a diſcharge of tithes in favour of the church, becauſe it ſhall not loſe its right without an actual recompence. Co. 2. the Biſhop of Wincheſter, 44. reſolved.]

Cro. E. 206. pl. 42. Mich. 32 & 33 Eliz. B. R. Naſh v. Molins, held that a ſpiritual perſon may preſcribe in non decimando, and by the 31 H. 8. he ſhall hold it diſcharged as the prior held it; and if he held it diſcharged non refert by what means.——Le. 240. pl. 325. S. C. held accordingly.

[2. A *ſpiritual perſon may* preſcribe *generally* in non decimando, becauſe he is more favoured than a layman, for this is always in a ſpiritual perſon, and ſo not taken from the church, for ſuch ſpiritual perſon was capable of a grant of tithes at the common law in pernancy. Co. 2. the Biſhop of Wincheſter, 44. reſolved.]

A ſpiritual perſon may *preſcribe* in non decimando. Roll. Rep. 264. pl. 36. Mich. 13 Jac. B. R. the Biſhop of Hereford's caſe.

A *dean and chapter* may, though it was objected, that a dean may be a layman, as the Dean of Durham was by ſpecial licence and diſpenſation of the king; yet it was anſwered, that this is a rare and ſpecial caſe, and therefore not to be brought for an example. Win. 65. Paſch. 21 Jac. C. B. Briggs's caſe.

† Cro. E. 475. pl. 1. and 511. pl. 36. Wright v. Wright, S. C. adjudged.—— Mo. 425. pl. 593. S. C. adjudged.——S. C. cited Mo. 531.

[3. *As* a *biſhop* may preſcribe in non decimando, as to be diſcharged of tithes *for himſelf, his farmers, and tenants at will, for certain land in the pariſh of another.* Co. 2. the † Biſhop of Wincheſter, 44. adjudged; and Mich. 15 Ja. B. R. ſame caſe came in queſtion, and adjudged, and a prohibition granted accordingly. Mich. 42, 43 Eliz. B. R. between ‖ CROWTHER AND FRIER, adjudged; M. 13 Ja. B. R. in the Biſhop of Hereford's caſe, reſolved, and a prohibition granted accordingly.]

‖ Mo. 618. pl. 844. Crowcher v. Fryar, S. C.

Mo. 425. pl. 593. Hill. 38 Eliz. B. R. Wright's caſe, S. P. adjudged, and ſeems to be S. C.—— Cro. E. 475. pl. 1. 511. pl. 36. S. C. adjudged.——S. C. cited Mo. 531.

[4. [*And*] when certain land is ſo diſcharged by preſcription in non decimando in the hands of a ſpiritual perſon, *if he leaſes it for years to a layman, he may now preſcribe* in non decimando alſo, becauſe the land is diſcharged in facto. Co. 2. the Biſhop of Wincheſter, 45. adjudged; and Mich. 15 Ja. B. R. in the ſame caſe it was adjudged alſo, and a prohibition granted.]

[5. A *parſon* of a pariſh *having land in another pariſh, parcel of his glebe, may* preſcribe in non decimando *for him, his farmers, and tenants.* Mich. 13 Car. B. R. between DR. WARD AND TAYLOR, per Curiam.]

[6. The *churchwardens* of a pariſh, admitting they may have land by preſcription, *yet cannot* preſcribe *generally* in non decimando, *for* this *land which they have for the reparation of the church for*

the pariſhioners, for they are not ſpiritual perſons; P. 37 El. B. between LONGELEY AND MEREDINE, adjudged.]

*[7. *Copyholders of inheritance* that *hold of a biſhop as of his manor, may* preſcribe, *that the biſhop and his predeceſſors ſeiſed of the ſaid manor for themſelves, their tenants for life, years, and tenants by copy of court-roll of the ſaid manor, time out of memory, &c. have been diſcharged of the payment of tithes for their lands, parcel of the ſaid manor*; for this is a good preſcription, and the copyholders ſhall be diſcharged of tithes thereby, for their tenements are part of the demeſnes of the manor, and this might commence upon a real compoſition for the whole manor. M. 42, 43 El. B. R. between CROWCHER AND FRIER, adjudged.]

Cro. E. 784. pl. 23. Crouch v. Fryer, S. C. adjudged, that the preſcription is good.—— Mo. 618. pl. 844. S. C. adjudged accordingly by 3 judges, Popham contra. —— Yelv. 2. S. C. adjudged by 3 juſtices. And adds a nota of the reaſon; becauſe preſcription in the lord ought of neceſſity in common intendment to precede the preſcription in the eſtate of the copyholder, and the diſcharge of tithes in the lands, which in this caſe may well be, (becauſe he is a ſpiritual perſon) ſhall trench ſo to the benefit of the tenant who is the copyholder; for by this means it is to be preſumed, that the lord has greater fines and rents; and adds another nota, that Popham was againſt this judgment, becauſe the plaintiff, who is a copyholder, will have in ſuo genere an eſtate of inheritance diſtinct from the eſtate of the lord, who is the biſhop.—— Noy, 132. S. P. and cites S. C.

A *copyholder* may preſcribe to be diſcharged of tithes, by *pleading that he was always tenant by copy to a ſpiritual corporation.* Lane, 17. Arg. cites it as ſo reſolved 40 Eliz.

[8. A *pariſh cannot* preſcribe in non decimando. Hill. 14 Ja. B. R. BARHAM AND GOOSE, per Curiam.]

Mar. 26. pl. 59. Paſch. 15 Car. Anon. S. P.

[9. A *county may* preſcribe in non decimando; contra, P. 12 Ja. B. R. per Coke.]

2 Salk. 655. pl. 1. Hill. 8 W. 3.

B. R. the S. P. as to a thing that is in its nature de jure tithable; for as no ſingle perſon, or his eſtate, can, no more by the ſame reaſon can the hundred, [or county] which conſiſts but of many ſingle perſon's eſtates. In the caſe of Hicks v. Woodiſon.

Though it be generally put in Dr. and Stud. 166. that a county may preſcribe to be diſcharged of any tithe, yet I find no inſtance of it in any other caſe than tithe-wood (except one in Roll. 654. which I am not ſatisfied with). Now tithe-wood does not ſeem to be due of common right, becauſe it does not renovare annuatim, but the church had got poſſeſſion of it, and the ſtatute de ſilva cædua, 45 E. 3. cap. 3. is but an affirmance of the common law, and where they have obtained it, it is to be paid as a cuſtomary tithe, and yet in the caſe of wood the parſon need not lay a cuſtom in his libel; but if the country be diſcharged by cuſtom, it muſt come on the other ſide. (Contra 13 Co. 13.) The caſe of tithe-wood is ſomewhat like the caſe of tithe of mills; the church claimed tithes for mills, and by the ſtatute of articuli cleri, cap. 5. de molendino de novo erecto, a prohibition lies not, but yet of an old mill a man may now preſcribe generally in non decimando. Per Holt Ch. J. Comb. 404. Hill. 9 W. 3. B. R. in caſe of Hicks v. Woodiſon.

[10. *So* a *wild may* preſcribe in non decimando, *as the wild of Suſſex*; Mich. 13 Ja. B. R. a trial was at the bar upon a prohibition upon ſuch a preſcription to be diſcharged of tithes of wood, between PORTER AND TIKE, and the preſcription found, and judgment given accordingly. Hill. 14. (*) Ja. B. R. per Curiam, ſuch a preſcription is good in BARHAM AND GOOSE's caſe. Mich. 17 Ja. B. in *Dr.* ANDREWS AND , adjudged upon a trial at bar, by which the preſcription is found.]

Libel for tithes of wood; the defendant ſuggeſted for * Fol. 654. a prohibition, a preſcription to be diſcharged of the tithes *of wood within the wild of Kent*. The plaintiff traverſed the preſcription, and iſſue found for the plaintiff in the prohibition, and allowed, and the plaintiff was diſcharged; and there is a nota, that the wild of Kent has twenty pariſhes in it; and Henden Arg. ſaid, that tithe of wood was not originally given to the clergy before John Stratford, archbiſhop of Canterbury, anno 17 Ed. 3. made a conſtitution, that tithes of ſilva cædua ſhould be paid within his province, and that in the next parliament, 18 E. 3. and ſo in every parliament to the 16 R. 2. the commons complained of

of this as a grievance and oppreſſion, and ſhewed two parliament rolls, where it was concluded, that tithes in them ſhall be paid as the uſage was before, and not otherwiſe; and that upon the ſame iſſue the *wild of Suſſex* was diſcharged the year before in B. R. and ſo the *wild of Surry* was in two trials in C. B and in B. R. Palm. 37, 38. Mich. 17 Jac. B. R. Clanrickard (earl of) v. Denton (lady). ——2 Roll. Rep. 122. S. C.

* There is not any caſe of a *cuſtom in non decimando*, excepting for wood in the wilds of Kent and Suſſex, which is no authority for allowing ſuch a cuſtom as to any other thing which is tithable of common right, for per Cur. *wood* is not tithable of common right, being part of the freehold, but it is tithable by cuſtom only; quod nota. Carth. 392. Hill. 8 W. 3. B. R. Hicks v. Woodſon.

But quære, for if wood is tithable only by cuſtom, then all the *libels for tithe-wood ought to be founded upon the cuſtom* alleged; and if ſo, then *there could be no ſuggeſtion of a modus for tithe-wood*; for it would be abſurd to ſuggeſt *one cuſtom againſt another* for one and the ſame thing; for if the duty ariſes by cuſtom only, it cannot be diſcharged by another contrary cuſtom, and yet many moduſes have been allowed againſt libels for tithe-wood. Carth. 393. Hill. 8 W. 3. (ſeems to be a note of the reporter).

[11. *So* the wild *of Kent* may preſcribe in non decimando of wood. Tr. 15 Ja. B. between BELL AND TARDE, a prohibition granted. Mich. 17 Ja. B. R. between
adjudged upon a trial at bar, in which the preſcription was found. Mich. 21 Ja. B. R. between LOAN AND DIXSON, a trial was at the bar upon a prohibition, in which the iſſue was, whether Hilden-Borough-Ward was within the wild of Kent or not? admitting and agreeing that it was diſcharged of tithes of wood if it was within the wild, and found by verdict that it was within the wild. Tr. 17 Ja. B. between FAWKENER AND ANDREWS, per Curiam.]

[12. A *man may preſcribe, that by the cuſtom of the country* where he is ſued for the tithes of milk of ewes, *no tithes, time out of memory, have been paid for milk of ewes.* Mich. 14 Car. B. R. between SEWEL AND BICHNER, per Curiam, a prohibition granted upon ſuch a ſurmiſe to the conſiſtory of Winton.]

[13. A man may preſcribe *that there is a cuſtom within the hundred of* Oſalſton in the county of Middleſex, and
in the county of Surrey, *that if any common baker of bread, inhabiting within any of thoſe hundreds, erects any water-mill, wind-mill, or hand-mill, within any of thoſe two hundreds, to grind his grain, to be employed in making of bread for himſelf, in his trade of a common baker, for the making of bread for the maintenance of his family, and to ſell to his cuſtomers inhabiting there, or near the ſaid hundreds, for their ſuſtentation, by the ſupport of whom the parſons within the ſaid hundred have more ample tithes, videlicet, of thoſe who have lands or tenements, and others, as of handycraft tradeſmen, offerings, and ſuch like, no tithes hath uſed to be paid from the time, &c. from the grinding of this grain ſo employed* as is aforeſaid in his trade; for *two hundreds may preſcribe in non decimando.* P. 15 Car. B. R. between KIDDEN AND EDWARDS, a prohibition granted upon this ſuggeſtion, where the baker is inhabitant in one of the ſaid hundreds, and erected a mill in the other hundred.]

The caſe of KIDDEN v. EDWARDS, Roll, '654. cannot be right, it is againſt the ſtatute of articuli cleri; per Holt Ch. J. Comb. 404. Hill. 9 W. 3.

14. If an *abbot or prior* had been *ſeiſed of lands diſcharged of tithes*, he who is now farmer of ſuch lands ſhall be admitted to preſcribe in non decimando by the ſtatute 2 E. 6. which wills that none ſhall pay tithes otherwiſe than they did for 40 years before, but in no other caſe ſhall a man preſcribe in non decimando, but only in modo

modo decimandi. Mo. 219. pl. 356. Mich. 27 & 28 Eliz. in Branche's caſe.

15. A *whole country* may preſcribe to be diſcharged from payment of tithes, *but this* at the firſt *of neceſſity ought to have a lawful commencement by way of compoſition or, &c.* Per Doderidge J. cites Linwood and Dr. and Student, to which Coke Ch. J. agreed. 2 Bulſt. 285. Mich. 12 Jac.

A country may preſcribe to be quit of tithes of wood, or any other tithe, ſo that there is ſufficient maintenance and ſuſtentation for the parſon beſides; but a town cannot ſo preſcribe. 2 Inſt. 645. cites Dr. and Stud. 147. b. and Br. Diſmes, pl. 14. —— 13 Rep. 13. Mich. 6 Jac. Arg. cites Dr. and Stud. lib. 2. cap. 55. S. P. —— Roll. Rep. 22. pl. 31. Paſch. 12 * Jac. B. R. in caſe of PORTER v. TIKE, it was ſaid by Coke Ch. J. that Wray Ch. J. held, that a country may preſcribe in non decimando, if the incumbent has ſufficient for his livelihood, but Coke ſaid that it ſeemed to him e contra.

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16. A *hundred* may preſcribe in non decimando, and it is good; for it is the cuſtom of the country, which is the beſt law that ever was; but a *particular town* cannot preſcribe in non decimando; and thereupon a prohibition was granted. Mar. 25, 26. pl. 59. Paſch. 15 Car. Anon.

S. C. cited Ld. Raym. Rep. 137.

17. In prohibition upon a ſuggeſtion that the *hundred* of Hunſbyton, in the county of Somerſet, is an ancient hundred, that there has been a cuſtom, time out of mind, *that the inhabitants of that hundred have been diſcharged of the tithes of barren cattle*, iſſue was taken upon the cuſtom, *and verdict for the plaintiff, but judgment was ſtaid.* 1. Tithe is due for agiſtment of barren cattle of common right, and at the common law it is 2s. per pound, but the cuſtom governs it as to the ſum. Comb. 403. Mich. 9 W. 3. B. R. Hicks v. Woodiſon.

4 Mod 336. S. C. and the cuſtom held not good, and conſultation granted. — Skin. 561. pl. 7. S. C. adjornatur. —— Comb. 404. ſays a conſultation was granted, and the court directed that it ſhould be ſpecially entered, becauſe it appears that the cuſtom is void and againſt law. ——— Carth. 392. S. C. the cuſtom was held void, and a conſultation granted. ——— 2 Salk. 655. pl. 1. S. C. held accordingly, and a conſultation granted. ——— 12 Mod. 111. S. C. held accordingly, and conſultation granted; for no country or hundred can preſcribe in non decimando for any thing that is tithable of common right. ——— Ld. Raym. Rep. 137. S. C. ruled accordingly, and the judgment was arreſted, and the court directed the entry to be made as is mentioned above out of Comb.

18. Cuſtom to pay no tithe of *hay employed in fothering* cattle is ill, for *hay is a predial tithe*, and though you feed your cattle with it, yet you ought to pay tithe; per Holt Ch. J. 12 Mod. 496. Paſch. 13 W. 3. Selby v. Bank.

19. B. moved for a prohibition to the ſpiritual court, the libel being for tithe-hay and lambs, cuſtom to pay the 10th *lamb yeaned* there, in conſideration whereof to be *tithe-free of lambs* which were *not yeaned there* is ill; per Holt Ch. J. of *common right* tithe-lamb is payable where they fall, but by *canon law* there is a regard to be had to the place where they were engendered and bred; and after conſideration the Court declared at another day, that no prohibition ſhould go in either part, for as to the lambs it is a *dangerous cuſtom*, becauſe eaſily converted into fraud by taking the ſheep away in yeaning time. 12 Mod. 496, 497, 498. Paſch. 13 W. 3. Selby v. Banks.

20. Of *wood ſpent in an ancient meſſuage* for huſbandry, one may preſcribe in non decimando, for that formerly tithe was not paid for wood; per Holt Ch. J. 12 Mod. 497. Paſch. 13 W. 3. in caſe of Selby v. Banks.

(H. a. 2) Modus Decimandi; what is; and Remedy for it; and Pleadings.

1. PROHIBITION for ſuing for tithes of 15 acres of land, 10 acres of meadow, and ſeven acres of paſture, and ſurmiſed, that he and all thoſe, &c. time out of mind, &c. *had uſed to pay 4d. yearly in ſatisfaction of all tithes of hay cut there;* the *jury find* the preſcription, but *that part of the land was never mowed*, but ſhew not certainly *what part;* it was adjudged for the plaintiff; for both parties agreed, that all the land had been mowed, and the finding contrary is void; and the verdict is certain enough. Cro. E. 333. pl. 13. Trin. 35 Eliz. B. R. Folcot v. Ridge.

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Moduſes are real compoſitions run out into preſcription; per King C. Gibb. 120.

2. Every modus decimandi is a diſcharge of the natural tithe, and ſo works by way of diſcharge. Hob. 118. pl. 148. Hill. 13 Jac. in caſe of Shelton v. Montague, cites D. Parſon of Pyekirk's caſe.

——A modus is nothing but *a real compoſition* for, or in lieu of tithes, *or an annual profit certain and permanent*; per Ward Ch. B. and Smith B. 1 Salk. 656. Mich. 3 Ann. in Scacc. in caſe of the Archbp. of York v. D. of Newcaſtle.

3. One modus ſued for in the ſpiritual court, and *another modus ſuggeſted* is no cauſe of prohibition unleſs for other cauſe; per Doderidge J. but per 2 juſtices contra. 3 Bulſt. 241, 242. Mich. 14 Jac. Harding v. Goſling.

4. Bill in Chancery to maintain the preſcription of a modus decimandi, to which the defendant demurred, and ſays, it is proper for the common law or eccleſiſtical court; and the Court allowed the demurrer, and *diſmiſſed the bill.* Ch. Rep. 27. 4 Car. 1. Brown v. Thetford.

5. In actions for tithes, and a prohibition brought upon this *preſcription*, that time out of mind, &c. the ſum of 2*s.* 9*d.* *had been paid for* 11 *doles of meadow* at 3d. the dole, and the caſe was, that this was a ſmall piece of meadow taken off and incloſed from a great meadow of which it was parcel, and the witneſſes did prove that 3d. the dole had uſed to be paid for the whole meadow, and that the 11 doles in queſtion was parcel of it, and the judge did direct the law to be againſt the plaintiff, becauſe he had laid his preſcription intire 2s. 6d. [2s. 9d.] for the whole, and not 3d. the dole, which does amount juſt to ſo much, and upon this direction the plaintiff was nonſuit. Clayt. 56, 57. pl. 97. aſſizes in Lent, by Vernon J. Ann. 1637. Seton's caſe, and ſays, vide if it is not all one in Mountjoy's caſe. 5 Rep.

6. In

6. In a prohibition, and the *preſcription* ſuggeſted was *to pay a rate-tithe of* 13*s.* 4*d. for all land, &c. and for profits of a mill*, and in evidence the *witneſſes proved ſeveral ſmall ſums paid, as* 5*s.* 2*s. &c. which in the whole came to the juſt ſum laid in the preſcription*, and it was holden no good proof by the owner of the inheritance; otherwiſe it had been if theſe ſeveral ſums had been paid by the ſeveral tenants of ſeveral parcels of the land in queſtion; and in this caſe it was held if ſuch a *preſcription* is *laid for an* 100 *acres*, and the *plaintiff fails in the number*, it is doubtful whether it be not a failure in proof. The beſt way is to lay it that it has been paid for ſuch cloſes, &c. by name; and in this caſe it was held clearly that no proof being to extend this ſum paid for the mill, the plaintiff did fail in his preſcription in all. Clayt. 81, 82. pl. 135. Aſſiſa, 15 Car. before Henden, baron of the Exchequer. Sir Arthur Robinſon's caſe.

7. There was a *compoſition* between the prebendary of A. and the abbot and convent of B. *that the prebendary of A. and his ſucceſſors*, for all time to come, *ſhould have their election yearly, either to receive tithes in kind of corn or grain ariſing within certain lands of the abbey, or elſe to receive five marks*, to be paid by the ſaid abbot and convent *in lieu thereof, ſo as ſuch election was notified to the abbot or any of the monks*, or porter of the abbey, &c. *The lands came to the king by the* 31 *H.* 8. *and from him to the defendant*, and the *prebend came to the king by the* 1 *E.* 6. *of chanteries, &c. and from him to the plaintiff.* Admitting the compoſition good, it was adjudged that the power of election was gone, becauſe it cannot now be made according to the compoſition; but in this caſe it was ſaid by Hale Ch. B. that in one SOUTHWELL'S CASE, in 44 Eliz. where an abbot had a quantity of wood to be taken yearly in [28] ſuch a wood, or a ſum of money at his election, it was held the election was transferred to the king by the ſtatute of diſſolution of monaſteries. Hardr. 381. Mich. 16 Car. 2. Sir William Ingolby v. Wivel & al'.

8. If the jury on an iſſue joined in a prohibition upon a modus decimandi find a *different modus*, yet the defendant ſhall not have a *conſultation*; for it appears he ought not to ſue for tithes in ſpecie, there being a modus found. Vent. 32. Paſch. 21 Car. 2. B. R. Anon.

But an *uncertain modus* is no cauſe of prohibition. Hetl. 100. Trin. 4 Car.

Goddard v. Tyler.——Litt. Rep. 151. Toddard v. Tyler, S. C.——11 Mod. 60. S. P. argued, Startup v. Doderidge.

9. Chancery denied to *decree rate tithe*, though it might be after two verdicts, and though it was urged that it was frequently done in the Exchequer. Ch. Caſes, 187. Mich. 22 Car. 2. Buſh v. Richley.

10. There is *no remedy* for a modus decimandi *but in the ſpiritual court.* 12 Mod. 416. per Cur. Mich. 12 W. 3. in caſe of Johnſon v. Ryſon.

11. Where a modus was ſet forth *payable on or about ſuch a day*, this was not good; for the day muſt be certain. 8 Mod. 375. Trin.

Ibid. cites the caſe of REYNOLDS

v Rogers, where the plaintiff ſuggeſted a modus, but did not lay it payable on any certain day, neither did the defendant in his anſwer confeſs any day of payment; ſo that no certain day of payment appearing, either in the bill or anſwer, the defendant, who was plaintiff in a croſs-bill, having laid it to be payable on a certain day, it was held good.

Trin. 11 Geo. 1. Blackett v. Finny; and cites it as lately reſolved in the caſe of Harriſon v. Clerke.

(H. a. 3) In what Caſes a Parol Agreement is good, or where there muſt be a Leaſe.

1. IN treſpaſs the plaintiff counted that a parſon, anno 18 H. 6. *ſold* to him all his tithes of his pariſh of A. payable, which did or might ariſe in the ſaid pariſh *during ſeven years* next, &c. and juſtified for tithes anno 18 and 19. Per Newton this cannot be good; for in anno 18, the tithes which came anno 19 were not in eſſe, and therefore it is not a good contract of a *thing not in eſſe*; but per Paſton contra, and therefore the plaintiff recovered notwithſtanding theſe objections. Quod nota pro lege. Br. Contract, pl. 13. cites 21 H. 6. 43.

2. A parſon may leaſe his tithes for years *without deed*; per Chocke J. Quod non negatur. Quære tamen. Br. Diſmes, pl. 8. cites 9 E. 4. 47.

Tithes will not paſs by grant without deed. Le. 23. pl. 29. Trin. 26 Eliz. B. R. Withy v. Saunders.

3. A *parſon in conſideration of* 12*d. granted to one of his pariſhioners that he ſhould hold his lands diſcharged of tithes.* It was holden by the whole Court that the ſame was no good diſcharge, being without deed as a leaſe of his tithes. But it was holden, if the parſon afterwards ſues the pariſhioner for tithes againſt the ſame grant and promiſe, the pariſhioner may have an action upon the caſe againſt the parſon upon his promiſe, although he cannot plead the grant as a leaſe. 2 Le. 73. pl. 98. Trin. 28 Eliz. B. R. Wellock's caſe.

4. Conſideration to *pay to A. the parſon* 10*l. per annum* during ſuch a term *for his tithes*, A. promiſed that the plaintiff ſhould hold his lands without tithes and without any ſuit for the ſame; per Gawdy; it is a good diſcharge for the time, and a good compoſition to have a prohibition upon, and is not like unto a covenant. Le. 151. pl. 208 Trin. 31 Eliz. B. R. Chapman v. Hurſt.

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2 Le. 29. pl. 32. Woodward v. Bugg, S. C. and a conſultation was granted. Wray ſaid, that if it had been for years it had been good, but here it is not any contract, but

5. Libel for tithes, the defendant ſuggeſted for a prohibition, that P. was ſeiſed of the lands, out of which the tithes were iſſuing, and in *conſideration of* 5*l. paid by him to the parſon, it was covenanted and agreed between them, that P. and his aſſigns ſhould hold the ſaid lands diſcharged of tithes during the parſon's life.* A prohibition was granted, but afterwards it was held that they may ſtill proceed in the ſpiritual court, becauſe here is no expreſs grant of the tithes, but only a covenant or agreement that P. ſhould be diſcharged of the payment, for which he hath a proper remedy by an action for not performing the agreement, and therefore no prohibition ſhall go; for this agreement cannot be without deed,

and the aſſignee has no colour to take advantage thereof. Cro. E. 188. pl. 13. & 249. pl. 10. Mich. 33 & 34 Eliz. B. R. Nelſon and Bugg v. Woodward.

only a diſcharge for life, which cannot be during his life without deed; and afterwards the record was read, which was concordatum agreatum fuit between the two parties pro omnibus decimis, during the time that one ſhould be parſon, and the other occupier of the ſaid lands, that in conſideration of 5l. the ſaid Prettiman and his aſſigns ſhould hold the ſaid lands diſcharged of tithes, the ſame is not a contract, but a promiſe, for he does not grant any tithes, &c. 3 Le. 257. pl. 341. S. C. in totidem verbis.——Ow. 103. Woodward v. Nelſon, S. C. ſays, that about this time Wray Ch. J. died, and Popham ſucceeded, and was ſworn the ſame day, and the Court held that the agreement by parol was not good, and a conſultation was awarded; but ſays, that upon ſearch made, no judgment is entered upon the roll.

6. If a man *ſell* his tithes for years *by word* it is good; but if the parſon *agrees* that one ſhall have his tithes for ſeven years by word, it is not good, becauſe it amounts to a leaſe; and Fleming Ch. J. held ſtrongly, that tithes *cannot be leaſed for years without deed.* Brownl. 98. Mich. 9 Jac. Anon.

Noy, 28. S. P.—— Tithes may be granted for *one year* without deed, and for no longer; per Coke Ch. J. Roll. Rep. 174. Sorrell v. Grove.——Becauſe the parſon for that year had, as it were, an intereſt; per Fenner J. Ow. 103. in caſe of Woodward v. Nelſon.——By way of agreement, tithes may paſs for years without deed, but *not by way of leaſe* without a deed; but a leaſe for one year may be of tithes without deed. Godb. 354. pl. 449.——S. P. by Wray and Fenner. Cro. E. 249. pl. 10. in caſe of Nelſon v. Woodward.

7. An *agreement to be diſcharged from tithes* may be *for a year by parol*, and ſhall *be good; but* to have ſuch an agreement *during the parſon's life, or for years, cannot be without deed;* and although it were objected that this agreement being in way of contract by retainer is not any leaſe of them, but only a contract which may be for many years by way of diſcharge to the party himſelf, who ought to pay them by retaining them without payment, as well many years as one year; yet the Court held that it could not be, becauſe the law will permit it for a year; it being quaſi by way of ſale; but for many years (which ſound in nature of a leaſe) it cannot be. And Tanfield ſaid, that ſuch a ſurmiſe was in a caſe betwixt NELSON AND PRETIMAN to be diſcharged for years, and ruled to be void; a multo fortiori to be diſcharged during the parſon's life; and ſuch a caſe was ruled betwixt ROLLS AND ROLLS; wherefore without further argument it was adjudged for the defendant, and conſultation was awarded. Cro. J. 137. pl. 13. Mich. 4 Jac. B. R. Hawkes v. Brayfield.

* [30]

8. If a parſon contracts with me *by word for keeping back my own tithes* for three or four years, this is a good bargain by way of retainer, and if he ſue me in the eccleſiaſtical court, I ſhall have a prohibition on this compoſition; but if he grants to me the tithes of another, though it be but *for an year*, it is not good unleſs it be by deed. 2 Brownl. 11. in a note there. Mich. 8 Jac. B. R.

2 Brownl. 17. contra if it be for more than one year, and cites WELLOW'S CASE, as ſo adjudged; but the laſt point of the grant of the tithes of another was agreed by all to be void; ſo * of the tithes of the pariſh without deed. Godb. 373. Bellamy v. Balthorp.——But agreement for *his own tithes for life* is not good, and in the caſe of years it is the better way to *plead it as an agreement*, and not as a leaſe. Noy, 121. Small's caſe.——Agreement to retain them *for life of the parſon* adjudged good. Lev. 24. Bernard v. Evans.——Pleading it by way of *demiſe* for a year is void by parol; but *diſcharge* of tithes by parol is good, or *leaſe of the rectory*, conſiſting of the glebe and tithes by parol for years is good. Lat. 176. Bellamy v. Balthorp.——Not good without deed. 2 Le. 29. Woodward v. Bugg.——3 Le. 257. S. C.——Per Hutton J. Het. 107.——Cro. J. 137. Hawks

Hawks v. Brayfield. —— Grant of tithes *by deed* for life is not good, if it be *to commence at a future day, and to enure by way of intereſt*, and not by way of *diſcharge*, and though it be to the owner of the land, yet to make it good there muſt be words of diſcharge in it. Yelv. 131. Edmonds v. Booth. During the life of the parſon the contract is on foot, but though the contract was with the pariſhioner, his executors and aſſigns, yet the *aſſignee* cannot ſue the parſon upon this contract, but he may have a prohibition to ſtay the parſon's ſuit in the ſpiritual court for the tithes in kind, and may put the parſon to his right remedy, and that is to ſue here. This agreement is no leaſe, becauſe not by deed, and the pariſhioner being dead, the parſon ſhall have his remedy againſt the executor, and not againſt the executors, leſſee at will. Per Doderidge J. and a prohibition was granted. Godb. 333. Snell v. Barret, S. C.

Cro. J. 137. pl. 13. Hawkes v. Brayfield, S. C. and a conſultation awarded; for though ſuch agreement may be good by parol for a year, yet it cannot be during the parſon's life, or for years, without deed, and cites S. P. ruled between Rolls and Rolls. ——Yelv. 94. Hawkes v. Brothwith, S. C. takes a diverſity where it is a contract to have tithes by way of retainer without deed, and where by way of perception.

9. Libel, &c. the defendant ſuggeſted, that there was an *agreement* between the Lord Chandos, who was ſeiſed of the manor of B. in the county of Wilts, and the plaintiff, who was parſon of B. *that* the ſaid *Lord Chandos, and his tenants of the ſaid manor, ſhould pay unto the ſaid parſon, ſo long as he ſhould continue parſon there, ſo much money in ſatisfaction of all tithes, and that in conſideration thereof they ſhould hold the ſaid manor diſcharged, &c.* and upon demurrer it was adjudged for this defendant, and a conſultation awarded. Hob. 176. pl. 199. Hill. 13 Jac. B. R. Hawles v. Bayfield.

10. A *pariſhioner* covenants with the parſon by deed *to pay the parſon annually* on Lammas-day 11s. and the *parſon in conſideration thereof*, and *upon receipt of the ſaid* 11*s. covenants* by the ſame deed *to diſcharge and acquit him of the payment of the tithes of B. cloſe*, as long as he ſhall be parſon. The pariſhioner being tenant for life, made a leaſe for a year, and after at will to another. The parſon ſued for tithes in kind in the ſpiritual court; about three years afterwards a prohibition was moved for, but denied. One reaſon was, that this was only a covenant, and no leaſe. 1. Becauſe it *depends on a condition precedent.* 2. Becauſe of the words, *(upon receipt of* 11*s.)* and a leaſe ought to have a certain commencement, and not depend on a condition (cites Pl. C. 271.). 3. Becauſe the words are not that he ſhall retain the tithes, but that he will diſcharge and acquit him of the payment of tithes, which words found only in covenant. 2 Roll. Rep. 121. Mich. 17 Jac. B. R. Alders v. Wray.

So of a covenant. Poph. 140. Fulcher v. Griffin.—So where the parſon in conſideration of 6l. per ann. covenanted and granted *by deed to diſcharge the pariſhioner of tithes*, on condition to be void on non-payment. The parſon ſued in the ſpiritual court; but the court would not grant a *prohibition*, becauſe the original, viz. the tithes, belong to the ſpiritual juriſdiction; but it was ſaid he may have covenant upon the deed at law. Godb. 272. Barnwell v. Pelſie.——2 Roll. Rep. 42. S. C.

11. In conſideration of compoſition promiſed by the pariſhioner for his tithes; parſon promiſes that *he will not ſue for tithes;* after parſon ſues; the tithes do not paſs in intereſt, for which the pariſhioner was put to his covenant, being by deed. Palm. 377. cites Alders v. Rayner, 16 Jac.

12. Tithes *cannot paſs without deed.* Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swodling v. Piers.

13. The

13. The parſon made a *parol agreement* with A. a pariſhioner, *that in conſideration of* 10*s. to be paid to him every year by A. his executors or aſſigns, he and they ſhould be quit of payment of tithes for ſuch lands during the life of the parſon*; the 10*s.* was conſtantly paid to the parſon, which he accepted; afterwards A. the pariſhioner made B. an infant his executor, and died; the mother of the infant took out admininiſtration durante minore ætate, and made a leaſe at will of theſe lands, and the parſon libelled againſt the leſſee for tithes; per Doderidge, during the life of the parſon the contract is a-foot; but the aſſignee cannot ſue the parſon on this contract, though he may have a prohibition to ſtay the ſuit in the ſpiritual court, and put the parſon to ſue here; and a prohibition was granted. Godb. 333. pl. 426. Trin. 21 Jac. B. R. Snell v. Bennet.

2 Roll. Rep. 327. Bennet v. Snell, S. C. and by Doderidge, the parſon has no remedy againſt the leſſee for the rent, but he muſt have it againſt A. or his executors, but the leſſee may have action againſt the parſon if he ſues him in the ſpiritual court; and a prohibition was granted. ——— Palm. 377. S. C. and prohibition was granted.

14. Where the defendant in *trover* juſtified by *leaſe of the tithes, &c. by the impropriator for a year*; per Cur. it is merely void *without deed*, otherwiſe if it be by leaſe of the tithes of a year *by the parſon himſelf*. Noy, 89. Mich. 2 Car. B. R. Bellamy v. Balthrop.

Lat. 176. S. C. held accordingly as to the impropriator; but that the parſon may diſcharge the pariſhioner of tithes by parol, or leaſe the rectory, conſiſting of glebe and tithes, by parol for years.

15. If A. *contracts with the parſon for the diſcharge of tithes for years* of his lands, and demiſes his lands to another, yet he ſhall not pay tithes, but the diſcharge runs with the land; but if he takes a *leaſe for his tithes by deed*, and makes a demiſe of his land, he has tithes of the leſſee; and the direction was, that the leſſee of the farm ought to ſhew expreſsly to the eccleſiaſtical court, that the farmer (viz. A. the leſſor of the land) had not a leaſe by deed. Het. 31. Mich. 3 Car. C. B. Booth v. Franklin.

Hetl. 122. Mich. 4 Car. C. B. Stone v. Walſingham, S. P.

16. There was an ancient compoſition between the prior and convent of Bath, and the vicar of North-Stoke, *that the vicar and his ſucceſſors ſhould have five marks yearly in lieu of all tithes of ſheep kept upon the manor of North-Stoke, and that all the tenants of the ſaid manor ſhould be diſcharged accordingly, but ſuch ſheep were only to be hog-ſheep, and not exceeding* 500. The manor came to the king by diſſolution, who granted it to Seymour. The vicar, notwithſtanding this compoſition, and though only 500 hog-ſheep were kept there, and though the five marks were conſtantly paid, libelled for tithes in kind; but the defendant had a prohibition upon ſuggeſting this matter, and upon hearing the cauſe on an Engliſh bill in the Exchequer, the compoſition was confirmed. Palm. 525. Paſch. 4 Car. in Scacc. Lon v. Seymour.

17. A ſuggeſtion for a prohibition was, that the *parſon made ſeveral agreements with his pariſhioner for the payment of* 6*s.* 8*d. for his tithes for four years*, and thereupon a prohibition was granted; and Harvey ſaid, that if an agreement be proved for thoſe four

years, it is ſufficient. Het. 128. Mich. 4 Car. C. B. Stone v. Walſingham.

18. The *vicar and pariſhioner inter ſe convenerunt* to pay ſo much for tithes, this was *confirmed by the biſhop*. This is no real compoſition, but *only a perſonal contract*, and ſhall not bind the ſucceſſor; and a prohibition was granted. Mar. 87. pl. 140. Paſch. 17 Car. Hitchcock v. Hitchcock.

19. Agreement made ten years before at 2s. in the pound for every pound rent of land within the pariſh, *as long as they ſhould live together, and he continue parſon*, payment to be made May 1ſt and November 1ſt. Per Cur. this agreement will not bind the [32] parſon, being *by parol*, but it will excuſe the pariſhioners of the penalties of 2 E. 6. and from coſts, till notice given of his diſſent, and *notice* given after payment due is *too late*, and ſo if given *after lands are manured and ſowed*. Hardr. 203. Mich. 13 Car. 2. in Scacc. Breamer v. Thornton.

20. In debt on 2 E. 6. cap. 13. on nil debet, it is good evidence to excuſe the defendant from the penalties of the ſtatute to ſhew a *parol agreement*. Keb. 21. pl. 60. Paſch. 13 Car. 2. B. R. Barnard v. Ewen.

21. In a ſpecial verdict in trover for a lamb, and a ſheaf of wheat, the caſe was, that the *abbey* of Fountaine being *of the Ciſtertian order, and exempted from payment of tithes of thoſe lands, quas propriis manibus excolerent, was ſeiſed of the grange of Hemmingford, &c. within the prebendary of Stodely, &c.* and *between the year 1216 and 1261, the abbot and convent, and the prebend, made a compoſition, confirmed by the patron and ordinary, that the ſaid abbot and convent ſhould be diſcharged of all tithes of their lands, quas propriis manibus excolerent in Hemmingford*, but they ſhould pay tithes there and elſewhere for their lands out of Hemmingford; *and that they ſhould pay yearly to the ſaid prebendary and his ſucceſſors five marks by equal payments every* half year. That *anno* 1359, *there was another compoſition made between the then abbot and prebendary, reciting the former compoſition, but the jury did not find that it was confirmed as the firſt was* by the patron and ordinary, *and by their later compoſition, the prebendary and his ſucceſſors were to have the tithes of corn and grain, as well of lands in the hands of the abbot and convent, as in the hands of tenants ariſing yearly in the ſaid place, or elſe five marks at the election of the ſaid prebendary, &c. of which notice was to be given to the abbot, &c.* or to the porter of the abbey, on St. Thomas's day, *and that when no election was made, then the prebendary, &c. ſhould have the five marks, ſaving the right of tithes of lambs and wool which was to be paid as formerly*; afterwards *the poſſeſſions of this abbey came to the crown by the ſtatute of* 31 *H.* 8. *and* that at the time of the trover, *the defendant was proprietor of the lands in Hemming ford, and that the plaintiff was ſeiſed in fee of the ſaid prebend, and* that *a lamb and ſheaf of wheat were renovant on the ſaid lands*; and the queſtion was, whether the defendant ſhould pay tithes or not? and this depended upon another queſtion, viz. whether the ſecond compoſition was good? It was inſiſted

ſiſted for the plaintiff that it was good, though not confirmed by the patron and ordinary, becauſe it was for the benefit of the prebend and his ſucceſſors, and an enlargement of the firſt compoſition; for by that he was tied up to the firſt five marks, but by this he has his choice either to take the five marks, or his tithes in kind; therefore it needs no confirmation, for the rule is, that the parſon, without his patron and ordinary, poteſt meliorare ſtatum eccleſiæ ſuæ; it is true the abbey is now diſſolved, and the poſſeſſions given to the crown by the ſtatute 31 H. 8. and ſo is the prebendary by the ſtatute 1 E. 6. but yet the tithes in kind may be recovered; *for the diſſolution of the abbey* will not hinder it, becauſe it *was by ſurrender of the abbot and convent*; for the *ſtatute* 31 *H.* 8. *veſts nothing in the crown but what the abbots themſelves ſurrendered ſince* 27 *H.* 8. and it is a rule in law, that res inter alios acta alteri nocere non debet; it is likewiſe true that the *prebendary can make no election, becauſe his poſſeſſions are given to the crown*; but where no election can be made, there the party, who was to have the benefit of it, ſhall have the thing itſelf without any election; but adjudged, that *the ſecond compoſition was void, becauſe* it was *not confirmed by the patron and ordinary, and becauſe there could be no election according to the compoſition, for that the prebend was diſſolved*; therefore *the firſt compoſition ſhall ſtand quoad terras in propriis manibus* as theſe lands were; *and for the others, that tithes in kind may be taken*; ſo the defendant had judgment. 3 Nelſ. Abr. 298, 299. pl. 8. cites Hardres, 381. [pl. 10. Mich. 16 Car. 2. in the Exchequer.] Ingoldſby v. Wivell. [33]

22. A ſuggeſtion for a prohibition was of an *agreement for a year*, and though this agreement *was pleaded in the eccleſiaſtical court by way of contract*, and not in bar as an agreement for life or for ſeveral years; yet the Court held it all one, and that both are triable in the ſpiritual court if the ſuit be for tithes in kind; but otherwiſe *if it were for the money, then a prohibition would lie*; and ſo Cro. J. 17. muſt be intended. 2 Keb. 6. pl. 14. Paſch. 18 Car. 2. B. R. Buckley v. Cheſter (Bp.).

23. In *ejectment of* tithes *upon demiſe of J. S. not ſaying by deed*, for which cauſe, after error brought here on judgment in C. B. after verdict, Rotheron prayed for the plaintiff in the firſt *judgment* that it may be reverſed, which Twiſden doubted; but per Cur. *reverſed*. 2 Keb. 376. pl. 33. Trin. 20 Car. 2. B. R. Angell v. Rolfe.

24. *Indebitatus aſſumpſit for tithes ſold.* Baldwin moved in arreſt of judgment, that this founds in the realty, and ſo an action of the caſe will not lie; but per Cur. it is well enough, for this ſhall *not be intended a leaſe* of tithes, *but a ſale* of tithes. Freem. Rep. 234. pl. 242. Mich. 1677. Anon.

25. A *leaſe* of tithes *cannot be for more than one year without deed*, and it is not good by way of leaſe for one year, but ſo it enures by way of ſale. Per North Ch. J. Freem. Rep. 234. pl. 242. Mich. 1677. Anon.

26. Caſe on a *ſpecial promiſe for tithes for ſix years*; on a motion in arreſt of judgment it was *held good*, though ſuch agreement

Though an intereſt paſſes by

ſuch an agreement, yet he having, according to the agreement, ſuffered him to take the tithes, an action lies for the money upon the other's agreement. Skin. 113. pl. 4. S. C.

be not a good leaſe, nor does any intereſt paſs by the ſame in the tithes, yet it is good to ground an aſſumpſit, and the action lies; judgment for the plaintiff. 2 Show. 307. pl. 314. Trin. 35 Car. 2. B. R. Eaton v. Shirwin.

27. The law for ſeveral years paſt hath been clearly taken that no *prohibition* will lie on any compoſition, whether *for life or years*, for any tithes, and therefore the *proper remedy is to appeal to the Arches*, if the Conſiſtory Court ſhould refuſe a plea of compoſition. Carth. 70. Mich. 1 W. & M. in B. R. Bradſhaw v. Swanton.

28. Parol agreement for the tithes of *lands to be incloſed was*, that the proprietors would be at the charge of incloſing, and that the rector and his ſucceſſors ſhould have *every tenth acre* in ſatisfaction of all tithes, which ſhould be likewiſe incloſed for him. This agreement was made with the predeceſſors of the preſent rector; the preſent rector traverſed the agreement, and the plaintiff took iſſue on the traverſe; the jury found the agreement, and gave a verdict againſt the rector, and after ſeveral motions the judgment was affirmed. 2 Lutw. 1057. Hill. 13 W. 3. C. B. Machin v. Moulton.

Hetl. 122. Mich. 4 Car. C. B. Stone v. Walſingham, S. P.

29. Where an agreement is made for tithes, they ſhall *paſs by way of bargain*; for otherwiſe they cannot paſs at all, becauſe they lie in grant, and therefore cannot otherwiſe paſs than by deed; for a *verbal* agreement for them is good only for a year. 8 Mod. 62. Mich. 8 Geo. The King v. Fairclough.

[34] And ſhall pay the *poor-rate*. Ibid.

30. Parſon leaſes his tithes for 2s. 6d. per acre to A. B. and C. they let every landholder his own tithes at 3s. per acre. The money which the *leſſees* receive of the *landholders* for thoſe tithes ſhall be accounted a *modus*, and wherever there is a modus, he that receives it ſhall be *taken to be occupier* of the tithes. 8 Mod. 63. Mich. 8 Geo. The King v. Fairclough.

(I. a) *Who* ſhall *have Advantage* of a Preſcription in Non Decimando.

* Cro. C. 422. pl. 14. S. C. adjudged by 3 juſtices for the defendant, and that conſultation be awarded. —Jo. 368. pl. 10. S. C. and held by 3. Contra Crook, that

[1. IF a man preſcribes, *that ſuch an abbot*, and his predeceſſors, *time out of memory*, &c. *held certain land diſcharged of* payment of *tithe, and that this came after by diſſolution* by the ſtatute of 27 H. 8. *to the crown*, and ſo derives a title to it from the crown, the *patentee ſhall not have advantage* of this preſcription by the common law, *without the help of any ſtatute*, becauſe it *ſhall be intended* that this diſcharge was by reaſon of ſome *perſonal privilege given the abbot and his predeceſſors, and ſo is gone by diſſolution of the body politic*, and *not in reſpect of any real compoſition*. P. 7 Car. in Scaccario, between CLARKE AND WARD, adjudged in the caſe of the Vicar of Daintre. Mich. 10 Car. B. R. between * TID-

DOWNE

DOWNE AND HOLMS, per Curiam, upon demurrer, and gave a peremptory rule for judgment accordingly, if cauſe was not ſhewn the next term to the contrary; but after judgment was ſtayed till M. 11 Car. at which time it was ſolemnly argued by the Court, and then adjudged by Brampſton, Jones, and Barkely e contra, the opinion of Croke, that the preſcription in non decimando was gone by the common law. H. 11 Car. between COCK AND THORPE, and ſo adjudged upon a demurrer without argument e contra the opinion of Croke. Intratur, P. 11 Car. Rot. 28.]

no prohibition lies, and a conſultation was awarded.— S. C. cited per Cur. Jo. 387. pl. 3. Paſch. 12 Car. B. R. —2 Keb. 29. pl. 59. Paſch. 18 Car. 2. B R. the S. C. cited per Cur. and ſaid that it had been agreed for law in all the courts of Weſtminſter.— Ibid. 175. pl. 61. cites S. C. accordingly.

*[35]

Fol. 655.

[2. In a prohibition, if the *plaintiff preſcribes, that king Edw. 6. was ſeiſed de nuper de-afforeſtata foreſta de Savernack in comitatu Wilts, of which* 20 *acres of wood*, called Wickham-Huſſocks, *within the pariſh of Pewſey, a tempore*, &c. *was parcel*, and *that king Edw. 6. and all his progenitors* and predeceſſors, *kings of England, foreſtam prædictam, cum pertinentiis, unde*, &c. *habuerunt & gaviſi fuerunt exoneratam & acquietatam immunem & privilegiatam de & a ſolutione omnium & ſingularum decimarum quarumcumque rectori eccleſiæ parochialis de Pewſey prædict'; ſeu firmario ſuo, pro tempore exiſtenti ſolubilium infra foreſtam prædictam, ſeu aliquam inde parcellam creſcentium, renovantium, provenientium, & contingentium, rectori eccleſiæ de Pewſey prædicta, ſeu ejus firmaria, pro tempore exiſtenti ſolubilium*, and *that king Edw. 6. by deed enrolled, conveyed the ſaid foreſt to the Duke of Somerſet in fee, and ſo* it was conveyed *from him* by mean conveyance *to the plaintiff*, the new Earl of Hertford, *in fee*, and that the defendant, being parſon of the ſaid pariſh, had ſued for tithes of the ſaid 20 acres of wood, to which defendant pleaded for a conſultation, that the ſaid 20 acres were not parcel of the ſaid foreſt, upon which an iſſue being joined, a verdict was given for * the plaintiff; and after *it was moved* in arreſt of judgment, *that this preſcription* in non decimando, which was laid in the king and his progenitors, kings of England, *was perſonal, and did not extend to the alienee of the king*; and after ſeveral arguments at the bar, it was adjudged per totam Curiam, that the plaintiff could not take advantage of this preſcription, without any argument by them, and a conſultation granted accordingly, for that *the ground of this preſcription was either becauſe it was a foreſt, and could not render tithes ſo long as it was uſed with wild cattle*, ſcilicet, deer, *or becauſe the king was not within the council of Lateran*, which ordains the parochial right, *or becauſe the king is perſona mixta*, and ſo might preſcribe in non decimando as a ſpiritual perſon, *in all which caſes it could not extend to the alienee of the king, the ſaid foreſt being diſafforeſted*; and ſo now it may render tithe in kind; and it ſhall *not be intended that any real compoſition* or conſideration *was given* for this diſcharge *without ſhewing thereof ſpecially*, no more than in caſe of a ſpiritual perſon or abbot that makes ſuch preſcription. P. 11 Car. B. R. between the Earl of HERTFORD AND LEECH, adjudged.

Jo. 387. pl. 3. S. C. and a conſultation was granted.— The king's leſſee ſhall hold diſcharged, but his feoffee ſhall not; per Henden, Davenport and Atthow Serjeants. Hetl. 60. Mich. 3 Car. C. B. in Comins's caſe.— Cro. C. 94. pl. 20. Morant v. Comming, S. C. it was doubted whether the patentee may have ſuch privilege, or that it be only a privilege annexed to the crown, during the time that the land is in the crown; but a prohibition was granted de bene eſſe, unleſs cauſe were ſhewn to the contrary ſuch a day.—

Lands in a foreſt not paying

adjudged. Intratur, Hill. 8 Car. Rot. 565. Vide my argument in this caſe in my book.]

tithes, being in the hands of the king, is but an immunity for that time only. Sty. 137. Mich. 24 Car. in caſe of Baniſter v. Wright.

It was held upon evidence by Hale Ch. B. and the whole Court, that the king is not, by virtue of his prerogative, diſcharged of tithes for the antient demeſnes of the crown; but that he is capable of a diſcharge de non decimando by preſcription, (becauſe he is perſona mixta,) as well as a biſhop. See 2 Rep. Biſhop of Wincheſter's caſe. But if the king alien any of the lands that he is ſo diſcharged of tithes for, his parentee ſhall pay tithes, and not only ſo, but the preſcription is deſtroyed for ever, though the ſame lands ſhould afterwards come into the king's hands again, by eſcheat or otherwiſe. Hardr. 315. pl. 7. Mich. 14 Car. 2. in Scacc. Compoſt v. . . . . .

Sid. 320. pl. 13. Bowles v. Atkins, S C. adjudged accordingly.

3. The *abbot of A. was ſeiſed in fee, and* that *he and his predeceſſors, time out of mind,* had *held the ſame diſcharged of tithes, and he granted the land to All Souls College in Oxford,* &c. Keeling Ch. J. delivered the opinion of the Court, in which they all clearly agreed, that this could not be intended of a diſcharge by real compoſition, not being pleaded or found ſo by the jury, but a mere preſcription, and perſonal to the abbot, and ran not with the land. 1 Lev. 185. Trin. 18 Car. 2. Bolls v. Atkinſon.

(K. a) *Who* ſhall *pay* Tithes.

[1. IF a *parſon ſows his glebe, and* after *leaſes over the land,* and after the *leſſee* ſevers the embleaments, he ſhall pay tithes for them to the parſon. P. 40 El. B. R. in Humfrey's caſe, per Fenner.]

• Cro. J. 362. pl. 23. S. C. adjudged. And the Court ſaid, that if any one will buy corn ſtanding of

[2. [*So*] if a parſon ſows his glebe, and after *ſells over the embleaments,* reſerving the land, and the vendee ſevers the embleaments, the parſon ſhall have tithes of them, notwithſtanding his own grant. P. 40 Eliz. B. R. Humfrey's caſe. Dubitatur. H. 11 Ja. B. R. between * Moyle and Ewer, Curia, and affirmed in a writ of error.]

the proprietor of a rectory, if he has not ſpecial words to diſcharge it he ought to pay tithes, and the carrying it away without ſetting out the tithes is an offence within the ſtatute, and ſhall pay treble damages. ——— 2 Bulſt. 183. S. C. adjudged for the plaintiff; ſtates it that the † plaintiff was poſſeſſed of the land ſown with corn, (but had not then the parſonage,) but that before ſeverance he became parſon.

† [36]

Hob. 188. pl. 232. Trin. 15 Jac. Harris v. Cotton, S. P. of an action brought by the parſon

[3. If a *parſon ſows his glebe,* and *dies before ſeverance,* and after a *ſucceſſor is inducted,* and after the *executor* or his vendee *ſevers* the embleaments, the *ſucceſſor ſhall have tithes* of them, for though the executor repreſents the perſon of the teſtator, yet he cannot repreſent him as parſon, inaſmuch as another is inducted. Contra P. 40 El. B. R. Humfrey's caſe.]

appropriate; but the Court would give no opinion, becauſe it hanged before them in ſuit. —— Brownl. 69. S. C. & S. P. in an action of debt brought upon the ſtatute 2 E. 6. and the Court ſeemed to incline that it would lie.

Fol. 656.

[4. If a *parſon ſows his glebe,* and after is *depoſed before ſeverance,* and another is inducted, it ſeems he ſhall have tithes of his predeceſſor.

ceſſor. (Quære, * whether there be not a diverſity where he dies before the annunciation, or where after?) H. 11 Ja. B. R. per Curiam.]

S. P. and ſo if he reſigns before ſeverance; per Coke Ch. J. 2 Bulſt. 184. Hill. 11 Jac.

* This ſeems to belong to the former plea.

5. If a *parſon demiſes his glebe to a layman*, there he ſhall pay tithes; contra of the parſon himſelf, who reſerves them in his proper hands; and that land before diſcharged of tithes ſhall be yet diſcharged of tithes, yet if *he who has purchaſed manor and rectory*, which is *diſcharged of tithes*, *leaſes part of his demeſnes*, the leſſor ſhall have tithes thereof, becauſe he has the parſonage. Br. Diſmes, pl. 17. cites 32 H. 8.

If a parſon leaſes his glebe for years, the leſſee ſhall not pay tithes; per Brown and Weſton; quod fuit conceſſum. Mo. 47. pl. 140. Paſch. 5 Eliz.—Contra by Coke Ch. J. 2 Bulſt. 184. Hill. 11 Jac. ——If the parſon of a church, which is not impropriate, leaſes his glebe, the leſſee ſhall pay tithes; but otherwiſe if it had been an impropriate church, becauſe of the ſtatute of 32 H. 8. of diſſolutions; cited by Hutton, Serjeant. Noy, 132. as ruled in the Exchequer in caſe of Brewer v. Veyſoy.—— If the parſon demiſes the glebe, his leſſee ſhall pay him tithes. Per Eyre Ch. J. Gibb. 79. Trin. 2 & 3 Geo. 2. C. B.

6. A parſon makes a *leaſe for years of parcel of his glebe* land, *of the value of* 13*l. per ann. rendering* 13*s. rent*; adjudged that the leſſee ſhall pay the tenths to the leſſor, notwithſtanding his own leaſe, and the reſervation of the rent; but there *otherwiſe* it had been, *if it had been a rack-rent* to the value of the land. Sed quære of that diverſity. Noy, 35. Mich. 31 & 32 Eliz. Perkins v. Wilde.

Cro. E. 161. pl. 52. Parkins v. Hinde, S. C. and though the rent was mentioned to be for all exactions and demands, yet a conſultation was granted by all the juſtices, for Wray ſaid, that the words here are no diſcharge; for theſe tithes ariſe, and accrue after, and are not things iſſuing out of the land, but collateral and due jure divino; and therefore cannot be diſcharged but by ſpecial words; but if the words had been as well for tithes growing and ariſing upon the land, as for other demands, then peradventure it had been a good diſcharge. But as the caſe is, it cannot be intended by any words, that he reſerved the rent for tithes, and ſo Gawdy J. did conceive, eſpecially as the caſe here is, the leaſe being of 24 acres of land, and only 13*s.* 4*d.* reſerved. ——D. 43. Marg. pl. 2. cites S. C. that it was reſolved the tithes ſhould not paſs by ſuch general words.——S. C. cited 11 Rep. 13. b. by the reporter in a nota as reſolved per tot. Cur. that the tithes ſhall not paſs by ſuch general words.

7. As long as the *vicar occupies his glebe lands* in his own hands, he *ſhall pay no tithes; but* if he demiſes it to another, the *leſſee ſhall pay* tithes to the parſon that is impropriate. Brownl. 69. 14 Jac. Harris v. Cotton.

8. If *parſon* be *tenant of the land*, and at this time land is diſcharged of tithe of wood in his hand, yet if he leaſes or ſells the wood, the *leſſee or vendee ſhall pay tithes*, *unleſs he ſells the tithes alſo*; per Doderidge and Haughton. Palm. 38. Mich. 17 Jac. B. R. in caſe of the Earl of Clanrickard v. Denton. [37]

9. If a *layman impropriator leaſes the glebe*, the leſſee ſhall pay tithes; and if he *purchaſe other lands* in the pariſh, which are diſcharged of tithes in his hands, and he demiſes them, the leſſee ſhall pay him tithes. Het. 31. Mich. 3 Car. C. B. Booth v. Franklin ſaid, that it was adjudged accordingly in the caſe of Perkins v. Hinde.

10. Tithes were claimed by the defendant as his *abſolute inheritance under a grant from the king*, and the ſame were decreed ſo. Fin. Rep. 309. Trin. 29 Car. 2. Roak and Collier v. Lee.

(K. a. 2) Payable to whom.

Executors or Succeſſors, &c.

1. IN treſpaſs it was admitted, that where *pariſhioners ſow* the land *the 10th day of May*, and after the *parſon makes his executors and dies*, and after *another parſon is inſtituted* and inducted, and after the pariſhioners cut the corn and ſever the tithes from the nine parts, the executors of the firſt parſon ſhall have the tithes, and not the new parſon. Br. Diſmes, pl. 7. cites 21 H. 6. 30.

2. If a man *keeps ſheep in one pariſh until ſheering time, and then ſells them into another pariſh*; in this caſe the vendee ſhall pay the tithe-wool to the pariſh where they were depaſtured in the greater part of the time of the growing of the wool; per Williams, Lane, 16. Hill. 4 Jac. in the Exchequer. Anon.

(L. a) *By whom* they ſhall be *paid*.

[1. IF a man *ſells to me wood*, and *I burn it in my houſe*, the *vendor* ſhall be charged for the tithes, and not the vendee, for no tithes are due for wood burnt in my houſe; and this was reſolved, P. 14 Ja. B. between Parſon ELLIS OF DEVON AND DRAKE, and a prohibition granted accordingly; although it was ſaid, by the *civil law*, the parſon hath election to ſue either of them; but this croſſes the *common law*.]

Cro. C. 237. pl. 20. S. C. but S. P. does not appear. —— J. 254. pl. 5. S. C. it ſeemed to the Court in reaſon that a ſuit was well brought againſt the owner, but be that as it will, it belongs to the Court Chriſtian to determine which of them ought to be ſued, and therefore for this reaſon as to this point a conſultation was granted. —— S. C. cited Hardr. 35. pl. 2. by the name of Fare v. Cauge, as held that tithes ſhall be paid for agiſtment of cattle by the occupier of the lands.

[2. If A. *agiſts the cattle of a ſtranger* in his land, the parſon may *ſue the owner of the land* for the tithes of the paſture; for otherwiſe it would be very inconvenient for the parſon to ſue every owner of cattle, and it would be very hard to know, and infinite. Mich. 7 Car. B. R. between FACEY AND LANGE, per Curiam.]

3. Where *graſs is cut and made into reeks or cocks, and afterwards ſold*, the parſon cannot ſue the vendee for the tithes thereof, but muſt ſue him who ſevered it. 2 Roll. Rep. 78. Hill. 16 Jac. B. R. Cannon's caſe.

[38] 4. If a *ſtranger takes emblements before ſeverance from the tithes*, the parſon *ſhall ſue* in the ſpiritual court for tithes againſt *the treſpaſſor*, and not againſt the tertenant; per Ley Ch. J. 2 Roll. Rep. 440. Trin. 21 Jac. B. R. in caſe of Gwyn v. Merryweather.

5. In

5. In a bill in equity for the tithes *of a nurſery* ſold; the Court was of opinion, that if the *owner ſells them, and pulls them up himſelf*, he ſhall pay the tithes; but if he ſell them particularly to another [after ſeverance] the vendee ſhall pay the tithes; as in caſe of tithes of corn, if corn be ſold ſtanding, the vendee ſhall pay the tithes; but if he ſell it after ſeverance, the vendor muſt. Hardr. 380, 381. pl. 9. Mich 16 Car. 2. in Scacc. Grant v. Hedding and Ball.

6. Upon hearing the cauſe above, divers doubts and queſtions were made; as 1ſt, Whether tithes ſhould be paid if they *yielded no other fruit?* 2dly, Whether tithes ſhould be paid *for thoſe trees that yield fruit which pay tithes?* 3dly, If *ſome yield fruit and others not*, whether or no thoſe that yield fruit, privilege and exempt the other which yield none, when they are all ſold together? 4thly, Whether tithes ſhall be paid for them when *ſold and tranſplanted in another pariſh?* Et adjornatur. But afterwards tithes were decreed in all ſuch caſes. Hardr. 380, 381. Mich. 16 Car. 2. in Scacc. Grant v. Hedding and Ball.

7. The plaintiff being rector of the pariſh of Hemyoke, in Devonſhire, brought a bill for agiſtment tithes againſt the agiſter; the caſe appeared to be thus, *defendant's father lived in the pariſh, and rented a farm there, defendant lived with him, and he being a butcher, and renting a farm in an adjacent pariſh, frequently brought cattle and put them in his father's ground for two or three nights, and ſometimes killed ſome of them off, but generally ſent them to his own farm.* The queſtion was, whether the owner of the land, or the owner of the cattle, ſhould pay agiſtment tithes? Ch. Baron and other barons agreed, that the demand ought to have been againſt the occupier of the land for the agiſtment tithe if any had been due, but they thought in this caſe nothing appeared due. And Baron Page ſaid, that as to what had been ſaid that the demand might be either againſt occupier or agiſter, that could not be; for the ſame duty could not ariſe in two different perſons at the ſame time. MS. Rep. in Scacc. Fiſher v. Lemen.

(M. a) Tithes Perſonal.

What ſhall be ſaid *Perſonal* Tithes.

[1. A Perſonal tithe *is the tenth part of the clear gain quæ debentur ex opere perſonali*, his charges and *expences*, according to his eſtate, condition, or degree, to be firſt *deducted*. Co. Magna Charta, 621. 657. 649.]

[2. Tithes of *fiſh taken at Iſland*, or of *herrings* or *pilchards*, upon the ſea, are perſonal tithes. Mich. 14 Ja. B. R. * Goslin and Horden, per Dodderidge. H. 14 Car. B. R. ſaid by Juſtice Jones, that in an appeal out of Ireland to the delegates here, in my Lord Desmond's caſe, it was agreed by all the civilians,

* See (C) pl. 4. and 6. S. C. and the notes there.

lians, that tithes perſonal taken in the ſea out of any pariſh are due deductis expenſis, and not tithes in kind. Co. Magna Charta, 621.]

Tithe of mills are perſonal tithes, per Coke Ch. J. Roll. Rep. 405. pl. 15. Jake's caſe.——See (Q) pl. 19. and the notes there.

* [3. Tithes of *fulling*-mills *and paper-mills* are perſonal tithes. Co. Magna Charta, 621.]

Carth. 215. Hill. 3 W. & M. in B. R. Gumble v. Falkinham.

[4. The tithes of a *corn-mill* are not perſonal, but predial or mixed, and of this according to the cuſtom of the realm, the miller ought to *pay the tenth toll-diſh* for tithes. Contra. Co Magna Charta, 621.]

S. P. the Court doubted what tithes ought to be paid out of a tithable mill; whether only perſonal tithes, viz. the 10th of the clear gain, or elſe predial tithes, viz. the tenth of all the income in general, and therefore a prohibition was granted generally, on purpoſe that the point might come before them upon a declaration and demurrer to it, ſo that the matter might receive a ſolemn determination by the Court.——Show. 281. Gumley v. Falkenham. S. C. and by Holt Ch. J. the tenth toll-diſh is the tithe; it is not the owner of the mill, nor the owner of the grain, that has the profit, but the miller; and this is a predial tithe, becauſe payable rectori loci, viz. where the mill is, and not merely where the parſon lives. It ſeems reaſonable, that the parſon ſhould have the 10th toll-diſh. Adjornatur.——4 Mod. 45. Grimly v. Fawlkingham, S. C. but S. P. does not appear.——The defendant had libelled in the ſpiritual court for the tithe of a corn-mill as predial tithe. The plaintiff ſet forth in his anſwer, that he conceived the tithe of a corn-mill to be a perſonal tithe; and therefore prayed to be allowed all his neceſſary charges in attending the mill before the tithe ſhall be paid. The judge over-ruled this plea, and decreed that the plaintiff ſhould pay theſe tithes without any ſuch deduction. Upon which Mr. Denniſon moved for a prohibition, and cited the caſe of CHAMBERLAIN v. CLIFTON, determined in the houſe of lords the 20th of June 1706, wherein it was reſolved, that the tithe of a corn-mill was perſonal-tithe; accordingly a rule was made to ſhew cauſe. 2 Barnard. Rep. in B. R. 336. Mich. 7 Geo. 2. Donalt v. Lowther.

It was decreed in the houſe of peers, on appeal from the Court of Exchequer, that the tithes of a mill *are perſonal* tithes, againſt ſeveral ſeeming authorities or doubts in the books; and that in conſequence of their being perſonal tithes, not the tenth toll or tenth diſh of the corn ground belongs to the parſon, but the *tenth part of the clear profits*, after the charges of erecting the

5. Mr. Newte being rector of the portions of Pitt and Tidcomb, of the rectory and pariſh church of Tiverton, in com' Devon, and an *horſe-mill for the grinding of malt* being erected within the ſaid portions by the corporation of the ſaid borough, who in 1699 had leaſed the ſame to the appellants for three years, at 30l. per annum. Newte preferred his bill in the Exchequer, Mich. 3 Ann. and on 20th February 1705, the cauſe was heard and debated, and the Court took time to deliver their opinions until the next term after; and on 22d April 1706, the Court of Exchequer were unanimouſly of opinion, that tithes were due for this new erected mill, and that ſuch tithe was the tenth toll-diſh, and decreed the appellants to account with the reſpondent accordingly, viz. from the 8th of May 1699, to the 8th of May 1701, and alſo to pay coſts; from which decree the defendants in the Exchequer appealed to the Houſe of Lords. 1. Becauſe the tithe of an horſe malt-mill was a perſonal tithe, for there was no natural increaſe from it, but only a profit ariſing from the invention of a machine, and the labour of a man and horſe; and if it were perſonal, the ſame could only be for the tenth of the neat profit, deducting all charges. 2. If a perſonal tithe was due for ſuch mill, it was only due where perſonal tithes have been by cuſtom paid for 40 years before the ſtatute of E. 6. 3. The appellants only took 2d. per buſhel for grinding, and the reſpondent did not prove any cuſtom, nor the value of the tenth toll-diſh, nor any other toll to be taken by the appellants. 4. That the

the tenth toll-diſh would be more ſometimes than the whole proprietors gains, conſidering the expence of erecting and maintaining this mill. 5. That the corn will pay tithe twice, for that moſt of the corn that was ſo ground was grown within the ſame pariſh, and ſo the tenth paid to the reſpondent in the field; and if any was ground that grew elſewhere, the ſame did in like manner pay the tenth to the incumbent where it grew. 6. This decree will introduce a new ſort of tithe, and will affect a great many people in London where there are many ſuch mills, and ſome thouſands of them are in other parts of the * kingdom, and if this decree be affirmed they muſt all pay tithes. On the reſpondent's part it was inſiſted, 1. That tithes were due both by the canon and ſtatute law for new erected mills; that tithes were by the canons due for all mills, and by *Artic. Cler. cap.* 5. for new erected mills, which expreſsly *provides that no prohibition ſhall lie in ſuch a caſe.* 2. That there had been from time to time ſeveral reſolutions and decrees for tithes of mills. 3. That the reſt of the mills within the reſpondent's portions had all along paid, and did ſtill pay, tithe or a compoſition for the ſame, and every modus for a mill proves tithes to be due, if they were not diſcharged by ſuch modus. 4. That it was a predial tithe, and the tenth toll-diſh payable for the ſame, and ſo was both the canon and cuſtom and uſage of this kingdom. 5. That this was not a double tithe, for it was paid by different perſons and for different purpoſes, viz. In the firſt caſe by the owner of the corn; and in the ſecond caſe by the owner of the mill. This cauſe was heard at the bar of the Houſe of Lords Monday 20 January 1706-7, and upon ſome debate in the houſe, the conſideration of tithes predial mixed or perſonal were due for ſuch a mill, and if any due in what manner payable, was referred to the judges, who after ſeveral adjournments attended in the houſe on the 17th day of February following; and all the judges of the King's-Bench and Common-Pleas (except Juſtice Powell) were of opinion unanimouſly, that the tithe due for a new erected malt-mill was a perſonal tithe only, and Ch. J. Holt and Ch. J. Trevor held, that there was no tithe due at all for ſuch mill, becauſe a perſonal tithe was due only where it had been paid within 40 years before, according to the ſtatute of 2 & 3 E. 6. cap. 13. ſ. 7. Upon which the lords reverſed the decree of the Exchequer, but ordered that Mr. Newte ſhould be paid the tenth part of the profits, &c. deducting all charges and expences, as reparations, &c. and that the appellants ſhould account with him in the Court of Exchequer for theſe profits, &c. Monday 17th day of February 1706. It is ordered and adjudged by the lords ſpiritual and temporal in parliament aſſembled, that the decree of the Court of Exchequer complained of in the petition of Roger Chamberlain and Francis Plympton ſhall be and is hereby reverſed; and that the plaintiff in the court below John Newte (the now reſpondent) do recover his tithes of the ſaid mill in the *nature of a perſonal tithe only; that is to ſay, the tenth part of the clear profits ariſing from corn ground in the ſaid mill, over and above all incident charges;* and to that end an

mill, and the other charges of ſervants, horſes, and other expences deducted. Abr. Equ. Caſes, 366. Newt v. Chamberlain.

S. C. cited 2 Wms.'s Rep. 463. as determined in the houſe of lords upon an appeal from a decree of the Court of Exchequer, where the bill was brought for the tithes of a malt-mill in Tiverton, in Devonſhire, and where the lords determined, with the aſſiſtance of 8 judges, (whereof Holt Ch. J. was one) that mills were titheable, but that the ſame was a perſonal tithe, and ſo ought to be paid out of the clear gain, after all manner of charges and expences deducted. And upon the authority of this caſe, the Maſter of the Rolls decreed, Trin. 1723, in caſe of Carleton v. Brightwell, the mill in queſtion there to pay

tithes, but that they ſhould be only paid as a perſonal tithe. 2 Wms.'s Rep. 463.

an account is to be taken of the profits of the ſaid mill, and charges for the time paſt within the time of the demand of the plaintiff John Newte's bill in the Exchequer and ſince, and the ſaid tithes do ſo continue to be paid for the future. And it is hereby ordered that the ſaid Court of Exchequer do cauſe the ſaid account to be taken, and what ſhould be found due thereon paid accordingly. MS. Rep. Mich. Vac. 5 Ann. Chamberlain & al' v. Newte.

Tithe for *malt-mills* is only perſonal, for it is not natural increaſe, being only profit ariſing from the invention of a machine, and the labour of man and horſe, and perſonal can only be for the tithes of the neat profit, deducting all charges. MS. Tab. January 20, 1706. Chamberlayn v. Plympton.

[41]

(N. a) Perſonal Tithes.

In what Caſes they are due. Of what Things they ſhall be paid.

[1. NO perſonal tithes ſhall be paid *out of the clear gains of the party*. Mich. 14 Ja. B. R. per Curiam.]

Roll. Rep. 419. pl. 5. S. C. but S. P. does not appear.

[2. *As* if the *owner of a ſhip lends it to mariners to go to Iſland for fiſh, upon a certain quantity of fiſh to be paid to him upon their return*, no tithes upon their return ſhall be paid by the mariners to the parſon out of thoſe fiſh which the owner ſhall have for the hire of his ſhip, becauſe this is a perſonal tithe, and for that that is but of the clear gain; and ſo in Devon upon the hire of a ſhip or boat to take pilchards or herrings. Mich. 14 Ja. B. R. per Doderidge, in GOSLIN AND HORDEN'S CASE.]

* Fol. 657.

[3. If a man *purchaſes an houſe for* 300*l.* *and ſells it again in a ſhort time for* 500*l.* yet no tithe ſhall be paid of the gain (*) thereof, for this is againſt the common law. M. 11 Ja. B. R. between DAVIES AND TOLBIN reſolved, and a prohibition granted.]

5. 2 & 3 *E.* 6. *cap.* 13. *ſ.* 7. *Every perſon exerciſing merchandizes, bargaining and ſelling, cloathing, handicraft, or any other art or faculty, being ſuch perſons and in ſuch places as within theſe* 40 *years have uſed to pay perſonal tithes, or of right ought to pay other than ſuch as the common day-labourers, ſhall yearly at or before Eaſter pay for his perſonal tithes the tenth part of his clear gains, his charges and expences according to his eſtate or degree to be deducted.*

6. S. 8. *In all ſuch places where handicraftſmen have uſed to pay their tithes within theſe* 40 *years, the ſame cuſtom ſhall continue.*

7. 2 *E.* 6. *cap.* 13. *ſ.* 9. *If any perſon refuſe to pay his perſonal tithes, it ſhall be lawful to the ordinary of the dioceſe where the party is dwelling, to call the party before him, and examine him by all lawful means, other than by the parties own oath, concerning the payment of the ſaid perſonal tithes.*

8. A parſon libelled in the ſpiritual court *againſt an innkeeper for tithes of the profits of his kitchen, ſtables, and wine-cellar*, and alleged in his libel that he made great gain in ſelling his beer, which he bought for 500l. and ſold it for 1000l. that negotiando & traficando he gained in the whole 3000l. and better; the Court granted a prohibition. 2 Bulſt. 141. Mich. 11 Jac. Dolley v. Davis.

(O. a) Tithes *Extra-parochial. Who* may have them.

[1. ANY *ſtranger* may have a *portion of tithes in the pariſh of another* parſon. 14 H. 4. 17. 44 Aſſ. 25.]

[2. 3 E. 1. Rotulo Clauſarum Membrana 3. the *Abbot* de Burgo Petri had by the charters of divers kings *decimam venationis capt' in foreſtis regis* infra comitatum Northt' 8 E. 1. Rot. Clauſarum, M. 2. accordingly in foreſta regis citra Trentham.]

[3. 13 E. 1. Rotulo Patentium, M. 6. the dean and chapter * M. S. had the tithe in foreſta de Claringdon ex conceſſione regis.]

[42]

* Quære, if this be not miſprinted for N. S. and intended to ſignify New Sarum, which is but a ſmall diſtance from Clarendon.

[4. The *king* ſhall have the tithe in places which are out of any pariſh, as in foreſts, and the like, and *may grant them by his letters patents*, and the patentee ſhall have them. † 22 Aſſ. 75. D. Proxys, 4 Co. 2. the Biſhop of Wincheſter, 44. for he is perſona mixta.]

† Br. Scire Facias, pl. 154. cites, 22 Aſſ. 75. —Br. Diſmes, pl. 10. cites S. C.

——Br. Patents, pl. 33. cites S. C.——Br. Prerogative, pl. 47. cites S. C.——Br. Prerogative, pl. 143. cites S. C.——Br. Juriſdiction, pl. 64. cites S. C.

[5. Libro Parliamentorum, fol. 19. inter placita in parliamento de 18 E. 1. the Prior of Carliol and the Biſhop of Carliol's caſe, it is there ſaid, that the *tithes* of land *within a foreſt*, which is *out of any pariſh, belongs to the king*, becauſe he is foreſta prædict' villas ædificare, eccleſias conſtruere, terras aſſertare, & eccleſias illas, cum decimis terrarum illarum, pro voluntate ſua cuicunque voluerit conferre poteſt, eo quod foreſta illa non eſt infra limites alicujus parochiæ.]

2 Inſt. 647. ſame record cited.—— See (P. a) pl. 2.

6. There is a fenn called *Wildmore, in com' Lincoln*, which is not known to be in any pariſh within. Whereupon it was ordered in the Exchequer that in this caſe the tithes ſhall be *paid to the parſon, vicar, or penſionary, &c. where the owner of the cattle inhabits; but if the* tithes have been *paid to the parſon of any pariſh, time out of mind, &c. though* it is *not known in what pariſh the moor* or common *is, they ſhall be continued to be paid in the ſame pariſh* where they have been uſed to be paid. But where no uſe of payment had been as before, nor the pariſh certainly known, they ſhall be paid to the parſon or vicar where the owner dwells, by a proviſo in the ſtatute 2 E. 6. cap. 13. Sav. 60, 61. pl. 136. 7 May, 26 Eliz. in Scacc. Wildmore Fenn's caſe.

By the civil law, the biſhop of the dioceſe ſhall have the tithes of lands not

7. The *canon law* is, that the biſhop is to have all tithes growing on lands not aſſigned to any pariſh within his dioceſe; yet this canon being againſt the law of the land, never had allowance within this realm, for in ſuch part of the foreſts as are out of any pariſhes, the king ſhall have them. 2 Inſt. 647.

within any pariſh there, but in England the king ſhall have them by the cuſtom of the realm; Arg. quod fuit conceſſum per Coke and Hobart, that the king ſhall have them. Roll. Rep. 454. Hill. 14 Jac. in Cam. Scacc.

8. If *lands are diſafforeſted*, and be within a pariſh, they ought to pay tithes; for their not paying tithes, being in the hands of the king, is but an immunity for that time only. Sty. 137. Mich. 24 Car. Baniſter v. Wright.

9. The *parſon of* the rectory of *A. by right of preſcription, hath intereſt in and to the predial tithes in the pariſh of B. where there are divers barren heaths and waſte grounds converted into tillage*, which never before yielded any profit to the church; the pariſh *church of B. ſhall have theſe tithes*, becauſe they are *decimæ novalium*, viz. ariſing of ſuch grounds as never were manured, nor yielded any profit at all to the church before; becauſe by the foundation of every church, the tithes in general of that and every pariſh are due to their own proper and peculiar church. Now foraſmuch as the church of A. &c. could never before be in the poſſeſſion
[43] of the tithes of theſe waſte grounds, becauſe they never were in being, and becauſe the law is tantum præſcriptum eſt quantum eſt poſſeſſum & non plus; and alſo becauſe *preſcription is not extended ad futura*, viz. it reaches not to profits of tithable grounds to come, it ſtandeth with great equity that the church of B. ſhould reap and receive theſe tithes. The Tithing Table, 7, 8. cites ſeveral books of the civil law.

(P. a) [Tithes Extra-parochial.]

To whom they belong *de Jure*.

Br. Scire Facias, pl. 154. cites S.C.—— See (O. a) pl. 4. and the notes there.

[1. THE tithes of ſuch places as are *out of any pariſh* belong de jure to the king, as foreſts, and ſuch like. 22 Aſſ. 75. per Thorpe.]

See (O. a) pl. 5.

[2. 18 E. 1. Libro Parliamentorum, 19. b. upon a ſuit for tithe between the parſon and the grantee of the king, &c. Willielmus, qui ſequitur pro domino rege, dicit, quod decimæ prædictæ ad dominum regem pertinent' & ad nullum alium, quia dicit, quod prædictæ placeæ ſunt *infra bundas foreſtæ ipſius domini regis de Inglewood*, & quod ipſe dominus rex in foreſta ſua prædicta, villas ædificare, eccleſias conſtruere, terras aſſertare, & eccleſias illas, cum decimis terrarum illarum, pro voluntate ſua cuicunque voluerit conferre poteſt, eo quod foreſta illa non eſt infra limites

alicujus parochiæ & petit quod decimæ illæ domino regi remaneant, prout debent ratione prædictæ, &c.]

3. 2 *E.* 6. *cap.* 13. *ſ.* 3. *Every perſon which ſhall have any beaſts or cattle tithable depaſturing on any waſte or common ground, whereof the pariſh is not certainly known, ſhall pay their tithes for the increaſe of the ſaid cattle to the parſon, owner, or their farmers, of the pariſh or place where the owner of the ſaid cattle inhabiteth.*

4. *S.* 4. *No perſon ſhall be ſued or compelled to pay tithes for any lands, which by the laws of this realm, or by any privilege or preſumption are not chargeable with ſuch tithes, or that be diſcharged by any compoſition real.*

5. Libel by a vicar for tithes of young cattle, and ſurmiſed, that the defendant was ſeiſed of lands in Middleſex, of which pariſh he was vicar, and that the defendant had *common in a great waſte called Sedgmore Common*, as belonging to the lands in Middleſex, and put his cattle into the ſaid common; the defendant ſuggeſted for a prohibition, that the land where his cattle went was not within the pariſh in Middleſex, but no prohibition was granted, becauſe of the clauſe in the ſtat. 2 E. 6. cap. 13. that tithes of the cattle feeding in a waſte or common where the pariſh is not certainly known, ſhall be paid to the parſon of the pariſh where the owner of the cattle lives. Mod. 216. pl. 3. Trin. 28 Car. 2. C. B. Anon.

6. Bill brought by the rector of S. for tithes *of beaſts fed upon a common.* Defendant by anſwer inſiſts, that *the common extends into ſeveral pariſhes*, and that the cuſtom was, that every farmer ſhould pay tithes to the rector where he lived, and that he lived in another pariſh, and he paid the tithes to that rector; but there being proof that *the cattle was driven upon that part of the common that lies in S.* there was a decree for the rector of S. but reverſed becauſe the cuſtom was good, there being no incloſures. MS. Tab. Jan. 1710. Mickleburgh v. Criſp.

(Q. a) Payable. At what Place. [44]

1. PRESCRIPTION to pay the *tithe-milk* at the *parſonage-houſe*, or at any other place, is good enough. Per Popham. Cro. E. 609. pl. 15. Paſch. 40 Eliz. B. R. in caſe of Auſten v. Lucas.

Tithe-milk ſhall be delivered at the parſonage-houſe; per Raymond B. becauſe where there is no cuſtom, the common law prevails; but Ld. Ch. B. and the other two barons agreed that it ſhould be delivered in the *church-porch*, becauſe the neighbouring pariſhes did ſo; and ſo it was decreed. Raym. 278. Paſch. 31 Car. 2. in Scacc. Dod v. Ingleton. ——Freem. Rep. 329. pl. 409. S. C. ruled accordingly. ——S. C. cited 12 Mod. 206. by Holt Ch. J. who ſaid that this was a mere equitable decree, guided by the cuſtom of the neighbouring pariſhes; and that a pariſhioner is not obliged of common right to deliver his tithe-milk either at the vicarage-houſe or church-porch, but only to ſet them out. —— Ld. Raym. Rep. 359. cites S. C. and Roke by J. held according to Raym. but Holt Ch. J. contra, and cited 3 Cro. 600. Auſtin v. Lucas, where Popham held, that a preſcription to pay it at the parſon's houſe is a good modus, and that the reſolution in Raym. is an equitable one.

2. A cuſtom was laid to pay *tithe-milk* of cows to the vicars, &c. *at the place where the cows were milked.* It was argued that this cuſtom was void for uncertainty, there being no place certain mentioned, ſo that it is in the power of the owner upon the tithing nights and mornings to milk them in ſeveral places, and there leave the milk, which being to be paid on certain evenings and mornings, it would be impoſſible for the vicar to have ſo many ſervants to attend at every milking place to take the milk, and ſo may be deprived of it; beſides in law, tithe-milk in kind ought to be carried by the proprietor either to the parſonage-houſe or to the church-porch. The court held the cuſtom void. Carth. 461. Mich. 10 W. 3. B. R. Hill v. Vaux.

(R. a) Payable. At what Time.

1. THE tithes *belong to the parſon as ſoon as ſevered* by the pariſhioners; per Manwood J. 3 Le. 24. pl. 50. Mich. 15 Eliz. C. B. in caſe of Tottenham v. Bedingfield.

2. Tithes ought to be paid *as ſoon as the tenth part can be well ſevered from the nine*, if there be no cuſtom to the contrary; and ſo it is for corn and hay, as ſoon as it is made into ſhocks or cocks. Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon.

3. All tithes ought to be paid *ſo ſoon as they may be fit for the parſon to receive them*; ſo calves at ſuch an age, and other things as the matter will bear. Raym. 277. Paſch. 13 Car. 2. in Scacc. Dod v. Ingleton.

[45]

(S. a) Payable. In what Caſes, though there is no Product.

1. WHEN tithes are payable *by cuſtom*, they ſhall be paid, though the lands are not rented, or *lay freſh*. Hardr. 184. pl. 9. Paſch. 13 Car. 2. in Scacc. in caſe of Holbeech v. Whadcock.

(T. a) Who capable.

1. THE *king* was capable of tithes at common law; for he *was perſona mixta*; reſolved. 2 Rep. 44. a. in the Biſhop of Wincheſter's caſe, and cites 22 Aſſ. 75.

Cro. E. 699. pl. 5. Hill. 40 Eliz. B. R. the S. P. agreed per Cur. and cites S. C.—Mo. 486. pl. 685. Mich. 39 & 40 Eliz. S. P. affirmed in a nota at the end of the caſe.

2. And *ſo was his patentee* by the prerogative of the king; reſolved. 2 Rep. 44. a. cites S. C.

3. But the *king's leſſee* ſhall pay tithes, though the king never paid any; for the king is privileged by reaſon of his prerogative. Cro. E. 511. in caſe of Wright v. Wright. Arg. cites it as adjudged, 31 Eliz. in the Exchequer.

——Jo. 387. pl. 3. Paſch. 12 Car. S. P. in caſe of the Earl of Hertford

Ford v. Leech; reſolved, and that the council of Lateran does not bind him, unleſs where he voluntarily ſubmits to it, that this was a perſonal privilege which non egreditur perſonam, and their grantee ſhall not have benefit of it.

4. 28 *H.* 8. *cap.* 11. *ſ.* 4. *If any ordinary take the fruits, tithes, profits, or caſualties, belonging to any parſonage or other ſpiritual benefice, &c. during the vacation of ſuch benefice, &c. and the ſame upon reaſonable requeſt does not reſtore to the next incumbent, or interrupt the incumbent to have the ſame; every perſon ſo doing ſhall forfeit the treble value of ſo much as he ſhall have received; the moiety of which forfeiture ſhall be to the king, and the other moiety to the incumbent, to be recovered in any of the king's courts.*

5. In a prohibition againſt a parſon who ſued for tithes, it was ſurmiſed, that the *clerk of the pariſh*, and his predeceſſors, aſſiſtants to the miniſter, have uſed to have 5s. for the tithe of the place, where, &c. It was the opinion of the Court, that if this ſpecial matter be ſhewed in the ſurmiſe, it might perhaps be good by reaſon of long continuance; and that by this the parſon is diſcharged from finding the clerk; which perhaps he ſhall be charged with, and ſo is as a payment of tithes to the parſon himſelf; but they held by common intendment tithes are not payable to a pariſh clerk, and he is no party in whom a preſcription can be alleged, becauſe he is dative and removeable; wherefore a conſultation was awarded. Cro. E. 71. pl. 26. Mich. 29 & 30 Eliz. Savell v. Wood. Mo. 908. pl. 1274. S. C. held accordingly.

6. None *by the common law* had capacity to take tithes, but *only ſpiritual perſons*, or *perſona mixta*, and regularly no mere layman was at common law capable of them, unleſs in ſpecial caſes; for no layman, unleſs in ſpecial caſes, could at common law ſue for them in Court Chriſtian, viz. for ſubſtraction of them; reſolved. 2 Rep. 44. a. Paſch. 30 Eliz. the Biſhop of Wincheſter's caſe. Cro. E. 512. pl. 36. Wright v. Wright, S.C. & S.P. but that by way of retainer he may well have them,

and cites 8 E. 4. 14. Regiſter, fol. 38. and F. N. B. 41. (G) and that there it is held that an aſſignee may hold diſcharged of tithes.

[46]

7. Tithes cannot be ſaid to be parcel of, or *appendant to, a manor*, and the *difference* is *between a tenth and tithe*, the firſt is temporal and the other ſpiritual. Cro. E. 599. pl. 5. Hill. 40 Eliz. B. R. Pigot v. Hearn. For they are ſpiritual, and of a diſtinct nature, and ſo cannot be-

long to a manor, and the Court held, that a man cannot *preſcribe* for tithes as parcel of a manor; but if he had preſcribed to have *decimam partem granorum*, it had been good, but not to have *portionem decimarum*, and a conſultation was granted. Cro. E. 293. pl. 7. Hill. 35 Eliz. B. R. Sherwood v. Winchcomb. —— Same caſes cited Saund. 142.

8. Pariſhioners preſcribed that there had been a *curate* or an incumbent *by appointment of the rector*, who adminiſtered the ſacraments, &c. and that the cuſtom of the pariſh, time out of mind, was, that the curate ſhould have all tithes renewing within that pariſh, except decimas granorum which were paid to the parſon, and that every pariſhioner who had ſo paid the tenths to the curate, was diſcharged againſt the parſon; but the preſcription was held ill; for the rector may remove the curate at his pleaſure. Noy, 15. Mich. 2 Jac. B. R. Bott v. Brabalon.

9. One who was accepted for a *chaplain to a chapel of eaſe which was not preſentative or donative*, libelled for tithes of the inhabitants within the precinct of the chapel; and a prohibition was granted. Litt. Rep. 72. Mich. 3 Car. C. B. Anon.

10. An *incumbent preſented by ſimony* cannot ſue for tithes againſt his pariſhioners. Mar. 84. pl. 109. Arg. cites Mich. 10 Jac. Stamford v. Dr. Hutchinſon.

11. *Appropriator gave a rectory by will* to the maintenance of a miniſter there for ever, reſerving no nomination of a miniſter there, and *ſaying nothing about a nomination.* The deviſe was void at common law, being made to no certain perſon. The eſtate thereof came to J. S. who nominated A. to be miniſter and ſerve the cure; afterwards B. ſuppoſing a lapſe to the crown, was preſented, inſtituted and inducted as if the church had been void. J. S. the rector, ſuppoſing that the nomination of the miniſter belonged to him, nominated A. It was urged for B. that here is a pious uſe wholly ſubject to this court, and that coming in by the ordinary, though he was *not parſon or vicar*, [but curate only,] *was allowed by the biſhop*, and decreed accordingly that he ſhould have the tithes. 2 Ch. Caſes, 31. Trin. 32 Car. 2. Perne v. Oldfield.

12. The *prior of N.* being *ſeiſed of the manor of N. and of the tithes* thereof, *ſimul & ſemel as of a portion of tithes*, 25 *H.* 1. *granted the manor and tithes to A. and his heirs, rendering rent, and he entered and held it diſcharged* of tithes, *and after granted two hides* of land, *part of the manor, to S. with the tithes thereof, and A. and his heirs paid the rent to the ſaid prior till the diſſolution, and after to the king and his aſſigns.* It was adjudged, that the two hides ſhould be diſcharged of tithes, for the prior might preſcribe for tithes en prender, and being well in him, he might grant them to A. paying 5s. rent, and ſo a judgment in C. B. affirmed in B. R. 2 Mod. 320. Trin. 34 Car. 2. in B. R. James v. Trollop.

Skin. 51. S. C. adjornatur.—Ibid. 239. S. C. but S. P. does not appear.—2 Show. 439. pl. 403. S. C. and judgment in C. B. affirmed.—Pollexf. 523. S. C. argued by the reporter.

13. A layman is not *capable* of tithes *en prender*, but a layman is capable of paying and taking a *modus* in lieu of tithes. Agreed by council. Arg. 2 Show. 440. Mich. 1 Jac. 2. in caſe of James v. Trollop.

[47] (U. a) Barren Lands. And what ſhall be ſaid ſuch.

1. 2 & 3 *E.* 6. *cap.* 13. *ſ.* 5. *ALL ſuch barren heath or waſte ground, other than ſuch as be diſcharged of tithes by act of parliament, which before this time have paid no tithes by reaſon of barrenneſs, and ſhall be improved and converted into arable ground or meadow, ſhall* * *after ſeven years after ſuch improvement pay tithe-corn and hay growing upon the ſame.*

* Here are no expreſs words of diſcharge of the tithes during the ſeven years, but by reaſonable conſtruction it impliedly amounts to a diſcharge during the ſeven years, and the ſeven years are to be accounted next after the improvement. 2 Inſt. 656.

Only

Only ſuch is intended barren land, which before the ploughing produced no profit to the owner. Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon.——Bendl. 80. pl. 122. 2 Eliz. S. P. ſays, that it is ſo underſtood by the opinion and judgment of the common law.——S. C. cited D. 170. b. Marg. pl. 5.

Waſte ground is underſtood ſuch ground as no man claims for his own, or no man can tell to whom it certainly appertains, and lies unincloſed and unbounded with hedge or ditch; but ground that lies incloſed, and hedged and ditched in ſo as the land is known, is not waſte ground. Bendl. 80. pl. 122. 2 Eliz. Anon. ——S. C. cited D. 170. b. Marg. pl. 5.

Heath ground is intended ſuch ground as is diſperſed and lies in common. Bendl. 80. pl. 122. 2 Eliz. Anon.——S. C. cited D. 170. b. Marg. pl. 5.

2. S. 6. *If any ſuch barren waſte or heath-ground, hath before this time been charged with tithes, and that the ſame be hereafter improved and converted into arable ground or meadow, the owners ſhall, during ſeven years after the improvement, pay ſuch kind of tithe as was paid for the ſame before the improvement.*

3. A *ſuit* was in the eccleſiaſtical court *for tithes of wheat and rye on* 60 *acres of land.* The defendant moved for a prohibition, ſuggeſting that the lands were barren heath and waſte grounds. It was *found by verdict that it was barren, but that of* 30 *acres of it, tithe of wool and lambs had been paid.* And becauſe by another proviſo in the ſtatute, viz. that ſuch tithes as were paid before ſhould be paid within ſeven years after the improvement, &c. and not any tithes of another nature, and becauſe the libel was not for other tithes than for wheat and rye, *the party could not have a conſultation, but* they told him that *he might commence a new ſuit in the eccleſiaſtical court for tithes of wool and lamb in the* 30 *acres not improved.* D. 170. b. pl. 5. 171. a. pl. 6. Mich. 1 & 2 Eliz. Pells v. Sanderſon. S. C. cited by Hobart Ch. J. Hob. 201. and ſays, that at firſt the whole court thought a conſultation ought to be awarded for the tithe corn; but that upon better adviſement they reſolved the contrary, for he had no right to purſue his ſuit for the corn.

4. If land be full of *thorns and buſhes* from time whereof, &c. and it is grubbed up and made meadow or arable land, tithes ſhall be preſently paid thereof, notwithſtanding the 2 & 3 E. 6. 13. for thoſe lands were not *naturally barren*, but became ſo by negligence or ill huſbandry, and the ſtatute intends only barren land made good by induſtry. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. in caſe of Sherington v. Fleetwood. 2 Inſt. 656. S.C. & S.P. reſolved.—Mo. 909. pl. 1278. S. C. reſolved.—Gouldſb. 147. pl. 66. S. C. but S. P. does not appear.——Mo. 599. pl. 824. S. C. but S. P. does not appear.——S. C. cited by the name of Farington's caſe, by Coke Ch. J. Roll. Rep. 354. in pl. 4. Paſch. 14 Jac.——3 Bulſt. 165. S. C. cited by Coke Ch. J. as reſolved.——Bendl. 80. pl. 122. 2 Eliz. Anon. S. P.——Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon. S. P.

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5. *Fenny land drained* is not exempted by the act. Mo. 430. pl. 603. If land be *overflowed* with water, and afterwards gained by induſtry, tithes ſhall preſently be paid, though the overflowing had been time whereof, &c. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. in caſe of Sherington v. Fleetwood.

6. Land which has *broom* is not within the ſtatute of 2 E. 6. for it is not barren land, and therefore if converted into arable ſhall pay tithe; per Coke Ch. J. Roll. Rep. 39. Trin. 12 Jac. B. R.

7. If a man at a great expence *gains land from the ſea, which was marſh and ſandy land, and covered with ſalt water, and* afterwards Roll. Rep. 354. pl. 4. Buck v.

Witt, S. C. held accordingly, notwithſtanding it was inſiſted that

wards *converts it into arable* land, he ſhall pay tithes preſently, becauſe this land is not barren of its own nature, but only by accident, by reaſon of the ſand and ſalt-water overflowing it. Agreed per Cur. clearly. 3 Bulſt. 156. Paſch. 14 Jac. Witt v. Buck.

the party had been at great coſts in making mounds to keep out the ſea, and that the ſtatute was made for the encouragement of huſbandry.

Hetl. 147. S.C. & S.P.

8. If ſheep were kept on barren land, or if yielded any profit which yielded tithes, this *tithe* ought to be paid within the ſeven years. Per Richardſon Ch. J. Litt. Rep. 311. Mich. 5 Car. C. B. Flower v. Vaughan.

9. In action on the ſtatute 2 E. 6. the caſe was an incloſure was part of the waſte, and it was turned into a paſture, and held that though it was of ſmall value, viz. 2s. per ann. and never ſown or turned into meadow, yet it ſhall pay tithes, and the very *incloſure is an improvement*, and it is no waſte ground within the ſtatute to be freed from *tithes* for a time, &c. Clayt. 127. pl. 226. March 1647. Anon.

10. Barren lands to be exempted from tithes within the meaning of 2 E. 6. muſt be ſuch land as is *barren ſuapte natura;* and on ſuggeſtion for a prohibition to a ſuit for tithes of ſuch lands, it *muſt be alleged* to be barren ſuapte natura; per Powell J. 2 Ld. Raym. 991. Trin. 2 Ann. Anon.

If land yields any profit before, as wood, &c. it is not within the

11. Prohibition for ſuing for tithes *of barren lands newly cultivated* was denied. 1ſt, Becauſe the *plaintiff did not ſuggeſt that they were ſuapte natura ſteriles.* 2dly, Becauſe there *was no affidavit that this was pleaded in the ſpiritual court.* 6 Mod. 86. Mich. 2 Ann. B. R. Anon.

ſtatute; for it ought to be ſuapte natura ſterilis. 6 Mod. 96. 2 Ann. B. R. Horner v. Bonner.

(X. a) Diſcharge. By Common Law.

So if he make feoffment, his feoffee ſhall pay. Savil. 3. pl. 8.

1. IF the parſon of a church not impropriate leaſes his *glebe*, the *leſſee ſhall pay* tithes; but otherwiſe if it had been an *impropriate church*, becauſe of the ſtatute of 32 H. 8. of diſſolutions. Noy, 132. cites D. 43. a.

Mich. 22 & 23 Eliz. Vicar of Sturton v. Grieſly.——D. 43. a. b. pl. 21. Mich. 30 H. 8. ſays the juſtices and ſerjeants were of different opinions as to the leaſe of parcel of the glebe, reſerving a rent, and ſays ideo quære.

* [49]

The orders of the Ciſtertians, Templars, and Hoſpitallers, were diſcharged of tithes *ſub modo*, viz. *quamdiu propriis manibus exco-*

2. The prior of St. John's of Jeruſalem had privilege from Rome, viz. *Ciſtertians, Templars, Hoſpitallers*, that they ſhould *not pay tithes of any lands, quæ propriis manibus* aut ſumptibus *excolunt, but their termors* and all other occupiers *paid tithes* according to the ſtatute 2 H. 4. * cap. 4. *The prior and confreres made a leaſe for years before the diſſolution, and the leſſee paid tithes to the church of Rocheſter proprietary, and the king after the diſſolution granted the reverſion* of the manor *to B. and his heirs, in tam amplo modo as the prior, &c. had it.* The term expired, the patentee and his heirs ſhall

ſhall hold diſcharged ſi propriis manibus excolunt. But if he makes a leaſe, the termor ſhall pay by the ſtatute 31 H. 8. cap. 13. Per Ld. Keeper, Catlyn, Saunders, Southcot, and Dyer. Dy. 277. 8. pl. 60. Trin. 10 Eliz. Anon.

luntur, &c. 2 Rep. 44. b. at the bottom, cites D 277. 10 Eliz.—

This privilege to theſe three orders of religion was *granted to them by the council of Lateran*, anno Domini 1215. and anno 17 Johannis Regis, and was allowed by the general conſent of the realm; but *this privilege extends only to the lands which they had before that general council.* 2 Inſt. 652.

3. *Lands in the hands of an abbot, and of the farmers of an abbot, were beyond time of memory, &c. charged with tithe only of lambs and wool*, and now the parſon ſues to have tithe of hay and grain; prohibition lies by the ſtatute 31 H. 8. by the word (diſcharged) in the ſtatute. D. 349. b. pl. 16. Paſch. 18 Eliz. Parſon of Peykirke's caſe.

4 *Unity* of poſſeſſion is no cauſe for diſcharge of tithes, but is only a ſuſpenſion during the time of the unity, but if *after ſeverance no tithes are paid* for 20 or 30 years, they ſhall be charged with the payment continually, and the payment proves that the unity was the only cauſe of the ſtay of payment; but if after the ſeverance, tithes *have not been paid*, it is a vehement *preſumption of diſcharge* by ſome compoſition, or that the abbey was of the order of Ciſtertians, or others who were diſcharged by the general council; per Manwood Ch. B. Savil. 62. pl. 134. Paſch. 28 Eliz. in caſe of Whiſcard v. Futter.

5. Libel againſt the *Biſhop of L.* for tithes out of the manor of D. the biſhop *ſuggeſted, that he and all his predeceſſors were ſeiſed of the ſaid manor, and ſo long as it was in their poſſeſſions it had been diſcharged of tithes*; and that in the reign of E. 6. the *ſaid manor was conveyed to the Duke of Somerſet in fee; and afterwards regranted to the biſhop and his ſucceſſors*; held the preſcription good in a ſpiritual perſon, but not of a common perſon; and they were all clear that the *preſcription is not gone by this interruption*; for tithes are not iſſuing out of the lands, neither can a unity of poſſeſſion extinguiſh them, neither are they extinguiſhed by a releaſe of all right to the land. Le. 248. pl. 436. Mich. 33 Eliz. B. R. Lincoln (Biſhop) v. Cowper.

Cro. E. 216. pl. 13. S. C. held accordingly.—— Le. 300. pl. 411. Trin. 31 Eliz. B. R. Per Wray, S. P. —Ow. 39. S. P. Per Wray.

6. A *mere layman*, who *was not capable of tithes in pernancy*, yet *was capable of a diſcharge* of tithes *at common law in his own land*, as well as a ſpiritual perſon; per Cur. cites 8 E. 4. 14. a. b. and the Regiſter, fol. 38. that this may be *by grant*, as by the patron, parſon, and ordinary, *or by compoſition*, as where a pariſhioner gave part of his land to the parſon for diſcharge of tithes of the reſidue; *but not by preſcription* to be diſcharged of tithes; for it is commonly ſaid in the law books, that he may preſcribe in modo decimandi, but not in non decimando. 2 Rep. 44. a. b. Paſch. 38 Eliz. The Biſhop of Wincheſter's caſe.

7. In caſe of a prohibition it was reſolved, that *unity of the eſtate, and not in occupation of the land and rectory at the day of diſſolution of the abbey*, was not a diſcharge of payment of tithes by the ſtatute 32 H. 8. but if the abbot held the land at the time of the diſſolution in fee, and the rectory alſo, thoſe lands were always

diſcharged; but if the lands were *in leaſe for years*, although but for a ſmall term of years, the lands ſhould pay tithes; and ſo it was ſaid it was adjudged in Knightley and Spencer's caſe; and in Green and Buſkin's caſe. Mo. 528. pl. 799. Mich. 40 & 41 Eliz. B. R. Benton v. Trot.

8. As for the *council of Lateran*, I never knew it pleaded in my life. Some ſay that tithes were payable of right before; but how
[50] an eccleſiaſtical conſtitution can inſtitute or create a temporal right, is ſomewhat ſtrange; beſides if this created the parſon's right, it would deſtroy all the preſcriptions and moduſes in the nation. Per Holt a counſel. Arg. 2 Show. 440. pl. 403. Mich. 1 Jac. 2. B. R. in caſe of James v. Trollop.

9. There are *five ways* or means *whereby abbey lands are holden diſcharged of tithes*, that is to ſay, *compoſition, bull, or canon, order, preſcription of diſcharge, and unity of poſſeſſion of parſonage and land, time out of mind*, together with payment of tithe; of theſe five, *the four firſt diſcharges the abbots themſelves had, or might have* them, but *the fifth was no diſcharge in the hands of the abbeys, but it made a diſcharge of payment of tithes to the king, and thoſe that claim under him by the favourable conſtruction of that clauſe of* 31 *H.* 8. for ſo much as that clauſe extends to; which opinion was long controverted, being confeſſed of all hands that it was no full and perfect diſcharge in law.

Now of the other *four, the firſt three*, that is, *compoſition, bull, or canon, and order, were granted* and affixed *unto the body of the monaſtery*, and were granted unto them *as perſonal privileges*, in reſpect of their ſpiritual abilities or functions, and their capacity of tithes, and diſcharge of tithes for that cauſe; and therefore theſe *had all vaniſhed and expired with the diſſolution of the body*, if they had *not* been *preſerved to the king and his patentees by that clauſe; but diſcharge* of tithes of the lands of monaſteries *by preſcription is of another nature*; for having been always (as preſcription preſumes) in ſpiritual hands, *the law judges that it was never charged with tithe;* as *the pleading is*, that the lands were *immunes a ſolutione decimarum negative, non privative*, ſcilicet, *uncharged, not diſcharged*, as if they had been once chargeable; the reaſon whereof was, that being ſpiritual perſons they were able to miniſter to themſelves ſpiritual rites, and therefore performing officium they might retain beneficium; and this non-charge ſtanding upon preſcription, was inherent to the land, not as a thing given, but *as a non ens*, lands that never yielded tithe, and land of the little monaſteries ſo free of tithes, the king by the ſtatute 27 H. 8. and his patentees were to hold free, not by reaſon of any privilege which did need to be preſerved by any ſtatute, but ever by the grant of the land by any kind of conveyance.

And therefore though I ſaid that *diſcharge of bull, or compoſition*, was to die with the corporation, yet *if it were once run out, time out of mind, it was* then *to be pleaded* and uſed *as a non-charge by preſcription*, which was a title of diſcharge by the temporal law, and if it were impugned, it were to be drawn by prohibition to a trial at the common law, and this without the help of any ſtatute;

and

and therefore in the Biſhop of WINCHESTER'S CASE it was reſolved, that the biſhop holding lands of his biſhopric, diſcharged of tithes by preſcription, his farmer being a layman ſhall have a prohibition for his diſcharge; and ſo ſhall the biſhop have himſelf, though he be a ſpiritual perſon; and yet biſhoprics, and their lands, are in point of diſcharge of tithes at the common law out of all ſtatutes; ſo then the concluſion is, that of the five ways of diſcharge of tithes, three, that is to ſay, *order, compoſition, bull, or canon, are preſerved* and kept alive *by the clauſe of diſcharge in the ſtatute of* 31 *H.* 8. and a fourth, which is *unity, is created by that branch*, and the fifth, which is *preſcription, ſtands by the common law, and has no need nor uſe of any ſtatute*; per Hobart Ch. J. Hob. 309. Hill. 15 Jac. in caſe of Wright v. Gerrard and Hilderſham.

10. There be *divers diſcharges* of tithes, 1ſt, *Real compoſition*, which a layman may have. 2dly, Diſcharge by reaſon of *order, as Ciſtertians*, &c. 3dly, By reaſon of *papal bulls*. 4thly, By *preſcription*, which ought to be only by a ſpiritual corporation: and if the ſtatute 31 H. 8. had not been made, the perſonal diſcharge, as by bulls, or by reaſon of order, had been diſcharged alſo, for that the perſons to whom they were annexed were diſſolved; therefore to prevent it the ſtatute was made, which ordains, that where any monaſtery was diſcharged from the payment of tithes, in ſuch caſe the king ſhall hold the lands diſcharged, notwithſtanding the corporation to which ſuch privileges were annexed be diſſolved; and there is not any clauſe to this purpoſe in 27 H. 8. and this ſtatute of 31 H. 8. does not extend to monaſteries diſſolved by the ſtatute of 27 H. 8. therefore this reaſon of unity of poſſeſſion is not any diſcharge in itſelf of the tithes; and the ſtatute of 31 H. 8. does not extend to give a diſcharge but to the lands which come to the king of the 4th of February 27 H. 8. Cro. J. 608. pl. 3. Hill. 18 Jac. B. R. Gerrard v. Wright. [51]

11. Pope Innocent the 3d. by his bull diſcharged thoſe of the *order of premonſtratenſes* of the payment of tithes of ſuch lands as were of their own manurance or other improvement. Note, *About the year of our Lord* 1150, *moſt of all religious orders were exempt* from payment of tithes out of their poſſeſſions kept in their own hands, *which Pope Adrian the 4th about that time reſtrained to Ciſterciences, Templarii, Hoſpitularii*, and that all other orders ſhould pay tithes, &c. 2 Inſt. 652. S.P. Per Sir John Davies, Arg. Poph. 157. S. P. Per Noy. Arg. 2 Roll. Rep. 479. 80.

12. The *king is not* by virtue of his prerogative *diſcharged of tithes for the ancient demeſnes of the crown*; held upon evidence by Hale Ch. B. and the whole Court. Hardr. 315. pl. 7. Mich. 14 Car. 2. in Scacc. Compoſt's caſe.

13. *One tithe in ſpecie cannot be a diſcharge of another* tithe in kind; per Holt Ch. J. 12 Mod. 498. Paſch. 13 W. 3. in caſe of Selby v. Bank

(Y. a) Diſcharged by Statutes.

1. 31 *H.* 8. *cap.* 13. *ſ.* 21. *ALL perſons which ſhall have any monaſteries, &c. or any manors, meſſuages, parſonages appropriate, tithes, penſions, portions, or other hereditaments, which belonged unto the monaſteries, &c. ſhall hold the ſame diſcharged of tithes in as ample manner as the abbots, &c. held the ſame at the days of diſſolution, &c.*

2. An *abbot had a rectory impropriate, and alſo land within the ſame pariſh*, &c. and *ſo paid no tithes becauſe he could not pay them to himſelf, and for no other cauſe was diſcharged;* and after the diſſolution the rectory is granted to one, and the land to another. It was holden by Egerton, Solicitor, upon the ſtatute 31 H. 8. that in ſuch caſe the king nor his patentees ſhould not be diſcharged of tithes, for the lands were not diſcharged in right; but if the lands in the hands of the abbot were diſcharged in right, as by compoſition or lawful means, there the king and his patentee ſhould be diſcharged from payment of tithes. 4 Le. 47. pl. 124. Mich. 30 Eliz. in the Exchequer. Prowes's caſe.

[52] 3. And it was ſaid by Burleigh, Ld. Treaſurer, that if the *compoſition or cuſtom was that the abbot and his ſucceſſors ſhould be diſcharged*, without extending to farmers or leſſees, if the abbot made a leaſe, and the *leſſee paid tithes* as he ought, and after the reverſion comes to the king the leſſee ſhould pay tithes during his leaſe, but after the leaſe determined the king and his patentee ſhould not pay, but ſhould be diſcharged by the ſaid ſtatute. 4 Le. 47. pl. 124. Mich. 30 Eliz. Prowes's caſe.

4. The like matter was in Chancery, Trin. 30 Eliz. The *abbot of Tewkeſbury having the rectory impropriate of Tewkeſbury*, 11 *H.* 7. *purchaſed lands within the ſaid pariſh to him and his ſucceſſors;* after the diſſolution the king granted to G. the rectory, and to W. the lands; and if W. ſhould pay tithes, was referred to Manwood and Periam, who gave their reſolution, that tithes were payable. 4 Le. 47. pl. 124. Mich. 30 Eliz. Prowes's caſe.

Mo. 913. pl. 12 1. Quaries v. Spurling. S. C. adjudged accordingly.— Jo. 186. pl. 5. Trin. 4 Car. B. R. in caſe of Whitton v. Weſton, S. C. cited by Winch and Warburton, as adjudged;

5. In debt upon 2 Ed. 6. cap. 13. for not ſetting forth of tithes. The caſe was, that the lands were parcel of the poſſeſſions of the *Knights Templars*, who *were diſſolved in E. II.'s time, and their poſſeſſions and their lands annexed to the priory of St. John of Jeruſalem, with all privileges, &c. They had a ſpecial privilege to be diſcharged of tithes* for all their lands *quamdiu propriis manibus excoluntur*, and theſe poſſeſſions were afterwards given by general words, in tam amplis modo & forma, &c. as the abbot had them, to the king, by the ſtat. 32 H. 8. cap. 24. and from the king theſe lands came to S. the defendant. Adjudged that the *grantee ſhall not have the privilege* to be diſcharged; for by the common law a lay perſon was not capable of ſuch a privilege, *nor ſhould the king have benefit of that privilege until the ſtatute* 31 *H.* 8. *cap.* 13. that the

the king and his patentees ſhall hold the lands diſcharged of tithes, in as ample manner as abbots, &c. held the ſame at the time of the diſſolution. But *this ſtatute extends only to ſuch poſſeſſions as came to the king by ſurrender, &c. and ſhould be veſted in him by that act*, and not to ſuch as veſted in him by another act of parliament, and thoſe lands were given to the king by a ſpecial act of parliament of 32 H. 8. which hath the ſame words in the firſt clauſe as 31 H. 8. hath, but hath not the ſecond, and therefore is no cauſe of holding them diſcharged of tithes. Cro. J. 58. pl. 3. Hill. 2 Jac. B. R. Cornwallis v. Spurling.

but the reaſon was, becauſe it was not found by verdict (the ſame being ſpecial) that the ſaid lands came by the diſſolution to the king, neither was any mention made of the ſtatute of 32 H. 8. and then if it was not a diſſolution, (as it was in the ſaid caſe,) the fermor ſhall pay tithes, and that after the judgment in Spurling's caſe, and after the caſe of Urry v. Bowyer, in which the Court was divided, it was made a point in the ſerjeant's caſe, which proves that the caſe never was adjudged; for it is not uſed to put any caſe adjudged in the ſerjeants caſes, but a point of doubt which is in controverſy.

Debt on the ſtatute 2 E. 6. for tithes. The lands were parcel of the poſſeſſions of the prior of St. John of Jeruſalem, and came to the crown by the 32 H. 8. cap. 24. and parcel of St. John W. in the pariſh of M. and H. and whether they were diſcharged from payment of tithes by 32 H. 8. cap. 24. was the queſtion on a trial at bar, and a ſpecial verdict found. Hale Ch. J. thought that they ſhould not pay tithes by reaſon of the word (privileges), and in Whitty v. Weſton, Bridgm. 32. Lat. 99. Godb. 392. pl. 478. the Court was divided, but that Cro. J. 57. Mo. 913. Cornwallis v. Spurling. In debt on 2 E. 6. judgment was, that the lands are tithable, and ſo 2 Brownl. 8. 20. Urrey v. Bowen; et adjornatur; but D. 277. pl. 60. is, that they are not tithable; and afterwards reſolved that the lands are not tithable, and judgment for the defendant. Raym. 225. Mich. 25 Car. 2. B. R. Foſſet v. Franklin. ——— 3 Keb. 217. pl. 23. the Court conceived that the preſcription muſt be found for the king, his farmers and tenants, and that non-payment by the under-tenants of the king's fermor is ſufficient evidence; ſo of Ciſtercians, it not appearing that they ever paid tithes, and yet in tenant's hands.

* [53]

6. Debt upon the ſtatute 2 Ed. 6. for not ſetting out tithes brought by the parſon of Merrow. The defendant *pleaded, that the prior of St. John of Jeruſalem, in England, was ſeiſed in fee of the lands, &c. in the right of his hoſpital, and that he was of the order of the Hoſpitallers*, and that * he and his predeceſſors ratione ordinis ſui, had time out of mind been diſcharged of payment of tithes; then he pleads the ſtat. 31 H. 8. for the diſſolution of monaſteries, and the ſtat. 32 H. 8. for the diſſolution of hoſpitals, and that by theſe diſſolutions the lands were veſted in the king, and that he ratione ſtatutorum held them diſcharged of tithes, who granted them to the anceſtor of the defendant, under whom he claimed; and upon a general demurrer the chief queſtion was, whether the lands were diſcharged or not? And that depended upon the expoſition of the ſtatutes 31 & 32 of H. 8. viz. whether the clauſe of diſcharge of tithes in the ſtatute 31 H. 8. ſhall extend to theſe which were given to the king by the ſtatute 32 H. 8.? 2. When the Hoſpitallers were diſſolved by the ſtatute 32 H. 8. and all their poſſeſſions, hereditaments, and privileges given to the king, his heirs and ſucceſſors, whether this extends to his patentees or aſſigns, for that they are not named in the ſtatute? Upon the firſt point two judges held, that theſe lands were not diſcharged of tithes by the ſtatute 31 H. 8. becauſe that ſtatute did not give any lands or monaſteries, but only ſettled them in the crown, which then were, or hereafter ſhould be diſſolved, as it was held in the ARCHBISHOP OF CANTERBURY'S CASE; and the intent of that act was to diſcharge thoſe lands only, and not any which came to the king

Godb. 392 to 399. pl. 478. S. C. argued; and Jones and Doderidge held, that they of St. John's of Jeruſalem were eccleſiaſtical perſons, though they were divided from the juriſdiction of the biſhop, but the caſe was adjourned to be further argued. —Lat. 89. S. C. argued; and Jones J. ſaid it was well evidenced to the jury that they were eccleſiaſtical, and the judges are not to take notice whe-

ther they are ſo.—— Bridgm. 32. S. C. argued.

king by virtue of any other ſtatute, and therefore this clauſe of diſcharge did not extend to thoſe lands which came to the crown by the ſtatute 27 H. 8. for diſſolving the leſſer monaſteries, and ſo it was adjudged in WRIGHT AND GERRARD'S CASE, nor to the chantry lands, which came to the king by the ſtatute 1 Ed. 6. as it was adjudged in the ſaid Archbiſhop's caſe; nor to the lands which came to the crown by the ſtatute 32 H. 8. as it was adjudged in QUARLES AND SPURLING'S CASE. Now it is plain, that theſe lands did not come to the crown by the ſtatute 31 H. 8. becauſe they did not come by diſſolution, ſurrender, or renouncing, but by act of parliament. It is true there are other general words in the ſtatute 31 H. 8. viz. or by any other means, but theſe words cannot be intended of an act of parliament, but by ſome other inferior means. Two other judges of a contrary opinion, to whom one of the other having changed his former opinion, agreed that theſe lands came to the crown by the ſtatute 31 H. 8. by diſſolution, and by other means, for the word (diſſolution) includes a diſſolution by act of parliament, and theſe general words (by any other means) include likewiſe an act of parliament, eſpecially in this caſe, becauſe great part of the Hoſpitallers being beyond ſea, there was no other means to convey their lands to the crown but by act of parliament, for thoſe who were beyond ſea could not be compelled to ſurrender; then as to the ſecond payment, the privileges of the Hoſpitallers being given to the king, his heirs and ſucceſſors, and the privilege to be diſcharged of tithes being given to them by an ancient council, and explained by the council of Lateran to extend only to thoſe lands which they had at the time that this privilege was granted, was held by one judge to be a perſonal privilege, and that the Hoſpitallers being diſſolved, this privilege is gone, and could not be transferred to another; but 3 other judges were of opinion, that this privilege was given to the king by act of parliament before the Hoſpitallers were diſſolved, and if ſo, it is not a perſonal privilege in the king, but a real diſcharge of the lands by virtue of an act of parliament, and ſhall go with the lands in whoſe hands ſoever they come, for the privilege is to be diſcharged quamdiu propriis manibus excolunt, and when the king granted it over it ſhall be propriis manibus of the patentee, and judgment was given by the opinion of Hide Ch. J. Doderidge and Jones, contra

[54] Whitlock, that theſe lands were diſcharged of tithes. 3 Nelſ. a. 302, 303. pl. 19. cites W. Jones, 182. [to 192. Trin. 4 Car. B. R.] Whitton v. Weſton.

Jo. 2. pl. 3. Mich. 18 Jac. C. B. Wright v. Gerrard, S. C. and a conſultation awarded.— Hob. 306. pl. 388 S.C. and a conſultation

7. The prior of Hatfield and his predeceſſors, time out of mind, were ſeiſed of the parſonage of Hatfield, and of a farm in the pariſh called D. Farm at the ſame time. The priory being under 200l. per ann. was given to the king by the ſtatute 27 H. 8. The king gives the abbey and farm to the abbeſs of B. The abbeſs ſurrenders all to the king. The queſtion was, whether the king, and thoſe that claim under him, ſhall hold this farm diſcharged of tithes by force of the perpetual unity. A conſultation was granted. Reſolved by 3 juſtices, (Warburton e contra,) that the impropriation

priation was given to the king by the 27 H. 8. though no impropriation is there named, but only tenements, churches, tithes, and hereditaments. 2dly, If it was not granted and given to the king by the 27 H. 8. then it was given by 31 H. 8. for by the diſſolution in 27 H. 8. the body to which the appropriation was made was diſſolved, and conſequently the appropriation gone, as in 3 E. 3. in the caſe of the Templars, and the ſtatute 31 H. 8. extends only to thoſe appropriations which were not diſſolved till 4 February 27 H. 8. 3dly, It was agreed that the ſtatute 27 H. 8. does not of itſelf give any diſcharge of tithes. 4thly, That unity of poſſeſſion perpetual, and time out of mind, of the lands, and of the rectory, does not by itſelf make a good diſcharge of tithes without the benefit of the ſaid clauſe. 5thly, They reſolved, that the clauſe of diſcharge in 31 H. 8. does not extend to thoſe monaſteries that were diſſolved, but only by way of excluſion to thoſe which were diſſolved after 4 Feb. 27 H. 8. Jo. 187, 188. cites it as Wright's caſe.

granted by the uniform conſent of all the judges. —— Cro. J. 607. pl. 3. Gerrard v. Wright, S. C. held accordingly by 3 juſtices, but Warburton J. e contra, for he held that appropriations were not given to the king by the ſtatute 27 H. 8. and therefore to ſupply the defect the ſtatute 31 H. 8. was made, wherefore thoſe appropriations being given by ſtatute 31 H. 8. the ſaid diſcharge extends unto them. 2dly, The intent of the ſtatute 31 H. 8. was to give equal diſcharge to the one as well as to the other, as well to the land given by the 27 H. 8. as to that given by 31 H. 8. and that upon this reaſon is the caſe of the land of the prior of St. John's of Jeruſalem in 10 Eliz. Dyer. But notwithſtanding a conſultation was granted. ——S. C. cited and relied upon by Jones and Brampſton. Cro. C. 424, 425. Mich. 11 Eliz. B. R.

8. An *abbot or eccleſiaſtical perſon* might preſcribe in non decimando, but when the corporation was diſſolved, or when the corporation granted the land to a layman, he ſhall not have benefit of the preſcription; becauſe *it was perſonal to the abbot*, reſolved. Jo. 373. pl. 10. Mich. 11 Car. B. R. Sydowne v. Holme.

9. And it was alſo reſolved, per tot. Cur. that this *privilege by preſcription, and other perſonal privileges by bull or order*, that abbeys under 200l. a year, and which were diſſolved by 4 Feb. 27 H. 8. cap. 28. *were not* preſerved and *given to the king or his patentee* by the ſaid ſtatute. Ibid.

10. But 3dly it was reſolved, that privileges by preſcription, or by order or bull, *are preſerved by the clauſe of* 31 *H.* 8. cap. [13.] and the king nor his patentee ſhall not pay tithes, *but it extends only to monaſteries diſſolved after the* 4 *Feb.* 27 *H.* 8. and therefore the leſſer abbies under 200l. diſſolved by 4 Feb. 27 H. 8. are not included within the ſaid clauſe of 31 H. 8. Ibid.

11. An *abbot was parſon imparſonee* of the church where the ſcite of the monaſteries and tithes were, and *the abbey was diſſolved.* The *king granted the monaſtery to one, and the perſonage and rectory to another.* It was the opinion of the juſtices, that if the *land of the abbey was the glebe of the parſon before the appropriation*, then this land is diſcharged of tithes by 31 H. 8. cap. 13. for it remains notwithſtanding the appropriation, and the *glebe cannot be gained by preſcription*, and the glebe was never chargeable to pay tithes; but the *demeſnes* of the abbey *were of other lands, not parcel of the glebe*, and therefore ſhall be chargeable to pay tithes if they were *not diſcharged* in the hands of the abbot, but *only by unity*

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unity of poſſeſſion; but *if in right by a compoſition*, then they ſhall be diſcharged afterwards, as they were in the abbot's hands. Mo. 46. pl. 140. Paſch. 5 Eliz. Anon.

12. Thoſe *abbies that came to the crown by* 27 *H.* 1. ought to pay tithes, and though no payment hath been at any time ſince the diſſolution for the lands of ſuch abbies, that ſhall *not free them* when they come in queſtion, for they were ſpared in former times becauſe the reaſon of the law was not then known. Clayt. 41. pl. 70. 11 Car. before Vernon J. Anon.

13. A prohibition was granted to ſtay a ſuit for tithes in the eccleſiaſtical court, upon a ſuggeſtion that the lands were *part of the poſſeſſions of the priory of St. John's of Jeruſalem*, and ſo diſcharged by ſtatute 32 H. 8. [cap. 24.] And though there be difference of opinions in the books, yet the later judgments are that they are diſcharged. Freem. Rep. 299. pl. 357. Mich. 1680. Star v. Ellyot.

14. *Abbot ſeiſed in right of his abbey of a rectory with all tithes*, &c. The abbey is diſſolved, and the crown grants the tithes, &c. The parſon diſputes the tithes with the patentee, but bill diſmiſſed. MS. Tab. March 21, 1715. Turner v. Wray.

(Z. a) Diſcharge by Unity of Poſſeſſion. Preſcription.

1. *ONE man in a vill cannot preſcribe to be quit of* tithes, becauſe it is particular. *Contra* if *the whole country* ſo preſcribe. Br. Diſmes, pl. 14. cites Doct. & Stud. lib. 2.

2. A *compoſition* was *betwixt an abbot and a parſon, that in recompence of the tithes of all the woods within the manor, whereof the abbot was owner, he ſhould have to him and his ſucceſſors* 20 *loads of wood every year, in* 20 *acres of the manor, to burn and ſpend in his houſe; afterwards the parſonage was appropriate to the abbey*, and after that the *abbey was diſſolved*; and the king granted the parſonage to one, and the 20 acres to another. It was held, that by the unity the eſtovers were not extinct, for if they be tithes they are not extinct by this unity of poſſeſſion, for that tithes run with the lands, and tithes de jure divino & canonica inſtitutione do appertain to the parſon. Mo. 50. pl. 151. Paſch. 5 Eliz. Anon.

3. In caſe of a prohibition, it was reſolved, that an *union of copyhold lands, and of the parſonage in the hands of the parſon, as parſon imparſonee*, was no diſcharge of the tithes of the copyhold lands. Mo. 219. pl. 356. Mich. 28 Eliz. in the Court of Wards. Branche's caſe.

4. Prohibition, and *ſuggeſted that he and all his predeceſſors, &c. were ſeiſed of the manor* of which tithes were demanded, *diſcharged of tithes, and that the manor in time of E.* 6. *was conveyed to the Duke of S. and* was *afterwards re-granted to the biſhopric again.* It was the opinion of the juſtices, that the preſcription was not determined

mined when it came to the biſhop again, for tithe is not a thing iſſuing out of land; and unity of poſſeſſion doth not extinct them, nor a releaſe of all * right to the land. Cro. E. 216. pl. 13. Hill. 33 Eliz. B. R. Wickham v. Cooper.

5. The *ſtatute* 31 *H.* 8. gave all colleges diſſolved, &c. to the crown, with a clauſe, that the king and his grantees ſhould hold them diſcharged of tithes, as the abbots held the ſame at the time of the diſſolution. Afterwards, by the *ſtatute* 1 *Ed.* 6. all colleges whatſoever were given to the crown, but in this ſtatute there is no clauſe of diſcharge of tithes. Upon a libel for tithes, the farmer of the lands of Maidſtone College, in Kent, moved for a prohibition upon the ſtatute 31 H. 8. The Court held clearly that the king had the lands of the college by the ſtatute 1 Ed. 6. Another queſtion was, whether theſe lands, which the king had by virtue of the ſtatute of 1 Ed. 6. ſhall be diſcharged of tithes by the ſtatute 31 H. 8. but as to this the juſtices doubted; for though the ſtatute 1 Ed 6. enacts, *that the king ſhall have the lands in as ample manner as the colleges*, &c. yet that clauſe *extends only to the eſtate in the lands, and not to the tithes.* Another queſtion was, whether *the unity of poſſeſſion without compoſition or preſcription was a ſufficient diſcharge of tithes by the ſtatute* 31 *H.* 8. And agreed by all that it was. Mo. 420. pl. 579. Mich. 37 & 38 Eliz. B. R. Green v. Boſekin.

S. C. cited Mo. 534. per Popham.—— 2 Rep. 46. a. Trin. 38 Eliz. B. R. the Archbiſhop of Canterbury's caſe, S. P. and a conſultation granted, and ibid. 49. b. cites the principal caſe by the name of Green v. Buſſkin, and that a conſultation was granted accordingly. ——S. C. cited Jo. 4. in pl. 3.——Pollexf. 9. cites the Archbiſhop of Canterbury's caſe, 2 Rep. 48. and ſays, that it proves that if the farmers paid tithes, then no diſcharge by reaſon of unity, and likewiſe expreſsly, that if the lands were in leaſe, and no tithes paid by the farmer, that then they are diſcharged by the unity.

6. In a prohibition the plaintiff *ſuggeſted that the queen, and all thoſe whoſe eſtates ſhe had*, &c. *uſed to pay the rector of K.* 2*s.* 4*d. yearly, in ſatisfaction for all tithes of the lands called Cowley in K.* in Wiltſhire; and iſſue being taken upon this preſcription, and upon evidence at bar, it appeared that the *queen had the eſtate of the abbot of K. who was owner of the lands, and alſo rector in fee in the right of his abbey*; on which *it was inſiſted*, that the plaintiff had not proved his preſcription, becauſe neither the abbot could pay tithes to himſelf, nor the queen who had the eſtate of the abbot, but *that the allegation ſhould have been, that when the queen let the lands, the occupiers uſed to pay* 2*s.* 4*d. in ſatisfaction* of tithes. But Curia contra; for they were clear that the unity of the inheritance, both of the lands and rectory in the abbot, is not a perpetual diſcharge of the tithes; and if ſo, then *the retainer of them by the abbot ſhall be taken to be a payment to himſelf.* Mo. 527. pl. 697. Mich. 40 & 41 Eliz. B. R. Chambers v. Hanbury.

Mo. 532. cites S. C. as reſolved accordingly.

7. Unity of inheritance of both is no diſcharge perpetual of tithes, nor of the recompence for them, and if ſo, then *retainer* may be ſaid *payment for a man's ſelf.* Mo. 528. pl. 697. Mich. 40 & 41 Eliz. B. R. Chambers v. Hambury.

8. Reſolved and adjudged that perpetual unity time out of mind until the diſſolution prima facie diſcharges the land from payment of tithes. 1ſt, Becauſe the *ſtatute* 31 *H.* 8. *c.* 13. *does not ſay diſcharge of tithes, but of payment of tithes*; and divers other reaſons,

† Hob. 300. in caſe of Slade v. Duke. Hobart Ch. J. obſerves,

reaſons, whereof the principal was *for the infinite impoſſibility*, and impoſſible infiniteneſs *of ſuch immunities and diſcharges which ſuch religious houſes had cannot be known*, and that *general allegation of unity at the time of the diſſolution*, &c. *without averment that it was perpetual, is not ſufficient.* And ſuch unity *ought to have four qualities*; 1ſt, It ought to be *juſt and rightful*, and not by tort. 2dly, *Equal*, viz. a fee in both. 3dly, It ought to be *perpetual* time out of mind. 4thly, It ought to be *free of payment of any tithes*; for if their farmers at will, or for years, &c. paid any tithes to them, the unity will not ſerve. And if the appropriation * was made in time of E. 4. H. 6. H. 4. R. 2. E. 3. &c. it is not ſufficient upon the point of unity; for it ought to be perpetual; but in ſuch caſe he may *allege the ſaid branch of* 31 *H.* 8. *of diſcharge of the payment of tithes, and that the abbots, &c, time out of mind, till the diſſolution have held the land diſcharged* of tithes (as he well may preſcribe by the common law) and gives ſuch evidence that he may approve it; and ſo if in truth the land be diſcharged, he has ſufficient remedy to relieve himſelf; † and ſays, ſee the Bp. of Wincheſter's caſe. 2 Rep. 44. b. 45. a. But if the abbey, &c. was founded within time of memory, then he cannot preſcribe at all; and ſince the appropriation was made 20 H. 8. it cannot be diſcharged. 11 Rep. 14. b. Mich. 10 Jac. C. B. Priddle v. Napper.

that Ld. Coke in this caſe of Priddle ſays, that if the abbey itſelf were founded ſince memory, then he cannot preſcribe at all in the general diſcharge, and ſo leaves it as a caſe deſperate where the abbey was founded ſince time of memory, which yet he might eaſily have relieved, if he might plead a diſcharge at the time of the diſſolution, without ſhewing how, which is either a retraction or an explanation of his former report of the Biſhop of Wincheſter's caſe. 2 Rep. 43. b.

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9. An *abbot* having a privilege to be *diſcharged of tithes* of lands, *quamdiu propriis manibus excolunt*, in the time of Ed. 4. *made a gift in tail*, and 31 *H.* 8. *the abbey was diſſolved.* The donee of the iſſue in tail ſhall not be diſcharged of tithes, becauſe the ſtatute 31 H. 8. diſchargeth none, but ſuch as were diſcharged at the time of the diſſolution, ſo that they muſt claim the eſtate and diſcharge under the abbot ſince the ſtatute; but if the land had returned to the abbot or the king before or after the ſtatute, it had been otherwiſe. Hob. 244. pl. 320. Mich. 16 Jac. Farmer v. Shereman.

10. If *one has a portion of tithes out of a rectory, and afterwards he purchaſes the rectory*, the portion of tithes *is not extinguiſhed*, but remains grantable; agreed per Cur. and the council of both ſides; and Haughton J. gave this reaſon for it, viz. *becauſe the portion of tithes may be more ancient than the rectory; and* that *the rector in ancient times had no title to the tithes*; for *before the council of Lateran* every one might pay his tithes to what parſon he would. 2 Roll. Rep. 161. Paſch. 18 Jac. B. R. Sir Edward Coke's caſe.

Hob. 306. pl. 388. S.C. & S.P. by Hobart Ch. J. —— Jo. 3. Wright v. Gerrard.

11. A perpetual *unity of a church appropriated, and the land*, is not any diſcharge of tithes of itſelf; and the ſtatute 27 *H.* 8. *doth not give any diſcharge, but* gives *only the poſſeſſions as they were in the hands of the abbots*; and that refers to the poſſeſſions, and not to the tithes out of them, which are collateral things; and there is *no clauſe of diſcharge of tithes in the ſtatute of* 27 *H.* 8. *as there is in* the

the ſtatute of 31 *H.* 8. and the ſtatute of 31 *H.* 8. *does not extend to the ſtatute of* 27 *H.* 8. and therefore reſolved, that the unity of poſſeſſion of itſelf is not a diſcharge of tithes. Cro. J. 607. pl. 3. Hill. 18 Jac. C. B. the ſecond reſolution in the caſe of Gerrard v. Wright.

S.C. & S.P. reſolved.—S. C. cited Cro.C. 425. Mich. 11 C.B. in caſe of Sydown v. Holme, and agreed by all the four juſtices to be good law, that the abbeys which came to the king by the ſtatute 27 H. 6. were not within the privilege of 31 H. 8. nor to have benefit of that ſtatute. ——S. C. cited Jo. 373. in S. C. of Sydown v. Holme.

12. Unity of poſſeſſion *of a manor and rectory* will not exempt the demeſne lands from the payment of tithes when they come to be ſevered. Comyns's Rep. 498. pl. 213. Paſch. 8 Geo. in Scacc. Fox v Bardwell.

(A. b) Diſcharge. By Order. [58]

1. WHERE the *Ciſtercians* had a privilege to be diſcharged of tithes ariſing from their lands, which propriis manibus excolebant, but their farmers ſhould pay tithes, and that order is now diſſolved, by the ſtatute 31 H. 8. the king and his tenants of thoſe lands ſhall be diſcharged of ſuch tithes as the ſpiritual perſons were; for *the king cannot excolere, and therefore his farmers ſhall be diſcharged; and ſo long as the king has the freehold, his farmers, though leſſees for years, or at will, ſhall have ſuch privilege;* but if the king grants over the reverſion, then the farmers ſhall pay tithes. 2 Le. 71. pl. 95. 29 Eliz. in Scacc. The Counteſs of Lenox's caſe.

2. Where a *diſcharge* was *by reaſon of the perſons* that were to pay tithes, as the *Ciſtercians*, &c. there the patentee ſhould pay tithes; but if it was by reaſon of *unity*, it ſhall then be diſcharged by the ſtatute in the hands of the patentee, for that privilege runs with the poſſeſſion. Per Popham; and judgment for the plaintiff. Cro. E. 578. pl. 1. Mich. 39 & 40 Eliz. B. R. Blinco v. Barkſdale.

Where the *preſcription* in an abbot was *merely perſonal*, it would not extend to the alienee, but if it was *in reſpect of any real compoſition*, it is otherwiſe; but this real compoſition ought to be ſhewn the ſame in the caſe of the King and his alienee. Lev. 185. Trin. 18 Car. 2. B. R. Bolls v. Atkinſon.——Sid. 320. pl. 13. Bowles v. Atkins. S. C.

3. So long as the land is occupied by him that has the fee ſimple which did formerly belong to the *order of Ciſtercians*, it ſhall *pay no tithes*, but if he let it for years or life, the *tenant* ſhall pay tithes. Brownl. 44. Trin. 15 Jac. Anon.

4. When tumor papalis was here in England, all *monks* were in reſpect of their orders *diſcharged* of tithes, who after increaſing to ſo great a number, and having here great revenues, the holy church was thereby impoveriſhed, and filia devoravit matrem; for remedy whereof, *Pope Paſchall II. ordained* that *Ciſtercians, Templars, and Hoſpitallers*, ſhould be only diſcharged, and that all other orders ſhould pay their tithes, which alſo in reſpect of their great revenues was found to be an impoveriſhment to the church, and there-

Land may be ſaid to be manured propriis manibus by ſervants, if ſo be it was in poſſeſſion, and uſed as a farm by the prior, &c.

Clayt. 16. pl. 26 March 1633. before Vernon, judge of aſſiſe, in Horn's caſe.

fore *Pope Adrian conſtituted* that the land of Ciſtercians, Templars, and Hoſpitallers, ſhould be only diſcharged *quæ propriis manibus excoluntur*. Per Montague Ch. J. Cro. J. 454. pl. 30. Mich. 15 Jac. B. R. in caſe of Doubitoft v. Curteen.

5. If the *impropriation* did *not come to the crown till* 31 *H.* 8. yet it was an abbey under the value mentioned in the 27 *H.* 8. and given to the crown, the king ſhall be now in by the ſtatute of 27 *H.* 8. and ſhall not participate of the privileges given by 31 *H.* 8. for diſcharge of tithes. Clayt. 68. pl. 117. Aug. 1639. Sir Marmaduke Strickland's caſe.

6. Where land was *diſcharged* of tithes *by reaſon of order*, and there was a *common* belonging thereto, land *taken* of late time *out of the common*, and which was no part of the poſſeſſions of the abbot, is not diſcharged. See Clayt. 11. pl. 20. March, 8 Car. Bell's caſe.

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Land *eſcheated* afterwards ſhall not partake of the privilege, but lands *then in leaſe* or *copy* when the leaſe endeth after the counſel or copyhold comes to the lord, it ſhall be privileged as thoſe then in their hands ſhould be. Clayt. 107. pl. 181. April, 8 Car. Whitfield, judge of aſſiſe. Hodgſon's caſe.

7. The land which the *priors of St. John* of Jeruſalem held in their hands in fee *at the council of Lateran*, are only capable of diſcharge of tithes, and not what they purchaſed after; and where it was *in a farmer's hands*, though he purchaſed the fee afterwards, he ſhould not hold it diſcharged as a lord abbot. Clayt. 16. pl. 26. March 1633. before judge of aſſize. Horn's caſe.

8. In caſe of tithes and defence made by privilege of the *Ciſtercian order*, viz. dum *propriis manibus* excolunt, &c. 1ſt, It muſt be for thoſe that are *owners of the inheritance* of ſuch land. 2dly, A *truſtee* of land, though another has the eſtate in law, *is ſuch* an inheritor and *owner* of lands, &c. 3dly, This extends to meadow as well as arable, and this privilege was for *great tithes*, as corn or hay, &c. and did not *extend to ſmall tithes*, and therefore payment of ſmall tithes is no evidence to prove the greater tithes to be due. Clayt. 53. pl. 92. Aug. 13 Car. before Barkley, judge of aſſiſe. Anon.

9. In prohibition the privilege of the *Ciſtercian order* came in queſtion. The land was parcel of the abbey of Rivaux, and no tithes had been paid, time out of mind, &c. nor was any paid at the diſſolution of the abbey; the judge ſpared the giving in *evidence* dum propriis manibus excolunt, and held it *ſufficient to ſhew the diſcharge of payment of tithes, time out of mind*; and though the order is put in the declaration, which is ſufficient of itſelf, *yet he may take advantage of the ſtatute of* 31 *H.* 8. which is the beſt courſe. Clayt. 95. pl. 161. Aug. 23, 1641. before Whitfield J. Foſwick v. Bulmer.

2 Roll. Rep. S. C. held accordingly. —— Palm. 118. S. C. adjudged.

10. Lands were *diſcharged of tithes, the abbot being of the order of Ciſtercians*, dum propriis manibus excolebant. The lands were *parcel of the demeſnes of a manor, but in leaſe for years at the time of the diſſolution*. Reſolved, that although the farmer paid tithes at

the time of the diſſolution, yet quoad the abbot, the inheritance was diſcharged of tithes, and therefore that now the *king or his patentee ſhould hold them diſcharged.* Cro. J. 559. pl. 6. Hill. 17 Jac. B. R. Porter v. Bathurſt.

11. If land was diſcharged *in the hands of an abbot* at the time of the diſſolution, be it which way it will, and without ſhewing how by union, &c. and if he hath ſo continued to be diſcharged it ſhall be diſcharged, and the 2 E. 6. gives no remedy but in ſuch courſe and manner as then he might have had. Clayt. 67. pl. 117. Aug. 1639. Sir Marm. Strickland's caſe.

12. The caſe upon a feigned iſſue out of Chancery was, whether ſuch lands were diſcharged of tithes which formerly belonged to *Fountaine abbey* in Yorkſhire, *which was of the Ciſtertian order;* and it was held clearly that *the council of Lateran, which freed that order from payment of tithes, was a general one received in England;* and if theſe lands were diſcharged of tithes from the time of that council, that *no after covenant or contract made by the abbot to pay tithes could diſpenſe with this privilege,* or make them liable to tithes; for once diſcharged by this council, and always diſcharged, for *this council is as forcible as an act of parliament, which concludes all parties;* and the Court were alſo of opinion, that if there were any ſuch agreement for payment of tithes before the council, yet this council as a general law, which includes all men's conſent, had diſſolved it, and the lands were diſcharged. Hardr. 101. pl. 5. Paſch. 1657. in Scacc. Stavely v. Ullithorn.

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13. Upon a bill in equity the queſtion was, whether *lands* were diſcharged of tithes as having been *part of the poſſeſſions of an abbey of the Ciſtertian order.* The Court held, that a tenant for life or years is not within the ſtatute, but that a tenant in tail who hath an eſtate of inheritance is diſcharged, quamdiu propriis manibus, &c. Hard. 174. pl. 4. Mich. 12 Car. 2. in Scacc. Wilſon v. Redman.

Hardr. 190. pl. 17. Paſch. 13 Car. 2. in Scacc. S. C. ſays an iſſue was directed to try whether the lands out of which they were demanded had belonged to any religious order which claimed to be diſcharged, quam diu propriis manibus, &c. It was clearly held by the Court, that if ſuch lands were in leaſe at the diſſolution, &c. or an eſtate for life, or in tail, were out upon them, yet he in reverſion ſhould have the benefit of ſuch diſcharge after the determination of thoſe eſtates, becauſe *the diſcharge was not interrupted, but only ſuſpended, during the time that they were in the hands of particular eſtates.*

14. Upon a bill in equity for the *tithes of paſture ground,* parcel of the poſſeſſions of the abbey of Fountaine, being of the Ciſtertian order, it was held per Cur. that tithes *for agiſtment of cattle were payable by the owner of the cattle,* becauſe they take the profits and herbage of the ſoil, and therefore it cannot be ſaid that the profits are taken by the owner of the ſoil, or that the ground is in propriis manibus. The Chief Baron ſaid, that the owner of the ſoil might pay them, but clearly the agiſtor is compellable to pay them. Hardr. 184. pl. 10. Paſch. 13 Car. 2. in Scacc. Pory v. Wright.

So in the caſe of *commoning.* Ibid.

(B. b) Diſcharge by Payment of other Tithe or Thing.

1. WHERE the *pariſhioner does any thing* which he *is not compellable by the law to do, which comes to the benefit of the parſon*, there if he demand tithes of the thing in lieu whereof this is done, prohibition ſhall be granted. Per Barkley, who ſaid it was a rule. Mar. 65. pl. 100. Mich. 15 Car. In Skinner's caſe.

2. And there is another rule, that *cuſtom may make that tithable which of itſelf is not tithable.* Mar. 65. in the S. C.

3. The inhabitants of the pariſh of H. in which there was a chapel of eaſe, ſuggeſted a cuſtom, that thoſe who lived in ſuch a precinct of the ſaid pariſh *ought to find a rope for the third bell, and to repair part of the mother-church;* in conſideration whereof they have been freed from payment of tithes to the mother-church. Whether this was a good cuſtom, quære, for it was adjourned, Mar. 91. in pl. 151. Hill. 16 Car. Anon.

(C. b) Diſcharge. Pleadings.

1. LIBEL, &c. for the tithe of wood. The defendant ſuggeſted that the *lands were parcel of the priory of Cree-church, and that the prior thereof, and his ſucceſſors, time out of mind, held the ſame diſcharged of tithes.* Exception was taken becauſe it did not ſay any particular diſcharge, as compoſition, unity of poſſeſſion, or privilege of order, as Templars, &c. Per Wray, though *the ſpecial manner of diſcharge is not ſet down*, yet it *ſhall be intended to be by lawful * means, as compoſition*, or otherwiſe; for the ſtatute is, that the king ſhall hold diſcharged as the abbot, &c. and we ought to take it, that it was a lawful diſcharge of the tithes at the time of the diſſolution. Le. 240. pl. 325. Mich. 32 & 33 Eliz. B. R. Naſh v. Mollins.

Cro. E. 206. pl. 42. S.C. and per Cur. a ſpiritual man may preſcr be in non decimando; and by the ſtatute of 31 H. 8. he ſhall hold it diſcharged as the prior held it, and if he held it diſcharged,

* non refert by which means, for it ſhall be intended lawful means.

[61]

2. Prohibition, the plaintiff *ſuggeſted that the prior of B. was ſeiſed of the rectory and of the lands, out of which* the tithes were demanded, *in fee ſimul & ſemel, from time whereof, &c. and at the time of the diſſolution*, and for that reaſon the land is diſcharged, &c. The *defendant traverſed the unity at the time of the diſſolution*, &c. Fenner and Clench (cæteris abſentibus) held that the traverſe was good; for though there had been an unity of poſſeſſion, time out of mind, yet if it was not at the time of the diſſolution, tithes ſhall be paid; but *if the diſcharge had been pleaded generally by preſcription, and not by unity*, &c. then *the preſcription ought to have*

have been anſwered, and not the unity. Cro. E. 534. pl. 14. Mich. 39 & 40 Eliz. B. R. Button v. Long.

3. In a prohibition the plaintiff *ſuggeſted, that the abbot of Vale Royal was ſeiſed in fee of the parſonage of W. and of the grange of D. out of which the tithes were demanded by the now parſon of W.* and by reaſon thereof the ſaid abbot and his predeceſſors, time whereof, &c. were ſeiſed of the parſonage and grange in their demeſne, as, &c. in right of the ſaid abbey, & ratione inde ſhewed the unity of poſſeſſion and diſcharge of tithes upon the ſtatute 31 H. 8. The *defendant pleaded that the abbey was founded 5 E. 1. within time of memory, and confeſſed the unity* of the parſonage and grange *after the time of its foundation.* The whole Court held the plea in bar good, and that he need not traverſe the preſcription, for the *ſhewing the abbey to be founded within time of memory is a ſufficient confeſſing and avoiding; but if the defendant* againſt the ſuggeſtion of the perpetual unity *would ſhew that the demeſnes before the ſtatute, and in the time of the abbot, were in the hands of the farmers,* &c. there *he ought to traverſe the preſcription;* for though the poſſeſſion was chargeable in other hands, yet as to the fee-ſimple, which repoſed in the abbot, it is a diſcharge in right. Yelv. 31. Hill. 45 Eliz. Gibſon v. Holcroft. S. C. cited 2 Mod. 60.

4. *Libel for tithes of 2 acres,* parcel of the poſſeſſion of ſuch an abbey, which came to the king by the ſtatute 27 H. 8. The defendant *pleaded the ſtatute 31 H. 8. and averred that the abbey, from the time of the foundation to the diſſolution, had been diſcharged of tithes of theſe two acres;* and upon demurrer to this plea, it was objected that it was ill, becauſe the *diſcharge ſhould be pleaded only to the time of the diſſolution, by reaſon of the uncertainty of the commencement* of the diſcharge; ſed per tot. Cur. a conſultation was granted; but Doderidge ſaid, that *if he had alleged that the abbey was founded before time of memory, and that the foundation, till the diſſolution, was diſcharged, it had been good,* quod Coke conceſſit. Roll. Rep. 54. pl. 27. Trin. 12 Jac. B. R. Prowſe v. Layfield.

5. S. ſues a prohibition againſt D. alleging, *that an abbot, &c. was ſeiſed of that land diſcharged of the payment of tithes at the time of the diſſolution,* and ſo conveyed it to the king, and from the king to him. The defendant demurs, and it was reſolved, that the abbot's holding of it diſcharged of tithes, &c. was not good, *without ſhewing how*; for note, the ſtatute 31 H. 8. cap. 3. is in as large and ample manner as the abbot held it, &c. and the ſtatute pinches upon that; ergo, he ought to take notice by what manner the abbot was diſcharged; alſo ſuch a claim of diſcharge of tithes is contrary to * common right, and therefore ſhall be ſtrict. Noy, 97. Hill. 15 Jac. C. B. Slade v. Drake. Jo. 6. pl. 5. S. C. and Hobart, Hutton, and Winch, held that he ought to ſhew how the abbot was diſcharged at the time of the diſſolution; for that ſtatute gives diſcharge; yet for pleading it as it was at common law, the party ought particularly to ſhow how; but Warburton held e contra, and error was brought et pendet quære de eo. ——— Hob. 295. pl. 378. S. C. adjudged for the defendant, and a conſultation awarded; Warbuton diſſentiente.

*[62]

6. *Libel for tithes,* the *defendant ſuggeſted* for a prohibition *that the abbot of, &c. and his predeceſſors before and at the time of the diſſolution, hold the lands diſcharged* of tithes *by reaſon of the unity of*

poſſeſſion; it was inſiſted, that this ſuggeſtion need not to be proved within the ſtatute of 2 E. 6. for by that ſtatute the ſuggeſtion ſhall not be proved, unleſs the cauſe be determinable in the ſpiritual court for the not proving the ſuggeſtion, and that this caſe is not determinable there by the expreſs words of the ſtatute. Sed per Cur. *though preciſe proof may not be made of the diſcharge, yet the defendant might ſwear that always ſince the ſtatute* 31 *H.* 8. *the lands have been reputed to be diſcharged by unity, or that he had heard it commonly reported to be ſo vel ſimilia*; and Doderidge ſaid, he had known divers precedents of proof made in this Court in ſuch manner. 2 Roll. Rep. 125. Mich. 17 Jac. B.R. Congley v. Hall.

7. Upon a *bill for tithes*, the *defendant* by his anſwer *ſet forth, that the lands*, of which the tithes were claimed, *were parcel of the priory of . . . and that the lands belonging to that priory were diſcharged by order; without ſaying any more*, this was held ſufficient, quod nota; becauſe of the uncertainty. Hardr. 322. pl. 5. Hill. 14 & 15 Car. 2. in Scacc. Page's caſe.

8. Suggeſtion of a diſcharge by the Ciſtertian order, in a ſuit for tithes, *ought to aver poſitively that theſe lands were in the abbot's hands at the time of the diſſolution, and now in the patentee's own hands*, otherwiſe no prohibition will be granted; and it is not ſufficient to ſay that the vills were, unleſs of which are parcel. Keb. 830. pl. 9. Hill. 16 & 17 Car. 2. B. R. Barrington v. Boucher.

(D. b) Revived.

1. *A Preſcription was laid in an abbot and convent to be diſcharged of tithes*, and it appeared that *the body corporate was diſſolved, becauſe all the monks were dead, and the lands came to laymen*; it was adjudged that they ſhall pay tithes in kind, becauſe the preſcription continues no longer than the lands remained in the abbot's and convent's hands Godb. 211. pl. 301. Mich. 11 Jac. C. B. Windſor (Canons) v. Webb.

(E. b) Treſpaſs juſtifiable in order to ſetting them out, and carrying them away. And Pleadings.

1. *TRESPASS* lies by parſon againſt him who *carries away tithes ſevered* from the nine parts; *contrary where he will not ſever* his tithes, and carries them all away; there ſuit lies in the ſpiritual court. Br. Treſpaſs, pl. 108. cites 38 E. 3. 5.

[63] 2. In treſpaſs *of corn* taken the *defendant juſtified for tithes as ſervant of the parſon* of M. ſo *he took the tithes of his maſter abſque hoc, that he took the corn of the plaintiff* and others e contra. Br. Treſpaſs, pl. 49. cites 44 Ed. 3. 39.

3. Treſpaſs

3. Treſpaſs *de clauſo fracto on D. the 6th day of July* the *defendant juſtified as for tithes ſevered from the nine parts as parſon the 10th day of Auguſt, abſque hoc that he is guilty unleſs after the tithes ſevered, and till they were carried away*, and it was held clearly that every parſon may *enter to collect his tithes, and to turn them till they are dry*, and of this the *reaſonable time ſhall be tried*, and a good plea, and *ſhall not be compelled to ſay that he is not guilty before nor after;* for he is guilty every year after the tithes ſevered; and the plaintiff *replied, that the day the defendant juſtified, the defendant was not parſon, or that the tithes this day were ſevered;* and ſo ſee that the plaintiff was not compelled to reply to the abſque hoc taken by the defendant. Br. Traverſe, per, &c. pl. 242. cites 12 E. 4. 6.

Br. Replication, pl. 61. cites S.C.— A parſon ſhall have *reaſonable time to take his tithes* ſevered from the nine parts, *and to turn them till they are dry, and that he* carries them away. Br. Treſpaſs, pl. 325. cites 12 E. 4. 6.

In *treſpaſs*, where the *defendant juſtifies as parſon, and collected the tithes which were ſevered from the nine parts*, it is a good *iſſue*, that *the tithes were not ſevered from the nine parts*. Br. Iſſues joines, pl. 69. cites 12 E. 4. 6.

4. Treſpaſs of *graſs cut*, the defendant *juſtified as parſon of the pariſh*, and took *as tithes ſevered* from the nine parts, the plaintiff ſaid, that de ſon tort demeſne without ſuch cauſe. Per Brian this is no plea, no more than *where the defendant juſtifies as his franktenement*, or by leaſe, or for years, ſuch replication de ſon tort, &c. is no plea. Pigot ſaid, this is true *there;* for the *defendant claimed intereſt in the ſoil and the occupation there;* contra here, by which he *replied* as above, *abſque hoc, that they were ſevered from the nine parts*. Br. De ſon tort, &c. pl. 21. cites 16 E. 4. 4.

5. In *treſpaſs in D.* the *defendant juſtified as parſon of D. for tithes*, the *plaintiff ſaid that they grew in another place, and not in the place in the bar*, and no replication unleſs they had ſaid *that the place is out of the pariſh of the defendant;* for he may take his tithes in any place in this pariſh, by which he ſaid that it was in another pariſh, and not in the pariſh of the plaintiff. Br. Replication, pl. 54. cites 21 E. 4.

Br. Traverſe per, &c. pl. 267. cites 21 E. 4. 65. that he ought to traverſe the pariſh, and not the place; for prima facie if they grow in the pariſh the parſon ſhall have them.

6. *Treſpaſs* for breaking his cloſe and treading his graſs, &c. and taking and carrying away five loads of his hay; the defendant as to all except breaking the cloſe and ſpoiling the graſs pleads not guilty, and as to the reſt he *juſtified, for that he is ſeiſed of the tithe-hay ariſing in the ſaid cloſe; and for that the hay (viz.) five cart loads were cocked ſeparately for tithes of the ſaid hay, he entered* the cloſe *and carried away the hay, doing as little damage as he could, quæ ſunt eadem*, &c. the plaintiff *replied, that the defendant took the graſs which the plaintiff had cut and made it into hay, upon the land, and carried it away, and ſo five cart loads of his hay mentioned in the declaration, he took and carried away, and traverſed that there were five cart loads of hay in the ſaid cloſe ſeparated for tithes;* the defendant demurred ſpecially, for that the plaintiff traverſed the quantity of hay ſeparated for tithes, which is not traverſable; and of that opinion was all the Court, for the defendant having pleaded not guilty as to all except the ſpoiling the graſs, and juſtified

2 Lutw. 1313, and 1316. S.C. Curia adviſare vult.

this by entering and taking tithes of hay, it is good whether they were loaded in one or two or five carts; and it was lawful for the defendant to make the hay on the land after it was ſeparated, and judgment was given for the defendant by the whole Court. 3 Lev. 228. Trin. 1 Jac. 2. C. B. Paine v. Brigham.

[64] 7. In treſpaſs defendants as ſervants of the parſon juſtified their entry into the land *with their horſes and mollitur chaſed the cattle in the ſaid cloſe to ſee what tithes were due for the cattle.* It was objected that this was not juſtifiable, becauſe there were other means to come to the knowledge thereof. But the Court delivered no opinion as to that, judgment being given on another matter. Cro. J. 360. pl. 21. Mich. 12 Jac. B. R. Rolls v. Boulting and Roberts.

(F. b) Remedy for Recovery of Tithes. And in what Court.

1. OF tithes there *is not any form to demand at the common law.* But you will find in the Regiſter, fol. 165. a form of writ of covenant de decimis garbarum ad eccleſiam ipſius prioris de N. qualitercunque ſpectant'. Thel. Dig. 68. lib. 8. cap. 9. ſ. 1.

2. *In aſſiſe a plaint is made of the tenth part of all manner of corn growing in* 100 *acres of land, and of the tenth part of all manner of hay in* 10 *acres of meadow cut after the tithes of the parſon aſſigned,* &c. Thel. Dig. 68. lib. 8. cap. 9. ſ. 2. cites Hill. 44 E. 3. 5. *But* ſays, that *now by the ſtatute of* 32 *H.* 8. *cap.* 7. *a man ſhall have præcipe quod reddat, and all manner of writs real of all profits called eccleſiaſtical or ſpiritual,* as parſonages, vicarages, portions, penſions, diſmes, &c. After the making of which ſtatute Theloall ſays, he has ſeen writ of covenant of ſuch form to levy a fine, quod teneat covent', &c. de rectoria eccleſiæ parochialis de M. ac de omnibus decimis granorum, garbarum, & fœni eidem rectoriæ ſpectant', &c. ſive cum omnibus decimis granorum garbar' & fœni eidem rector' ſpectant', &c.

3. And in *præcipe quod reddat omnes & omnimodas decimas majores mixtas et minutas infra villam ſive hamlet' de B. in parochia de A. quoquomodo creſcen' contingen' ac annuatim renovan'* &c. Quære of theſe forms and of others now uſed. See præcipe quod reddat *quartam partem decimarum & oblationum eccleſiæ ſancti,* &c. Thel. Dig. 68. lib. 8. cap. 9. ſ. 3. cites 16 E. 3. Quare Impedit, 147. and ſays, ſee fine levied of a parſonage, 2 H. 3. Grant, 89.

Br. Aſſiſe, pl. 19. cites S. C. 4. *Aſſize* was maintained *of tithes by name of profit apprender,* notwithſtanding the defendant demurred to the juriſdiction. Br. Juriſdiction, pl. 7. cites 44 E. 3. 5.

5. If the *king grants tithes which grow in great foreſts,* as Englewood *by letters patents, and another takes them, he ſhall have ſcire facias againſt*

againſt them in Chancery, and ſhall be at iſſue there, and then it ſhall *be ſent into B. R. to try* as in other caſes. *But* if the *ſuit* be *againſt them who ought to render the tithes and ſet them out* and ſever the nine parts, *then lies the ſuit in the ſpiritual court;* note the difference. Br. Diſmes, pl. 10. cites 22 Aſſ. 75.

6. 32 *H.* 8. *cap.* 7. *ſ.* 2. *All perſons of this realm and other his majeſty's dominions ſhall truly ſet out and pay all tithes and offerings, according to the cuſtoms and uſages of the places where ſuch tithes or duties ſhall grow; and in caſe any perſons, of their ungodly and perverſe will, with-hold any tithes or offerings, the parſon, or party eccleſiaſtical or lay, having cauſe to demand the ſaid tithes or offerings, may convene the perſons offending before the ordinary, his commiſſary or other competent judge, according to the eccleſiaſtical laws. And the ordinary, &c. having the parties or their lawful procurators before him, ſhall proceed to the examination, hearing and determination of ſuch matter, ordinarily or ſummarily, according to the courſe of the eccleſiaſtical laws.*

7. 32 *H.* 8. *cap.* 7. *ſ.* 3. *In caſe any of the parties appeal from* [65] *the ſentence of the ordinary, &c. the judge ſhall adjudge to the other party reaſonable coſts, and ſhall compel the party appellant to pay the ſame by compulſory proceſs and cenſures of the laws eccleſiaſtical, taking ſurety of the other parties to reſtore the coſts, if the principal cauſe be adjudged againſt him; and ſo every ordinary, or other judge eccleſiaſtical, ſhall adjudge coſts to the other party upon every appeal in every ſuit of ſubſtraction or detention of tithes, or in any other ſuit concerning the duty of ſuch tithes or offerings.*

8. S. 4. *If any perſons, after ſentence definitive given againſt them, obſtinately and wilfully refuſe to pay their tithes or duties, or ſuch ſums of money wherein they be condemned for the ſame, two juſtices of peace of the ſhire, whereof one of the quorum, ſhall have authority, upon information, certificate or complaint, made in writing by the eccleſiaſtical judge that gave the ſentence, to cauſe the party refuſing to be attached and committed to the next gaol, till he ſhall have found ſurety to the uſe of the king to perform the ſentence.*

9. S. 7. *Where any perſons which ſhall have any eſtate of inheritance, freehold, term, right or intereſt, in any parſonage, vicarage, portion, penſion, tithes, oblations, or other eccleſiaſtical or ſpiritual profit, made temporal, or admitted to be in temporal hands by the laws of this realm ſhall be diſſeiſed, or otherwiſe put from their lawful inheritance or intereſt by any perſon claiming title to the ſame, the perſons ſo diſſeiſed or put from their right, their heirs, wives, and ſuch other to whom ſuch injury ſhall be done, ſhall have their remedy in the king's temporal courts, or other temporal court, as the caſe ſhall require, for the recovery of ſuch inheritance or intereſt, by writs of præcipe quod reddat, aſſiſe of novel diſſeiſin, mortdanceſtor, quod ei deforceat, writs of dower, or other writs original, as the caſe ſhall require; and writs of covenant, and other writs for fines, and other aſſurances of any ſuch parſonage, vicarage, portion, penſion, or other profit called eccleſiaſtical or ſpiritual, ſhall be granted in the chancery, as hath been uſed for lands.*

By this act, a layman, having tithes or offerings, may either ſue for the ſubſtraction or withholding of the ſame in the eccleſiaſtical court, or at the common law, at his election; and ſeeing that no ſpecial writ is given by

by the ſtatute, the party muſt have a general writ of aſſiſe de libero tenemento, and make a ſpecial plaint; but his præcipe muſt be quod reddat omnes & omnimodas decimas majores, minimas & minutas infra pale quoquo modo creſcent' contingent' ac annuatim renovant', &c. according to his caſe. But neither aſſiſe nor any præcipe did lie of them, as of tithes or any other eccleſiaſtical duty at the common law; for the aſſiſe brought of any manner of corn growing in an hundred acres of land, after the tithes of the parſon taken, was a lay profit apprender, and no eccleſiaſtical duty. But tithes, or other eccleſiaſtical duties that came to the crown by the ſtatutes of 27 H. 8. 31 H. 8. 37 H. 8. and 1 E. 6. are by thoſe ſtatutes, and this of 32 H. 8. and of 1 & 2 P. & M. in the hands of laymen temporal inheritances, and ſhall be accounted aſſets, and huſbands ſhall be tenants by the curteſy, and wives endowed of them, and ſhall have other incidents belonging to temporal inheritances; only that they have this eccleſiaſtical quality, that the owner or poſſeſſor thereof may ſue for the ſubſtraction of the ſame in the eccleſiaſtical court. Co. Litt. 159. a.

No *præcipe* lies for ſetting out tithes at common law; and I doubt not, *by the ſtatute 32 H. 8. cap. 7.* though Sir Edw. Coke, in his Litt. fol. 159. a. ſeems to be of opinion, that *a man may at his election have remedy* for with-holding tithe after that ſtatute, *by action or in the eccleſiaſtical court*, by that ſtatute doubtleſs he has *for the title of tithe*, as for tithe of land, or for the taking them away, but not, perhaps, for not ſetting them out; per Vaughan Ch. J. Vaugh. 195. Hill. 18 & 19 Car. 2. C. B. in caſe of Holden v. Smallbrooke.

10. *S. 8. provided that this act ſhall not give remedy or ſuit in the courts temporal, againſt any perſon which ſhall refuſe to ſet out his tithes, or detain his tithes or offerings.*

11. The *compelling the appellant to pay coſts, is to be underſtood when the caſe appertains properly to the ſpiritual court;* but if the ſuit did not originally or properly appertain to them, as in caſe for *tithes of trees ſpent in fuel*, a prohibition ſhall be awarded, as well to the coſts as the original ſuit, notwithſtanding this ſtatute. Noy, 137. Anon.

[66] 12. When *tithes* were *ſet out*, they *are lay-chattles;* and *if a ſtranger carries them away, action lies not in the ſpiritual court, but here;* otherwiſe where they are not ſevered from the 9th part; per Doderidge J. and Ley Ch. J. 2 Roll. Rep. 440. Trin. 21 Jac. B. R. Gwyn v. Merryweather.

13. The parſon exhibited *his bill in the Exchequer for predial and other tithes*, and *upon proof of the quantity and value, had a decree for the whole;* and the clerks ſaid that this was the *conſtant practice where* a bill is exhibited for predial tithes, and *the ſingle value is only demanded.* Hardr. 4. pl. 4. Trin. 1655. in the Exchequer, Hardwick v. Newte.

14. 7 & 8 *W.* 3. *cap. 6. impowers two* juſtices of peace *to determine complaints for nonpayment of* ſmall tithes. *And the money adjudged due ſhall be levied by diſtreſs and ſale. But the complaint muſt be made within two years.* Appeal *may be to the ſeſſions, and no* * certiorari *ſhall be allowed unleſs the title be in queſtion.*

In caſe of a modus *the juſtices are not to intermeddle.*

The judgment ſhall be inrolled, and be a bar to any other proceſs. Party removing into a foreign county may be followed if adjudged againſt him. If the complaint be vexatious, *defendant ſhall have coſts not exceeding* 10*s. and any perſon ſued for any thing done in purſuance of this act, and the plaintiff be nonſuit, &c. ſhall have double* coſts, *if no ſuit be begun in the Exchequer or eccleſiaſtical court.*

* In the conſtruction hereof it has been adjudged, that if the party inſiſts on any matter of law before the juſtice of peace, which is any way doubtful, as on a cuſtom in a pariſh to be diſcharged of a certain kind of tithe, &c. the order may be removed within the intent of the ſtatute. 2 Hawk. Pl. C. 289. cap. 27. ſ. 38. cites Hill. 6 Geo. The King v. Furnace.

(G. b) Remedy for Recovery of Tithes. How; and in what Caſes. And Pleadings.

1. A Parſon ſues in the ſpiritual court for tithes of wheat and rye growing on 60 acres of land. The *defendant ſuggeſted for a prohibition that the ſaid* 60 *acres were barren*, and that by his induſtry they became fruitful, and that 7 *years are not expired* according to the ſtatute 2 E. 6. for tithes of barren lands. The *jury found that* 30 *acres of the ſaid lands were barren, but that* 30 *acres of the ſaid lands had yielded tithes of wool and lambs* to the parſon. The parſon ſhall not have a conſultation for them; for he has not ſued for them in the Spiritual Court; by the judges of both benches. Jenk. 218. pl. 65. cites D. 171. 2 Eliz.

By the opinion of all the juſtices of both benches, (except Whiddon) the party who ſued in the ſpiritual court ſhall have conſultation for the ſaid reſidue, ad quod Saunders Ch. B. conceſſit. D. 171. a. pl. 6. Pells v. Saunderſon. ——S. C. cited Hob. 192. in pl. 242. that a conſultation was denied, becauſe he ſhould not have ſued for tithes in kind, which if they ſhould grant, a conſultation ſhould be allowed but for the ſmall tithe only.

2. An action of *debt* was brought upon this ſtatute by G. *againſt two tenants in common*, and it appeared that *one of them ſet out his tithe, and* that *the other afterwards took it and carried it away;* and adjudged that the action lies only againſt him which carried it away. Hutt. 122. cites it as a caſe ſhewn Mich. 8 Jac. Sir John Gerrard's caſe.

4 Le. 7. pl. 30. 26 Eliz. B. R. Gerrard's caſe, is of *tithes ſevered and carried away by a ſtranger*, and that the pariſhioner may plead the ſame matter in bar in the ſpiritual court.

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3. In debt on the ſtatute 2 E. 6. for not ſetting out tithes, the *declaration recited the ſtatute as made Nov.* 2. *anno* 2 & 3 *E.* 6. whereas it could not be in two years of the ſaid king, and therefore after verdict judgment was arreſted. Mo. 302. pl. 452. Mich. 33 & 34 Eliz. in Scacc. Langley v. Haynes.

4. *Action* on this ſtatute *may be brought in any of the king's courts;* reſolved by all the Barons. Sav. 131. pl. 206. Paſch. 36 Eliz. in Scacc. Anon.

5. *Defendant pleaded not guilty*, and held well enough, the action of debt being founded on the ſtatute for a wrong done, and *debt lies* on it though a certain penalty is not given thereby, but the treble value, which is uncertain. Cro. E. 621. pl. 11. Mich. 40 & 41 Eliz. B. R. Johns v. Carne.

Cro. E. 766. pl. 4. Trin. 42 Eliz. B. R. Wortley v. Herpingham, S. P. reſolved accordingly; for it is not for a non-feaſance, but for a mal-feaſance, wherein the tort is ſuppoſed. ——Mo. 302, pl. 452. Mich. 33 & 34 Eliz. in Scacc. Langley v. Hains, S. P. adjudged. ——Brownl. 31. Paſch. 10 Jac. Anon. S. P. ——Hold. 65. Trin. 8 Jac. Pain v. Nichols, S. P. ——For wool or lambs no action lies upon the ſtatute; for they are not predial tithes, nor ſmall tithes by the ſtatute of E. 6. Brownl. 70. Hill. 9 Jac. Mortimer v. Freeman. ——Palm. 222. Arg. cites it as reſolved 40 & 41 Eliz. Sharman v. Beadle, that action of debt lies upon this ſtatute for tithe of lambs; and thence infers that lambs are not ſmall tithe.

6. *Baron* poſſeſſed of a *leaſe for years in jure ux'* may ſue alone and recover the treble value, and need not mention the quality

Cro. E. 608. pl. 9. Paſch. 40 Eliz.

Beadle v. Sharman. S. C. held accordingly. of the grain. Jenk. 279. pl. 2. cites the caſe of Bedel v. Smith.

——2 Inſt. 650. cites S. C. & S. P. reſolved accordingly.——Huſband and wife *joined*, and held good. 13 Rep. 48. Bedel v. Sherman.——*But* where the action is for *tithes ſet out*, they cannot join, though for tithes not ſet out they may. Jo. 325 pl. 5. Mich. 9 Car. B. R. Anon.

Baron and feme were leſſees of a parſonage, &c. A pariſhioner ſets forth the tithes, and preſently takes them away again. Reſolved that the huſband and wife ought to have joined in the action, becauſe it is not for a thing in poſſeſſion; and if the huſband dies the wife ſhall have the damages, and not the executor of the huſband. Noy, 136. Hill. 7 Jac. B. R. Ford v. Pomeroy. ——2 Brownl. 9. S. C. Curia advifare vult; but ſeemed of opinion that the wife ought to join; for the ſtatute ſays, that the proprietor ſhall have the ſuit for the not ſetting forth, &c. and the *huſband in this caſe is not intended proprietor, as the ſtatute intends, but the wife.*

Mo. 912. pl. 1288. S. C ruled accordingly. ——Jenk. 279. pl. 2. S. C. & S. P. —Mo. 912. pl. 1289. Hill. 34 Eliz. B. R.

7. After verdict on this ſtatute for the plaintiff, it was *moved in arreſt* of judgment *that the ſuit for the treble value ought not to be brought at the common law, but in the ſpiritual court*, as it ought to be for the tithes before they are ſet out; but reſolved that the action was well brought, and Tanfield ſaid, it was ruled in the Exchequer in Manwood's time, that it lay well at the common law. Cro. E. 608. pl. 9. and 63. pl. 1. Trin. 40 Eliz. B. R. Beadle v. Sherman.

Wentworth v. Criſpe. S. P. adjudged.

Cro. J. 70. pl. 12. Dagg v. Penkevon. S. C. Paſch. 3 Jac. in Cam. Scacc.

8. Reſolved, that the ſtatute which gives treble damages does not allow the jury to give other damages. No coſts being given by the ſtatute, the jury can aſſeſs no coſts. Mo. 915. pl. 1294. Trin. 44 Eliz. B. R. Day v. Peckvell.

adjudged.

Mo. 915. pl. 1294. Day v. Peckvell. S. C. reſolved accordingly that he ſhall have action by the equity of the ſtatute, becauſe he has right to the tithes, though the ſtatute does not give action to the farmer.

9. Debt upon the ſtatute of 2 E. 6. *by the plaintiff (a farmer)* for not ſetting forth of tithes, *and demanded the treble value;* the *jury upon non-debet* pleaded, *find for the plaintiff.* It was *aſſigned for error that the ſtatute does not give the treble value to the farmers* of the parſonage, ſed non allocatur. Cro. J. 70. pl. 12. Paſch. 3 Jac. in Cam. Scacc. Dagge and Kent v. Penkevon.

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Jenk. 315. pl. 4. S. C. Mo. 915. pl. 1294. Day v. Peckvell. S. C. reſolved accordingly.—— Agreement with one farmer ſhall bind his companion; reſolved. Mo. 915. pl. 1294. S. C.

10. Action was brought *by two [joint] farmers who demanded the forfeiture for carrying away the corn without ſetting forth of the tithes or agreeing with them for the corn*, but *without ſaying* that he did not agree with them *nor either of them*, yet held good, and judgment for the plaintiff, and affirmed in the Exchequer-chamber; for if he agreed with one of them, he ought to ſhew it. Cro. J. 70. pl. 12. Paſch. 3 Jac. Dagg v. Penkevon.

11. If a *pariſhioner ſets forth his tithes and preſently takes them away again;* debt lies for treble damages upon ſuch a fraudulent ſetting forth, though the ſtatute ſpeaks nothing of the fraud. Noy, 136. Hill. 7 Jac. B. R. Ford v. Pomeroy.

12. An action of debt brought upon the ſtatute of E. 6. for not ſetting forth of tithes, and the *plaintiff declared as well for the predial*

dial tithes, for which he might well bring his action, and for other tithes, as of lamb and wool for which no action would lie, and upon trial the *jury found for all,* as well for thoſe that would as would not bear an action; and after a verdict, this exception was taken, and *judgment arreſted.* Brownl. 65. Trin. 8 Jac. Pain v. Nichols.

13. Upon the ſtatute of 2 E. 6. cap. 13. In a prohibition to ſtay proceedings by a parſon in a ſuit in the ſpiritual court, againſt one of his pariſh, for hindering him in his way in the carriage of his tithes, the Court all agreed that *if a parſon has his uſual way ſtopt ſo that he cannot come to take away his tithes, being ſet out for him, he may have his remedy by ſuit in the ſpiritual court; but if the queſtion be whether the parſon be of right to have a way one way or another, this is triable by the common law,* and not in the ſpiritual court; but if he has a certain way granted to him, and ſet out by the common law, if he is at any time diſturbed and hindered by any of his pariſhioners or by any other in the uſe of this his way, he may ſue in the ſpiritual court. Bulſt. 67. Mich. 8 Jac. Anon.

14. Debt on the ſtatute, &c. after a verdict for the plaintiff it was moved in arreſt of judgment that the *declaration* was ill, becauſe the plaintiff *did not allege that he was parſon,* for he ought to bring the action according to the name by which he claims the tithes; for if a man will bring an action as heir, executor, or ſheriff, he muſt name himſelf ſo; but upon producing two precedents to the contrary, it was adjudged per tot. Cur. for the plaintiff. Brownl. 98. Mich. 9 Jac. Willot v. Spencer.

15. A man poſſeſſed of corn ſells it, and *before two witneſſes ſets out his tithes and afterwards privately takes away his tithes;* and the parſon ſues him upon the ſtatute of treble damages, for not ſetting forth of tithes; and the defendant proves by witneſſes, that he ſet forth his tithes; yet the fraud is helped; for *the words are without fraud or deceit.* Brownl. 34. Hele v. Frettenden.

A pariſhioner privately ſet forth his tithes, and takes witneſs of it, and immediately after he carries them away; *this is not a ſetting forth within the ſtatute.* For the words are, truly, juſtly, and without fraud or covin. Noy, 152. in caſe of Rocheſter v. Porter, cites 43 Eliz. B. R.

16. So one *ſecretly ſells his corn to one who was not known,* and *afterwards the vendee commands the vendor to cut the corn, which he does, and takes away the whole corn without ſetting forth his tithes;* and the queſtion was, who ſhould be ſued for the tithes? And the Court held *the firſt vendor ſhould be ſued,* for it was fraudulent. Brownl. 34. Hele v. Frettenden.

S. C. cited by Coke Ch. J. 2 Bulſt. 184. Hill. 11 Jac. —2 Inſt. 649. cites S. P. reſolved.

Trin. 44 Eliz. B. R. in caſe of Sprat v. Heale.———Noy, 152. in caſe of Rocheſter v. Porter. S. P. * and that the parſon ſhall not be compelled to ſue the vendee, who it may be was not known to him, cites 44 Eliz. B. R. Baker's caſe. ——And it is not traverſable, if the tithes were ſet forth according to 47 Eliz. reſolved in Trin. 7 Jac. B. R. Brickendine v. Denwood. Ibid.

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17. In debt upon the ſtatute of 2 E. 6. the caſe was, *A. was poſſeſſed of tithes in jure uxoris as executor of her former huſband, and granted totum jus, titulum* & intereſſe ſuum de et in decimis prædictis; reſolved unanimouſly that the grant was good, and the

the leaſe he had in the tithes in right of his feme did thereby paſs; and judgment for the plaintiff. Cro. J. 318. pl. 1. Hill. 10 Jac. B. R. Arnold v. Bidgood.

Brownl. 123. Kipping v. Swaine. S.C. & S.P. held accordingly, and

18. Debt upon the ſtatute 2 E. 6. cap. 13. for not ſetting out tithes; *the words of the ſtatute are, every of the king's ſubjects;* and the *plaintiff in reciting it, declared that quilibet ſubjectus dicti domini regis;* adjudged this was a miſrecital. 2 Bulſt. 119. Trin. 11 Jac. Tipping v. Swan.

that it was a fault incurable; for *the ſtatute refers (ſubditus) to his politic capacity, but (dicti) goes to his natural and ſole capacity*, and by ſuch conſtruction, the force of the ſtatute ſhall be determined by the king's death; by three juſtices, but Houghton doubted, and ſo it was adjourned. ——— Cro. J. 324. pl. 5. S. C. held accordingly, & adjornatur.

19. If the plaintiff declares in debt for not ſetting forth tithes, as of a *leaſe made to him for* 20 *years where it was but for* 10 *years;* this is good, for it is not material in this caſe how he doth declare, ſo as tithe is to be paid to him out of the land. Per Coke Ch. J. 2 Bulſt. 86. Trin. 11 Jac.

It was moved in arreſt of judgment that the declaration was, that the plaintiff was primo die occupator ac

20. As to the word *proprietor* in the ſtatute, *if a rectory be leaſed for years*, the *leſſee may well ſay poſſeſſionatus fuit, though he can take no profits before harveſt*, and the ſhewing the caſe, and pleading that by force thereof he was poſſeſſed and ſo continued, is clearly good; per Doderidge, quod tota Curia conceſſit. 2 Bulſt. 67. Mich. 11 Jac.

poſtea eodem die, &c. ſo that it appears not that he was proprietor, and therefore the action does not lie; for he may be occupator wrongfully, and ſo not proprietor; but it was anſwered, that the declaration is that tali die poſſeſſionatus fuit & ab eodem die occupavit, and this ſhall be judged of a rightful eſtate; and it is ſaid that he is rector eccleſiæ, and ſo ſhall be intended that he is proprietor of the tithes, if the contrary be not ſhewn; and judgment niſi. Sty. 107. Trin. 24 Car. [Hobart v. Boraſton.]

21. A *parſon may ſue for the double value in the ſpiritual court* and no prohibition will lie; for that is given by the expreſs words of the ſtatute of 2 E. 6. and ſo it was adjudged in MANWOOD'S CASE in the Exchequer; per Coke. Godb. 211. pl. 301. Mich. 11 Jac. C. B.

Brownl. 123. S. C. & S. P. held accordingly. —— 2 Bulſt. 119. Tipping v Swan. S. C. adjudged.

22. Plaintiff declared in debt on the ſtatute that he was proprietor for ſeven years of the rectory out of which the tithes were iſſuing, and that *defendant was occupier of lands there for ſix months from March* 10, *and cut his corn in Auguſt following, and carried it way* 10*th of September after;* though by plaintiff's own ſhewing, defendant's intereſt in the land was *determined before* he carried away the tithes, yet he ſtill continuing owner of the corn, the action lies. Cro. J. 324. pl. 5. Mich. 12 Jac. B. R. Kipping v. Swain, alias Stone.

23. In debt upon the ſtatute of E. 6. of tithes plaintiff *declares, that he was ſeiſed in fee of a portion of tithes of corn and hay growing upon ſuch a grange, whereof defendant was occupier, and alſo of* 40 *acres ſown with wheat, rye, and barley, and reaped the corn and carried it away without ſetting forth the tithes*, which were worth 40s. and the treble damages 6 l. after verdict it was moved that the declaration was not good, becauſe he *intitles himſelf being a lay perſon to a portion of tithes, and does not ſhew how;* and it being a profit

profit in another's ſoil he ought to make a good title to himſelf; ſed non allocatur; for this * action is grounded on a tort for not ſetting out the tithes, for which he demands the penalty of the ſtatute, and the ſeiſin in fee is only a conveyance, and for this action he needs not make a title, and therefore it is uſual to bring the action as firmarius or proprietarius, without ſhewing any particular title; and judgment for the plaintiff. Cro. J. 437. pl. 9. Mich. 15 Jac. B. R. Sanders v. Sandford.

24. And it was alſo objected not to be good, becauſe he did *not ſhew the quantity of every grain in ſpecie*, and ſo it is uncertain, and the Court knows not how to judge of it; ſed non allocatur; for he ſhews the value of the tithes which is the wrong ſuppoſed for the carrying them away, which is ſufficient. Ibid. 438.

25. The *abbot* of Eviſham *ſeiſed both of rectory and land time out of mind* 26 H. 8. *demiſed the land for ſix years, and by the ſame leaſe demiſed all tithes with a covenant that the leſſee ſhould not ſet forth the tithes [of] corn and hay* to the leſſor [and his ſucceſſors], *but that he ſhall pay tithe of wool and lamb to the leſſor, and ſmall tithes to the vicar.* It was adjudged that the lands ſhall pay tithes, 1ſt, Becauſe the tithes were demiſed, and therefore the lands were not diſcharged, but the tithes were payable. 2dly, Becauſe there was a covenant that the leſſee ſhall not ſet forth his tithes to the leſſor, which ſhews that they ſhould otherwiſe have been ſet forth. 3dly, Becauſe there is a proviſion for payment of tithe lamb, wool, &c. all which are ſtrong evidences that the lands were not diſcharged, as ſtrong as if there had been actual payment, and the finding of all theſe do ſtrongly imply that if there had been nothing elſe but a leaſing that that had not been ſufficient, but that it was neceſſary to find payment, or that which amounted to payment, diſcharges by grants and covenants expreſs. Pollexf. 8. cites Car. 2. [Cro. J.] 453. [Mich. 15 Jac. B. R.] Dobitoft v. Courteen.

26. Debt upon the ſtatute 2 E. 6. for not ſetting out tithes, the defendant pleaded *nil debet;* and this was *adjudged a good iſſue.* Hob. 218. pl. 285. Mich. 15 Jac. Bawtry v. Iſted.

Brownl. 52. Bawkey v. Iſted. S. C. and though exception was taken to the *venire facias*, becauſe it was of Horſted Parva, and not of the pariſh of Horſted Parva, yet judgment was given for the plaintiff, becauſe both the town and pariſh were named in the record, and the venire facias may be either of the town or pariſh.

27. In debt upon ſtatute 2 E. 6. of tithes, the plaintiff in his *declaration demanded more than the treble value did amount unto, and did not ſhew ſatisfaction for the reſt;* but all the Court held it good enough, for there is a *difference when an action is grounded upon a ſpecialty or a contract which is a certain ſum, or upon a ſtatute which gives a certain ſum for the penalty*, for there he may not vary from the ſpecialty. *But when the demand is of no ſum certain, but only ſo much as ſhall be given by a jury*, although he varies from the firſt valuation it is not material, for *he ſhall not recover according to his demand in his declaration, but according to the verdict;* judgment for the plaintiff. Cro. J. 498. pl. 6. Trin. 16 Jac. B. R. Pemberton v. Shelton.

2 Roll. Rep. 54. S. C. adjudged accordingly.—S. P. held accordingly, Comb. 283. Trin. 6 W. & M. in B. R. Auſtin v. Burſcoe.

28. In

An *information* was brought by *the queen only* u on this ſtatute, and the

28. In an action brought upon this ſtatute of 2 E. 6. it was *laid to be tam pro domino rege quam pro ſeipſo*, and upon exception taken thereto it was reſolved to be good; becauſe the king is to have a fine. Hetl. 121. Mich. 4 Car. C. B. Luvered v. Owen.

treble value was demanded, and adjudged that it lay not; for the ſtatute gives it to the party grieved, and not to the queen; and afterwards it was brought by the party grieved, and he had judgment to recover. Cro. E. 608. in pl. 9. cites it as ruled in the Exchequer in the time of Manwood, in the caſe of Wood v. Halton. —— Debt tam quam lies not on this ſtatute; for the * queen cannot have any benefit thereof, nor is it given to her by the ſtatute, but to the party grieved only, and thereupon the Court commanded judgment to be ſtayed. Cro. E. 621. pl. 11. Mich. 40 & 41 Eliz. B. R. Johns v. Carne. —— Mo. 911. pl. 1285. Anon. But ſeems to be S. C. held accordingly, and that action of debt non competit reginæ, but rather a fine for the contempt upon an information or indictment, the ſtatute being a prohibition not to carry away the tithes till the nine parts are ſevered.

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29. A *leaſe* was made *to two, they enter and occupy, and ſet not out their tithes, debt* was *brought againſt one* of them, it *lies not; but* here *it was found that one only occupied the land, and therefore the action well lies.* Hutt. 121. Mich. 8 Car. Cole v. Wilkes.

All. 80. S.C. reſolved accordingly. And it being further objected, that the plaintiff had intitled himſelf as proprietarius decimarum garbarum, and demands for tithe of grain in general, whereas garbarum is a word of uncertain ſignification, and divers ſorts of grain are not wont to be bundled up, as rape-ſeed, muſtard-ſeed, and cummin-ſeed, which uſed to be threſhed in the field; but reſolved that garba in its prime and proper ſignification is intended of corn; and ſo Roll ſaid it was reſolved in BAXTER'S CASE, upon conſultation with the civilians, where one upon a grant of decimas garbarum would have had tithe-hay; but they did agree that the word in its latitude did comprehend any thing that uſed to be bundled, as wood, &c. but the ambiguity of the word here is taken away by the verdict, and is to be intended of grain that is garbable. 2dly, The word grain is certain enough, for that it is expreſſed to be ſown upon a certain number of acres. —— Grano ſeminat' was held good without mentioning the quality of the grain. 13 Rep. 39 Eliz. Bedel v. Sherman.

30. Debt upon the ſtatute for not ſetting forth tithes; after verdict it was moved that the *declaration was* too general and uncertain, it being *for ſuch a quantity of grain, but did ſhew what ſort* of grain, *and ſo it may be for grain not titheable*, for the word *grain comprehends rape-ſeed, cole-ſeed*, &c. there is a very good authority that it comprehends *muſtard-ſeed;* but adjudged, that *the declaration was good, for it was for grain growing in ſuch a field;* and the word grain *in common underſtanding is taken for corn.* Styles, 103. 108. Trin. 24 Car. B. R. Southcott v. Southcott.

31. *In debt* upon the ſtatute 2 E. 6. for tithes, the *plaintiff declared, that he was rector of* M. A. *and by reaſon thereof ought to have the tithes of* 100 *acres of land in that pariſh, and of* 80 *acres of land in the pariſh of M. G. without ſhewing how he was entitled to the tithes of the lands out of his pariſh;* the Court held this to be *well enough after a verdict; beſides* that *a general allegation* without ſhewing a title *is well enough in this action.* Another exception was, that the plaintiff did not allege that the defendant was ſubditus domini regis, as the ſtatute requires; ſed non allocatur, becauſe it is alleged, that he was *occupator terræ*, which *implies that he was ſubditus.* Hardr. 173. Mich. 12 Car. 2. in Scacc. Phillips v. Kettle.

32. A *tenant in common of tithes brought debt* and declared *for the 20th part of the tithes.* Exception was taken that the tithe is but the 10th part; but per Windham J. though it be improper to the ſignification of the word, yet one may declare for the 20th part

of

of the tithes or the 15th part of them; for *the calling them tithes is only to ſhew and deſcribe the nature of the thing demanded.* Sid. 49. pl. 11. Mich. 13 Car. 2. B. R. Cole v. Banbury.

33. Debt for not ſetting out of tithes lies for *executor of parſon*, but not againſt executor of the pariſhioner; per Twiſden. Sid. 88. in pl. 5. Mich. 14 Car. 2. B. R. ſaid that ſo it was adjudged lately in C. B.

34. Where a ſuit was in the ſpiritual court *for double damages upon 2 E. 6. for not ſetting out of tithes, pending which ſuit defendant dies*, and then they *ſue the executors for double damages*; it was inſiſted for a prohibition, that this was a perſonal offence and tort of the teſtator, for which by the common law the executors ſhall not anſwer; and of this opinion were Windham and Keeling J. Sid. 181. pl. 20. Hill. 15 and 16 Car. 2. B. R. Weekes v. Truſſell.

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35. Debt upon the ſtatute 2 E. 6. for tithes, and declared, that he is rector of the churches of Dale and Sale, and the defendant occupied 400 acres of land in D. and S. ſowed them, and *took away the corn not tithed*; after verdict for the plaintiff it was moved in arreſt of judgment, that he *ſhould have ſhewn what part of the lands were in Dale, and what part in Sale*, ſo that the defendant might know how to anſwer particularly to each ſeverally, and perhaps he has good title to one church and not to the other; but per Hale Ch. J. and Cur. it is good, for the action is in nature of *treſpaſs* founded on the tort; and the exception diſallowed, and judgment given for the plaintiff. 2 Lev. 1. Paſch. 23 Car. B. R. Fellows v. Kingſton.

Vent. 126. S. C. by the name of Pellow v. Kingsford.

36. M. brought *debt as executor upon 2 E. 6. for not ſetting forth tithe due to his teſtator.* It was inſiſted that this action though for a forfeiture for a tort done to the teſtator was maintainable within the equity of the ſtatute 4 E. 3. that gives the executor treſpaſs de bonis aſportatis in vita teſtatoris; and the Court were clear of opinion for the plaintiff, and ſaid that it had been formerly reſolved ſo in the Exchequer-chamber. Vent. 30, 31. Paſch. 21 Car. 2. B. R. Juſtice Moreton's caſe.

Sid. 407. pl. 19. Morton v. Hopkins, S. C. & S. P. held accordingly, that ſuch action lies for executors, but not againſt executors.

37. If the *executor of a parſon* brings a *bill in Chancery* for tithes, he, not being entitled to the treble value by the ſtatute, need not *offer to accept the ſingle value*, as the parſon ſuing there ought to do if his bill be for carrying away the corn, &c. without ſetting forth the tithes according to the ſtatute. Vern. 60. pl. 57. Mich. 1682. Anon.

38. In debt upon the ſtatute 2 E. 6. for not ſetting forth of tithes; plaintiff *declared upon two leaſes, one of the parſon who had two parts, and another of the vicar who had the third part.* The *defendant pleaded not guilty, which was found againſt him.* It was moved in arreſt of judgment, that *not guilty* was no good plea, but nil debet; but *adjudged well enough.* Then it was *moved that the plaintiff ought to have brought ſeveral actions*, his title being by ſeveral demiſes; *ſed non allocatur; for that the ſuit was for the tort as well as upon the title*, ſo judgment was for treble damages.

Cro. J. 68. pl. 6. S. C. adjudged accordingly, and held the action well brought, in regard the plaintiff had both titles in him, and it is to have

the intire tithes.—— Noy, 3.

mages. Mo. 914. pl. 1293. Hill. 2 Jac. B. R. Sir Richard Champernoon v. Hill.

Champion v. Hill. S. C. reſolved accordingly; for it is perſonal, and one intire debt for one wrong. ——Yelv. 63. S. C. held accordingly.——Brownl. 86. S. C. ſeems only a tranſlation of Yelv.

Comb. 283. Auſtin v. Burſcoe, S. C. and judgment affirmed niſi.

39. In an action of *debt upon the ſtatute* 2 *E.* 6. *of tithes*, wherein the *plaintiff demanded the treble value*, &c. *Upon nil debet pleaded the plaintiff had a verdict* in C. B. and upon a writ of error brought in B. R. it was very much inſiſted on that the declaration was ill, becauſe the *plaintiffs had only alleged that the defendant had carried away the corn without ſetting out the tithes, but did not aver that the defendant had not made any agreement with them for the tithes*, for the ſtatute gives the penalty where the tithes are carried off without any agreement made for ſo doing; therefore if the defendant had agreed with plaintiffs for carrying off the corn without ſetting out the tithes, (as it does not appear but he might,) then it had been no forfeiture; and the Court was of that opinion, viz. that the declaration was ill for the reaſon ſupra if it had been upon a demurrer; but *this was helped by the verdict; for if there had been any agreement proved at the trial, the plaintiff could not have obtained a verdict.* Carth. 304. Paſch. 6 W. & M. in B. R. Alſton & al' v. Buſcough.

[73] 40. Suit in the ſpiritual court for tithes may be well brought *in name of the curate and ſequeſtrator.* 2 Lutw. 1066. Mich. 13 W. 3. Burton v. Cookerman.

(H. b) Count and Pleadings.

1. IT was awarded, that where *a lay man brings treſpaſs*, and the *defendant claims as lord of the parſonage for tithes*, the ſpiritual court ſhall not have juriſdiction, but ſhall anſwer in Banco. Br. Juriſdiction, pl. 10. cites 47 E. 3. 17.

2. The *bounds of a pariſh* were put in iſſue *in treſpaſs of ſheaves taken* where the defendant claimed them as his tithes as parſon of D. Br. Iſſues Joines, pl. 48. cites 50 E. 3. 20.

3. If a man *leaſes tithes* for years, rendering rent, there in debt he *ought to count that he was parſon, or* otherwiſe *convey to himſelf the tithes.* Br. Count, pl. 96. cites 10 H. 7. 21.

4. In a ſuit for tithes, *unleſs the plaintiff demands the ſingle value only*, the *defendant ſhall not be compelled to anſwer ſo as to diſcover the quantity and nature of prædial tithes*; Arg. Hardr. 137. Hill. 1658. in Scacc. ſays, that it had been often reſolved in this court, and that ſo it was adjudged here; 1 Jac. in caſe of Fenner v. Robinſon.

But in *debt on* 2 & 3 *Ed.* 6. *cap.* 13. the ſtatute gives

5. In *ejectment* of *tithes*, he muſt ſhew that it was by deed, becauſe that it cannot paſs without deed. Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swadling v. Piers.

the action to the proprietor, and when he names himſelf *proprietor*, he need not ſhew any other title. Roll. Rep. 13. pl. 16. Paſch. 12 Jac. B. R. Babington v. Mathews.——2 Bulſt. 228. S. C. adjudged, and Man Secondary informed the Court, that to ſay generally poſſeſſor, occupator, firmarius, &

or proprietarius, is good and ſufficient pleading upon this ſtatute, which gives the action to the proprietor, and that ſo it had been ſeveral times adjudged.

(I. b) Suits in the Eccleſiaſtical Court allowed or not. In what Caſes.

1. 9 *E.* 2. *cap.* 1. *FOR tithes, oblations, obventions or mortuaries, when they are propounded under thoſe names, the king's prohibition ſhall not hold place, albeit for the long with-holding of them they come to a pecuniary eſtimation, but if an eccleſiaſtical perſon lodge his tithes in his barn, and then ſell them for money, if that money be demanded before a ſpiritual judge, for this a prohibition lieth; for by the ſale they are temporal.*

2. 9 *E.* 2. *cap.* 2. *If debate ariſe upon the right of tithes, (having his original from the right of the patronage,) and the quantity of the ſame tithes do amount to a fourth part of the goods of the church, for this a prohibition lieth; but if a prelate injoin corporal penance, and the party afterwards commutes for money, that money is recoverable in the court chriſtian, and in that caſe a prohibition lieth not.*

3. 9 *Ed.* 2. *cap.* 5. *No prohibition ſhall be granted where tithes are demanded of a* new mill.

4. Where a man *will not tithe his corn*, ſuit lies in the ſpiritual court; but where he *ſevers the tithes* from the 9 parts, *and a man carries it away*, treſpaſs lies at the common law. Br. Diſmes, pl. 6. cites 38 E. 3. 6. [74]

5. *Treſpaſs by a lay man againſt W. N. clerk, of corn taken*, the *defendant ſaid that he is parſon there*, and the place is within his pariſh, *and the corn were tithes ſevered from the 9 parts*; judgment if the Court will take conuſance; et non allocatur; for a *lay man by intendment cannot have tithes*; by which he ſaid, that debate was in the ſpiritual court between him and the prior of D. who claimed tithes there, and the ſaid W. N. ſaid, that the prior himſelf was ſeiſed of the land, and infeoffed another, ſo that in his own land he could not have tithes, by which judgment was given for W. N. and after the plaintiff claiming by the prior got poſſeſſion, and the defendant took them as his tithes; judgment if the court will take conuſance; and no plea, but the defendant was compelled to anſwer over, becauſe the plaintiff was a lay man. Br. Juriſdiction, pl. 6. cites 42 E. 3. 12.

6. *Aſſiſe of novel diſſeiſin* was maintained of tithes as of lay profit apprender, and was brought *by a prior*, and therefore the defendant demanded judgment if the Court would take conuſance, and yet the aſſiſe was awarded to inquire of the truth; and there Ludlow ſaid, that *in ancient time every man might grant his tithes to what church he would* quod verum eſt, *and of ſuch tithes the juriſdiction belongs to the ſpiritual court notwithſtanding the grant.* Br. Diſmes, pl. 1. cites 44 E. 3. 5.

7. *But* where a man *grants the tenth part over and above the tithes which he ought to pay to the church*, there of this the lay court ſhall have juriſdiction. Br. Diſmes, pl. 1. cites 44 E. 3. 5.

8. 45 *E.* 3. *cap.* 3. *A prohibition (and an attachment thereupon) ſhall be granted, where a ſuit is commenced in the ſpiritual court for the tithes of underwood above twenty years growth in the name of ſilva cædua.*

9. 27 *H.* 8. 20. *Perſons* ſubſtracting *tithes ſhall be convened before the ordinary, and bound over by two juſtices to obey the ſentence.*

10. A man ſhall have prohibition *upon a ſurmiſe*, and ſo it was agreed 31 H. 8. that if a man be *ſued* in the ſpiritual court *for tithes of ſeaſonable wood*, the party grieved may make *ſuggeſtion* in Chancery or in B. R. *that he is ſued in the ſpiritual court for tithes of great trees which is paſt the age of* 20 *years, by name of ſilva cædua, which is ſeaſonable wood* uſed to be cut *where in fact it is great trees*, and pray a prohibition, and ſhall have it. Br. Prohibition, pl. 17. cites F. N. B. 43. and H. 31 H. 8.

11. 2 & 3 *E.* 6. *cap.* 13. *ſ.* 13. *Perſons ſued in the ſpiritual court, and not obeying the ſentence, ſhall be* excommunicated, *and the writ of excommunicato capiendo ſhall iſſue.*

12. *Where it appears by libel that the eccleſiaſtical court ought to hold plea*, there *prohibition* of the king *does not lie. Contra where it appears that they ought not to hold plea.* Br. Diſmes, pl. 14. cites Doct. & Stud. lib. 2.

13. Where there is *no parſonage* houſe or *barn*, and a *diſpute* is *about a way by which the tithes ſhould be carried*, the way to *plead* is, that J. S. is ſeiſed in fee of the rectory of D. and that time out of mind he and thoſe, &c. have uſed for them and theirs formerly to have a way to carry their tithes from ſuch a place over the land where, &c. unto ſuch a highway, and name the way which is the next to the place where the treſpaſs was done. 2 Le. 10. pl. 13. Mich. 19 & 20 Eliz. B. R. Anon.

Le. 128. pl. 175. S. C. cited accordingly.

14. Spiritual court cannot try an *agreement between the parſon and pariſhioners* for tithes. Arg. Cro. E. 136. Trin. 31 Eliz. in caſe of Gomerſal v. Biſhop, ſays, it was ſo ruled in the caſe of Pendleton v. Hunt.

[75]

Mo. 907. pl. 1268. Paſch. 36 Eliz. B. R. Fryer v. Beſtney. S. P.

15. The ſpiritual court will not allow of any plea for a *modus decimandi*. Per Coke Arg. Cro. E. 511. pl. 35. Mich. 38 & 39 Eliz. B. R. in caſe of Wright v. Wright.

Mo. 911. pl. 1284. S. C. accordingly, and no conſultation granted.

16. It was ſurmiſed for a prohibition, that the parſon or proprietor of the rectory and his predeceſſors had 20 acres of paſture, and 20 acres of wood, in ſatisfaction of tithes. If the witneſſes *prove the* 20 *acres of paſture, but do not prove the* 20 *acres of wood*, it is proof ſufficient; for the ſubſtance is proved, that he held land in ſatisfaction. Cro. E. 736. pl. 4. Hill. 42 Eliz. B. R. Auſten v. Pigot.

Ibid. ſays that Doderidge ſaid, that Mich. 34 & 35 Eliz. Bird v. Col-

17. On a prohibition, *plaintiff ſurmiſed a cuſtom time out of mind to pay* 3*s.* 4*d. for all great tithes, except corn, growing on* 70 *acres of land, and made proof by two witneſſes according to the ſtatute; but they teſtified*, that *the cuſtom* was *to pay* 4 s. yet a prohibition was awarded; for though he had failed in proof of the preſcrip-

tion, yet *ſo much is proved, that the ſpiritual court had no cauſe to proceed for tithes in ſpecie.* D. 171. a. marg. pl. 6. cites Mich. 42 & 43 Eliz. Rot. 227. B. R. Webb v. Beal. LINGWORTH, a conſultation was awarded in ſuch caſe,

but Popham anſwered, that the opinion of the juſtices of C. B. now is e contra; for *when a modus decimandi is furniſhed to be in one manner, and it is proved to be in another* manner, *we ought not to award a conſultation* to give them authority to ſue for tithes in kind, *but only to ſue for tithes in ſuch kind as is proved.*

18. *Libel for tithes of cows and calves*, &c. the *defendant ſuggeſted a modus to pay a halfpenny for the tithes of every calf, and* 1 *d. for a cow, and that upon a certain day they uſed to bring thoſe tithes to the church, and there pay them to the vicar, who libelled now to compel them to bring the tithes to his houſe.* It was held by Winch (he only being in court) that ſince they agree in the modus, and differ only in the place of payment, that is not matter of ſubſtance, and therefore no prohibition will lie. Win. 33. Trin. 20 Jac. C. B. Anon.

19. Where the *right of tithes comes in queſtion*, a prohibition ſhall not be granted; per Ley Ch. J. and Doderidge J. 2 Roll. Rep. 440. Trin. 21 Jac. B. R. in caſe of Gwynn v. Merryweather.

20. It belongs to the ſpiritual court to determine *who ſhall pay tithes for agiſtments*, whether the owner of the land, or the proprietor of the cattle. Jo. 254. pl. 5. Hill. 7 Car. B. R. Facy v. Longe.

21. A *conſultation was prayed upon a ſuit for tithes of two mills* in Newcaſtle, *ſuggeſting that they were ancient*, and per Curiam, *this nor no other ſuggeſtion, but only of a modus, need not be proved within ſix months*, by the ſtatute 2 E. 6. cap. 13. and Twiſden ſaid he knew it thus ruled heretofore in this court, and this is on a diſcharge at common law, and on reading the ſtatute, though the words were general, yet the Court would not grant conſultation for this cauſe, but ordered that if the plaintiff did not declare on his ſuggeſtion, the defendant appearing thereto, a conſultation ſhould go by the firſt day of the next term. 2 Keb. 134. pl. 100. Mich. 18 Car. 2. B. R. Eaton v. Naylor.

22. Upon the ſuggeſtion of a modus, the Court uſes to grant a prohibition without *notice given to the other party*. Freem. Rep. 78. pl. 95. Trin. 1673. Anon.

23. A prohibition was prayed to ſtay a ſuit for *tithes of wood*. The *plaintiff ſuggeſted he had a houſe in the pariſh, and that the wood was cut for fuel burnt in his houſe.* But the Court ſaid, that this would not ſerve unleſs it were *expreſſed, that the houſe was for maintenance of huſbandry, by reaſon of which the parſon had uberiores decimas.* Vent. 75. Paſch. 22 Car. 2. B. R. Tilden v. Walter. Sid. 447. pl. 8. S. C. held accordingly. —— Mod. 150. pl. 105. S. C but not appear. S. P. does not appear. —— 2 Keb. 628. pl. 31. Tilders v. Walker, S. C. & S. P. per Curiam.

24. The eccleſiaſtical court cannot *try a modus*, though the original ſuit be for a modus, becauſe the preſcription differs; but if the queſtion be *payment or non-payment*, then they may proceed; per Holt Ch. J. Cumb. 427. Trin. 9 W. 3. B. R. Godfrey v. Mathews. [76]

See tit Prohibition (F) pl. 17. 20. (M) pl. 9. (Q) pl. 14, 15. (U) pl. 1. and the notes at the ſeveral places.

25. One may libel in the ſpiritual court for *tithe of rakings of corn*, if it *never was gathered into ſheaves;* but otherwiſe after corn has been gathered into ſheaves, and there was *no fraud* in the gathering, and prohibition would lie; per Holt. 12 Mod. 235, 236. Mich. 10 W. 3. Anon.

The juriſdiction ariſing to the ſpiritual court by matter diſcloſed in the libel cannot be taken from them, but by other matter diſcloſed in the plea, and therefore in the principal caſe, which was a libel for tithe of ſilva cædua, *the ſuggeſtion that they were timber trees, and of 20 years growth, ought to have been ſet forth in the plea*; and a prohibition was denied. Barnard. Rep. in B. R. 71. Trin. 2 Geo. 2. Bouton v. Hurſter.

26. The *ſpiritual court has general juriſdiction of tithes, and if any ſpecial matter deprives them of their juriſdiction, it muſt be pleaded there; as* in caſe of a ſuit there *for tithes of faggots cut from the ſtumps of timber trees above the growth of* 20 *years;* if this had been pleaded there, and iſſue joined upon it, and on the trial it had been found not to be ſilva cædua, it had been well; but *if they had refuſed to admit the plea, a prohibition ſhould be granted.* 2 Ld. Raym. Rep. 835. Mich. 1 Ann. Dike v. Brown.

(K. b.) Where the Parſon ſhall have them; and where the Vicar.

Before this council there were no pariſhes, nor pariſh prieſts that could claim tithes, but a man might give them to what ſpiritual perſon he would, but to the church he muſt give them; but ſince pariſhes were erected they are due to the parſon (except in ſpiritual regular caſes) or vicar of the pariſh; per Hobart Ch. J. Hob. 296. in caſe of Slade v. Drake.

1. BEFORE the *council of Lateran*, men might have given their tithes where they pleaſed, and by this council they ſhall give it only to the curate of the pariſh where they grow or come. Br. Diſmes, pl. 21. cites 10 H. 7. 18.

2. *Libel, &c. by the parſon for tithes in ſpecie in the pariſh of N.* The *defendant for a prohibition ſuggeſted, that he was an inhabitant in the pariſh of S. and that time out of mind every inhabitant there had paid tithes for their lands which they had in the pariſh of N. to the vicar of S. and that the vicar of S. had paid to the parſon of N. 2d. for every acre.* The Court held that a prohibition lay, and it is as if he had preſcribed to pay 2 d. for every acre. Cro. E. 136. pl. 4. Trin. 31 Eliz. Coteford v. Peaſe.

3. If a *vicar is endowed of tithe-hay*, and *the land is ſown with corn*, the parſon ſhall have tithe in kind, and when the ſame is in hay, the vicar ſhall have the tithe-hay. Godb. 194. pl. 278. Trin. 10 Jac. C. B. Brown's caſe.

4. A modus pleaded *to pay ſo much to the parſon in diſcharge of tithes claimed by the vicar*, was diſallowed; and per tot. Cur. a conſultation was granted. 3 Bulſt. 220, 221. Mich. 14 Jac. Wintel v. Child.

5. *Alteragium* will paſs tithe-wool, &c. to the vicar; certified by the doctors. Win. 70. Hill. 21 Jac. C. B. in caſe of Bret v. Ward.

[77] 6. *Payment is evidence of endowment* of a vicarage, and no man can prove other endowment; per Cur. 2 Keb. 729. pl. 13. Hill. 22 & 23 Car. 2. B. R. Brigham v. Robſon.

7. A

7. A *modus to the rector* is a *good diſcharge againſt the vicar*; per Cur. Mod. 216. in pl. 3. Trin. 28 Car. 2. C. B. Anon.

8. A *ſuit* was in the ſpiritual court *by the vicar againſt the leſſee of the impropriator of a rectory for the ſmall tithes* of the pariſh, *and the hay-tithe of the glebe, which the vicar claims by preſcription and endowment.* Eyre Ch. J. held it to be good, becauſe the glebe may be charged by an expreſs and particular charge. Gibb. 79. Trin. 2 & 3 Geo. 2. C. B. in caſe of Barton v. Hollis.

(L. b) What Words will paſs or extinguiſh Tithes.

1. *RELEASE of all right of land* is no extinguiſhment of tithes. Le. 248. pl. 336. Mich. 33 Eliz. B. R. Lincoln (Biſhop) v. Cowper. Cro. E. 216. pl. 13. S. C. & S. P.— Le. 300. pl. 411.

Trin. 31 Eliz. B. R. Stile v. Miller. S. P.—Ow. 39, 40. Stile v. Miles. S. C. & S. P. per Wray.

2. If the *king makes a grant of tithes, all ſorts of tithes paſs thereby.* Hardr. 305. Arg. cites it as held clearly. Paſch. 12 Car. 2. C. B. in caſe of ESSINGTON v. BARKER; and ſays, the doubt in that caſe was occaſioned by a *videlicet in the grant*, viz. of ſuch and ſuch things; and the queſtion was, whether tithes of other things which were not named would paſs? but if the viz. had been out of the caſe, there would have been no ſcruple, but that all ſorts of tithes had paſſed.

(M. b) Equity.

1. LORD Chancellor declares that matters for *tithes* are *determinable in this court.* Toth. 282. cites Moone v. Bond. 3 Eliz. li. A. fo. 621.

2. A *demurrer* becauſe the matter concerneth tithes *over-ruled* and ordered. Toth. 283. cites Windham v. Noris. 17 Eliz. li. a. fol. 282.

3. Cuſtom proved of 16 pence an acre for tithe of wood, and no wood in kind, yet the Court would not decree a cuſtom. Toth. 111, 112. cites 38 Eliz. Wingfield v. Bedford.

4. A bill for the manner and cuſtom of tithing diſmiſſed. Toth. 113. cites 10 Jac. Knivet v. Freeman.

5. Point of tithes *determinable in this court, and parcel or not parcel.* Toth. 283. cites Decanus & Capit' Eccleſiæ Chriſti in Oxon. v. Grant, June 11 Jac.

6. Bill *to eſtabliſh certain cuſtoms of tithing* within a particular pariſh which never had been tried. The bill diſmiſſed as not proper for equity. N. Ch. R. 10. 5 Car. 1. Gawle v. Lake.

7. Tithes *in kind decreed*, notwithſtanding a decree in Lord Bacon's time. Toth. 131. cites 12 Car. Farmer v. Troſt.

8. A decree for *tithe conies* and *wood.* Toth. 132. cites 13 Car. Shires v. Burgaine.

9. In an *information* in the Exchequer Chamber *by Engliſh bill for ſmall tithes appertaining to the rectory of S. in D. The defendant in his anſwer did not admit the plaintiff's title, but alleged an extinguiſhment of the tithes by unity of poſſeſſion.* And the *plaintiff made no proof of the value of the tithes, nor what cattle had been depaſtured in the place where,* &c. and for that cauſe *the Court,* upon hearing of the cauſe, *refuſed to direct a trial at law, becauſe no particular damnification appeared to them* whereon to ground a decree for the plaintiff, if the verdict ſhould paſs for him; and hereupon the bill was diſmiſſed. Hardr. 4. pl. 3. Trin. 1655. The Att. Gen. v. Straite.

10. Upon a *bill* in equity *for tithes of corn and grain,* and a *demurrer* to it *becauſe the ſingle value was not barely demanded, but it was a bill of diſcovery only to enable the plaintiff to recover the treble value;* ſed non allocatur; for that tithes were ſuable for in this court before the ſtatute; quod nota & quære, becauſe it is contrary to the common practice and uſage, to have ſuch a bill without alleging that the plaintiff is contented to receive the ſingle value only. Hardr. 190. pl. 18. Paſch. 13 Car. 2. in Scacc. Driver v. Mann.

Hardr. 110. Mich. 1658. in the Exchequer, Button v. Honey. S.P. and the exception was over-ruled, becauſe the defendant by his anſwer admitted him to be

11. In a *bill for tithes* due to the complainant *as vicar and incumbent of* ——— in Eſſex; the *complainant did not ſhew how he was intitled* to them, viz. by preſcription, endowment, or otherwiſe. And the *Court held it to be good notwithſtanding,* as well as in an action at law for tithes upon the ſtatute of 2 E. 6. where the plaintiff is not obliged to ſet forth his title. But the reporter adds, quod nota, for it is againſt ſeveral precedents in this court, which he ſays he has known, of demurrers for that cauſe held to be good. Hardr. 321, 322. pl. 4. Hill. 14 & 15 Car. 2. Stone v. Ludlow & al'.

vicar, and that the tithes in queſtion were his due, but inſiſted only upon payment and ſatisfaction. But there is a note added, that it has been often ruled contrary, it being the ground and foundation of the plaintiff's title.

12. Chancery will *not decree a rate-tithe,* though it was inſiſted that it was frequent to do ſo in the Exchequer. Chancery Caſes, 187. Mich. 22 Car. 2. Buſh v. Riſhley.

13. A bill was exhibited for tithes, and *the juriſdiction of the Court demurred to; but the demurrer over-ruled,* and the defendant ordered to anſwer. And it was ſaid by Finch Lord Keeper, that the court of Exchequer did not hold plea by Engliſh bill until the ſtatute of 33 H. 8. cap. 39. Freem. Rep. 303. pl. 371. Trin. 1674. in Chancery. Anon.

Ld. Chan. cuſtor declared that this Court had cognizance of tithes as

14. Sir John Churchill as amicus curiæ ſaid that a ſuit for tithes, eſpecially *ſmall tithes,* was not proper in Chancery, and had not been uſed; yet Finch C. pronounced a decree for them, the bill for refuſal to anſwer being taken pro confeſſo. 2 Chan. Caſes, 237. Mich. 29 Car. 2. Anon.

well as the Exchequer, and that the plaintiff had electionem fori. 2 Freem. Rep. 27. pl. 29. Anon. ſeems to be S. C.

15. Bills

15. Bills to eſtabliſh a *modus decimandi* have been ſeveral times diſmiſſed, but where it is only to preſerve teſtimony North K. thought it reaſonable that the defendant ſhould anſwer, and overruled the demurrer. Vern. 185. pl. 184. Trin. 1683. Somerſet v. Fotherby.

S. P. as to the eſtabliſhing the modus, and demurrer allowed. Chan. Rep. 27. 4 Car. 1. Browne v. Thetford. ——— Such bills have been ſeveral times allowed; agreed by counſel and Court; but the bill being likewiſe to compel the parſon to give receipts on payment of the modus, it was diſmiſſed at the Rolls. Mich. 1738. Wood v. Farrington. ——— It was formerly doubted whether a bill in equity would lie to eſtabliſh a modus or cuſtomary manner of paying tithes, eſpecially if the cuſtom had not been found good at law; and ſometimes on a demurrer to ſuch bills they have been diſmiſſed; but the conſtant practice now is, to retain ſuch bills * and to decree on the pleadings, or to direct a particular point to be tried at law, concerning the reality of ſuch a cuſtom, or the legality of it. Equ. Abr. 367. (B) in the note in marg. againſt pl. 1.

*[79]

16. Bill to be relieved for *tithe oar*; the Court directed a trial, if any, and what cuſtom within the townſhip. 2 Vern. 46. pl. 43. Paſch. 1688. Buxton v. Hutchinſon.

17. In a bill for tithes brought *in the Exchequer*, though the right be ever ſo plain, yet *the decree* there *is, that he ſhall account and pay what tithe is due to the time of bringing the bill*, but *not that he ſhall pay* tithes *for the future; but in Chancery* it is to *the time of the decree*. 2 Wms.'s Rep. 463. in a nota there ſays that it was ſaid and admitted. Trin. 1728, in caſe of Carleton v. Brightwell.

The editor makes a quære, if this be the eſtabliſhed rule of Chancery, or done only of late in ſome few inſtances. Ibid.

For more of Diſmes [or Tithes] in general ſee tit. **Glebe, Preſentation** (C.), &c. **Prohibition**, and other proper titles.

Diſſeiſin.

(A) Diſſeiſin *of* a *Rent*.

[And where it is by one it ſhall be ſaid to be by others.]

[1. IF I have a *rent-charge* iſſuing *out of lands of which there are ſeveral tertenants*, and I *diſtrain* upon any of the lands, and *one of the tertenants makes a reſcous without the conſent of the others*, yet the others are diſſeiſors alſo, for the diſtreſs is a demand in law, and the non-payment a denial, and ſo a diſſeiſin. 39 Aſſ. 4. adjudged.] Fol. 658.

Br. Diſſeiſin, pl. 60. (50) cites S. C. and though one only made the reſcous, that all were adjudged diſſeiſors. Br. ſays that it ſeems the reaſon is, becauſe all of them detained the rent. ——— Fitzh. Aſſiſe, pl. 335. cites S. C. & S. P. but he that made the reſcous only was awarded to priſon. ——— Ibid. pl. 339. cites 40 Aſſ. 3. S. P. ——— Co. Litt. 161. b. S. P. as to a reſcous by one jointenant, but he that made the reſcous is only the diſſeiſor.

[2. If

* Br. Diſſeiſin, pl. 60. cites S. C. ——Fitzh. Aſſiſe, pl. 335. cites S. C.

[2. If the *grantee of a rent-charge demands the rents*, and after *diſtrains*, and a *ſtranger without the aſſent of the tenant makes reſcous*, yet this is a diſſeiſin in the tenant, for the non-payment was a denial, and the diſtreſs has not waived this diſſeiſin. The caſe aforeſaid of 39 Aſſ. 4. proved this. * 29 Aſſ. 51. dubitatur.]

[3. If he who ought to have a rent-charge *comes to the proctor of the tenant of the land out of which the rent iſſues, and demands the rent, and he refuſes* to pay it, this is a diſſeiſin. 18 E. 3. Aſſiſe, 78. adjudged.]

Br. Diſſeiſin, pl. 60. (50.) cites S. C.—— See ſupra, pl. 1.

† [80]

[4. If I have a rent-charge iſſuing out of land, of which there are ſeveral tertenants, a *demand upon the land in the poſſeſſion of one of the tenants, and non-payment*, is a diſſeiſin by all, for all † the rent iſſues out of every part. 39 Aſſ. 4. admitted by the judges.]

5. It was ſaid that *detainer* of *rent-charge* is a diſſeiſin, but not of *rent-ſervice*, quod nota. Br. Diſſeiſin, pl. 17. cites 3 Aſſ. 8.

6. Aſſiſe of rent-charge againſt A. and B. in B. R. the aſſiſe ſaid, that the plaintiff was ſeiſed and *came to diſtrain*, and *A. would not ſuffer him*, and after *A. aliened to B.* and the *plaintiff demanded the rent of B. and he would not pay it*, and both were awarded diſſeiſors, and the *diſſeiſin* of A. was *with force and arms*, and *countervails reſcous*, and that *B. is a diſſeiſor by his contradiction*, by which the plaintiff recovered, quod nota. Br. Diſſeiſin, pl. 23. cites 9 Aſſ. 7.

7. In aſſiſe it was awarded a ſufficient cauſe of diſſeiſin of rent, becauſe the *tenements* out of which the rent is iſſuing were ſo *incloſed that the lord could not enter* to diſtrain for the rent, quod nota. Br. Diſſeiſin, pl. 58. cites 36 Aſſ. 7. & concordat Littleton tit. Rents.

Br. Diſſeiſin, pl. 2. cites S. C. —In aſſiſe, the beſt opinion was, that if a man has *rent iſſuing out of three acres of land incloſed in a park of ancient time*, and *comes to diſtrain and cannot for the incloſure*, and the *tenant denies to let him enter*, that this is no diſſeiſin; for denier is no diſſeiſin for rent-ſervice, and the incloſure which is the cauſe, was not done by this now tenant. Br. Diſſeiſin, pl. 88. cites 49 Aſſ. 6.

8. In aſſiſe it was held by Parle that if *rent iſſues out of* certain *land* which is *incloſed in a park of ancient time*, ſo that none can come to diſtrain becauſe the gate is always locked, that of this incloſure aſſiſe does not lie, becauſe it is not incloſed for this purpoſe, and alſo it was made of ancient time, ſo that the ſeiſor is dead; therefore quære, where a man at this day keeps ſuch land incloſed of ancienty, and the rent is demanded, if he ſhall not be a diſſeiſor as well by the keeping it incloſed, as if he himſelf had incloſed it. Br. Seiſin, pl. 6. cites 49 E. 3. 15.

9. *Aſſiſe of rent* by prioreſs which was *taken for default*, and ſhe made title as to the rent-ſervice, and it was found that the tenant held of the prioreſs, and that the houſe was never out of poſſeſſion, but the predeceſſors had been ſeiſed of land, &c. And that the *bailiff* of the prioreſs *came to diſtrain*, and the *tenant ſaid, that he ſhould have no rent nor diſtreſs there before he had recovered it by law, by which he dared not to diſtrain for doubt of death.* And the ſeiſin

in the time of her predeceſſors is taken as well as ſeiſin in her own time. And *this menace is* taken a good diſſeiſin, and this in the time of this plaintiff, and therefore ſhe recovered by award. And ſhe recovered likewiſe upon the like title in three other aſſiſes. Br. Aſſiſe, pl. 39. cites 46 E. 3. 14.

10. *And* where a man *comes to enter* into land *where he has right* of entry *and makes his claim, and dares not enter for fear of death*, it ſhall be adjudged ſeiſin, and diſſeiſin by this claim, quod nota, per Perſey. Ibid.

11. Denier is a diſſeiſin of *rent-charge or* rent-*ſeck*, but *not of rent-ſervice* unleſs there were a reſcous made; note the diverſity. Br. Diſſeiſin, pl. 8. cites 8 H. 6. 58.

Denial is a diſſeiſin of a rent charge as well as of a rent-ſeck; albeit he may diſtrain for the rent charge as well as for a rent-ſervice. Co. Litt. 161. b.

So if none be ready upon the land *to pay it*, when it is demanded, &c. Br. Diſſeiſin, pl. 103. cites Littleton, tit. Diſſeiſin.

12. If the lord is going to the land holden of him to diſtrain for the rent behind, and the tenant hearing this encountereth with him, and *foreſtalls him in the way with force and arms, or menaces him* that he dare not come to the land to diſtrain for his rent behind, for doubt of death or bodily hurt, this is a diſſeiſin, becauſe the lord is diſturbed of the mean whereby he ought to come to his rent. Litt. ſ. 240.

13. There be *three cauſes of diſſeiſin of rent-ſervice*, viz. *reſcous, replevin, and encloſure*. Litt. ſ. 237. [81] You may make *ſix*

diſſeiſins of a rent-ſervice, viz. *reſcous* of a diſtreſs, *reſiſtance* to diſtrain, *replevin, incloſure, counterpleading* of the title, and *vouching of a record, and failing*. Co. Litt. 160. b.

Denier is no diſſeiſin of a rent-ſervice without *reſcous* or *reſiſtance*. Co Litt. 161.

14. If by foreſtalling or *menacing*, he that has a rent-charge or rent-ſeck is foreſtalled, or dare not come to the land to aſk the rent behind, it is a diſſeiſin. Litt. ſ. 240.

15. *Denier of rent-charge upon the* * *land* is a diſſeiſin. *Contra if it be off from the land*, quod non negatur. Br. Diſſeiſin, pl. 69. cites 14 E. 4. 4. * Orig. is (tenant).

16. *And* if *leaſe* be made *rendering rent, and for default* of payment *a re-entry* there if the tenant denies the rent upon the land, the leſſor may re-enter, but contra off from the land; *quære* inde. Br. Diſſeiſin, pl. 69. cites 14 E. 4. 4.

17. If a man grants a *rent-ſeck out of land in one county payable at a certain day and place in another county*, and the grantee is ſeiſed thereof, if the *grantee comes to the place appointed for the payment*, and there demands the rent upon the day accordingly, if the rent be denied this is no diſſeiſin of the rent, as it ſhall be upon a denial upon the land where the rent is payable upon the land. Plowd. Com. 71. a. an inference by the reporter from what went before. Hill. 4 & 5 E. 6. in caſe of Kidwellie v. Brand. The father granted a rent-ſeck of 4 l. per ann. to B. his ſon, iſſuing out of a houſe called the Unicorn in L. payable at Lady-day and Michaelmas, at the houſe of the ſaid B. in L. to begin at Michaelmas after his deceaſe, and gave 6 d. in name of ſeiſin. The jury found the grant and the ſeiſin, and the demand at the ſaid houſe called the Unicorn, and that none was there to pay it. Reſolved it was a good demand, being made at the ſaid houſe out of which it was iſſuing, though not made at the houſe where it was payable, and a diſſeiſin for non-payment of it. Cro. C. 507. pl. 12. Trin. 14 Car. B. R. Smith v. Smith.

18. Diſſeiſin

3 Rep. 85. a.—2 Sid. 75.

18. Diſſeiſin *cannot be* of rent but *at a man's pleaſure*. Kelw. 113. a. pl. 46. Caſus incerti temporis.

19. Note, that when books ſay that a *detainer* of a rent-charge or ſeck is a diſſeiſin, it muſt be intended *upon a demand* made. Co. Litt. 161. b.

Incloſure is a diſſeiſin of a rent-ſeck, becauſe the grantee cannot come upon the land to demand it. Co. Litt. 161. b.

20. *There be two cauſes of diſſeiſin of a rent-ſeck*, viz. *denial and incloſure*. Litt. ſ. 239.

21. The Mirror ſaith, that *diſturbance of one that is in peaceable poſſeſſion* doth amount to diſſeiſin; as if the *lord* that is in quiet poſſeſſion of his rent cometh to diſtrain, and is by the tenant *diſturbed ſo as he cannot take a diſtreſs*, this diſturbance is a diſſeiſin of the rent. 2 Inſt. 414.

And though a replevin be brought, and thereupon the ſheriff makes a re-delivery of the diſtreſs to the party by the courſe of law, yet this is a diſſeiſin of the rent-ſervice, becauſe by the reſcue and the ſuing the replevin the lord is diſturbed of the means by which he ought to have and come at his rent, viz. of the diſtreſs. Litt. 161. a.

22. So when the lord taketh a diſtreſs, and the tenant pays not his rent, but diſturbs him by unjuſt ſuit of a *replevin*. 2 Inſt. 414.

You may *add a fifth*, viz. *reſiſtance* to diſtrain, *counterpleading* and *vouching a record and failing*. Litt. 161. b.

23. There are four cauſes of diſſeiſin of a *rent-charge*, viz. *reſcous*, *replevin*, *incloſure and denial*; for a denial is a diſſeiſin of a rent-charge, as is ſaid before of a rent-ſeck. Litt. ſ. 238.

[82]

24. A *diſtreſs* for the rent is a demand in law, and then the *non-payment is a denial and diſſeiſin*. Co. Litt. 161. b.

25. Whereſoever there is a lawful demand of a rent, and the ſame is not paid, whether the tenant be preſent or abſent yet this is a denial in law although there be no words of denial. It appears here that the demand muſt be made upon the land, and although the tenant or any for him be there, yet muſt the grantee demand it, becauſe *without a demand there can be no denier* in deed, nor any in law. Co. Litt. 153. b.

(A. 2) Of what Eſtate it may be. Particular Eſtate.

1. IF one who is only *leſſee for years enters upon him that has a good title*, he is a diſſeiſor of all the fee-ſimple; per Anderſon and Periam J. Goldſb. 43. in pl. 22. Mich. 29 Eliz.

If the *king's leſſee for years* be ouſted by a ſtranger, yet the reverſion being in the king, he cannot be out of poſſeſſion but at his pleaſure. Cro. E. 34 Eliz. C. B. Wingate v. Mark.

2. Note, it was ſaid by Sir Francis Bacon the king's ſolicitor, that it was adjudged the 40 Eliz. in the Exchequer, that where *leſſee of the king for life* was ouſted by a ſtranger, it ſhould be ſaid a diſſeiſin of the particular eſtate, againſt the common maxim, that a *diſſeiſin cannot be of a leſs eſtate than a fee-ſimple*. Godb. 138. pl. 166. 40 Eliz. in the Exchequer.

(A. 3) What Poſſeſſion is an Impediment of a Diſſeiſin.

1. IF A. is ſeiſed of a *great cloſe* where, &c, and a *ſtranger enters and occupies part*, but A. continues in the poſſeſſion of the reſidue, he ſhall be judged in poſſeſſion of the *reſidue*, becauſe it is an entire thing, cites 4 E. 4. 2. 8 E. 3. 13. Seiſin of part of the ſervices is ſeiſin of the whole, cites Betſworth's caſe. 2 Rep. Brownl. 230. Mich. 11 Jac. in Dame Pett's caſe.

2. The *poſſeſſion of a houſe* is the poſſeſſion *of the land* for the leſſee againſt the leſſor of that which paſſes by one demiſe; but if a *ſtranger enters ſevers, and parts by metes and bounds*, nothing is wrought by the poſſeſſion of the reſidue. Arg. Brownl. 230. Mich. 11 Jac. in Dame Pett's caſe.

3. If *conuſor of a ſtatute* continues to keep poſſeſſion after the return of *liberari feci*, the conuſee's eſtate is turned to a right like the caſe of diſſeiſee's making continual claim as ſoon as ever the *diſſeiſee* leaves the premiſes, the continuance of poſſeſſion by the diſſeiſor make a freſh diſſeiſin. See 1 Inſt. 156. Litt. 129. and this is not like the caſe of *mortgagor* who continues in *by conſent* and not in oppoſition to the mortgagee; per Holt Ch. J. 2 Salk. 563. pl. 1. Trin. 3 W. & M. in B. R. Hammond v. Wood.

4 Mod. 48. Hannam v. Woodford. S. C. held accordingly. —— Skinn. 300. pl. 4. S. C. held accordingly; per Holt Ch. J. and Eyre J. —— 3 Lev. 312. Stephens v. Hannam, held accordingly.

(A. 4) What is a Diſſeiſin; and what an Abatement; and Pleadings in ſuch Caſes. [83]

1. *ENTRY ſur diſſeiſin* by D. againſt A. who ſaid that actio non, for he ſaid *that T. was ſeiſed and infeoffed two who gave to the baron who is dead, and to this feme tenant then his feme in tail*, and gave *colour*, and the *plaintiff ſaid, that before the donors any thing had, L. was ſeiſed in fee, and gave to his father and mother in tail, who had iſſue the demandant, and the father died, and the mother ſurvived and died proteſtando ſeiſed, and the ſaid T. abated and infeoffed the donors named in the bar*, and the *tenant maintained his bar, and traverſed that the tenant did not abate after the death of his mother*, &c. prout, &c. and per Danby Juſtice the title is not good; for he has ſhewn that his mother died proteſtando ſeiſed, after whoſe death the tenant abated, which cannot be unleſs the mother died ſeiſed in fact; for if ſhe was diſſeiſed in her life, it cannot be called an abatement but a diſſeiſin; for he cannot plead abatement but where there was a dying ſeiſed in fact, which all the juſtices agreed; and per Priſot clearly, if the abatement was well alleged the other may well traverſe it, and ſhall not be compelled to traverſe the gift in tail, by which the demandant was intitled,

titled, but may traverſe the abatement. Br. Pleadings, pl. 56. cites 38 H. 6. 18.

2. Abatement cannot be but upon maintenance of ſeiſin in fact, and *not by proteſtation;* quod nota per Cur. Br. Pleadings, pl. 59. cites 39 H. 6. 5.

3. The caſe was, that in *formedon of the gift of W.* the *tenant ſaid, that before the donor any thing had, J. N. was ſeiſed, and gave to his anceſtor in tail, who by proteſtation died ſeiſed, and W. abated and died, as in the writ, and the tenant re-entered as heir,* and the demandant ſaid that W. did not abate after the death of the father of the tenant prout, &c. and no iſſue; for where there is no abatement then it is not traverſable, by which he omitted the proteſtation; quod nota. Br. Pleadings, pl. 59. cites 39 H. 6. 5.

4. If *after the deceaſe of the father* a *ſtranger firſt enters* into land *and abates,* and the *youngeſt ſon* enters upon him, and *diſſeiſes him, and dies ſeiſed,* this is an entry by diſſeiſin, and not by abatement, and ſo ſhall not bind the eldeſt. Co. Litt. 242. b. ad finem.

(A. 5) Of what Eſtate or Things it may be.

* S. P. by Hobart Ch. J. Hob. 322.

1. OF *things not manourable,* hæreditamenta incorporea, as * common, corody, office, rent, &c. he that is ſeiſed of them has election to have aſſiſe, and to admit himſelf to be out of poſſeſſion; reſolved. 9 Rep. 51. a. Trin. 8 Jac. in the Earl of Salop's caſe.

A termor cannot be diſſeiſed. Cro. J. 679. pl. 15. Mich. 21 Jac. Johns v. Ridler.

2. Of *poſſeſſory things* an expulſion may be made as well as a diſſeiſin; and therefore if a man made a *leaſe for years* of land, and a ſtranger puts out the leſſee, he does alſo diſſeiſe him in the reverſion; but if the leſſor put him out, there is no diſſeiſin committed, and yet the leſſee has loſt his eſtate, and has but a right to it, and † that whether he will or no; for though it be true, that when two are in poſſeſſion, the poſſeſſion is judged in him that has right, for he only poſſeſſeth though the other be in poſſeſſion too, and takes away the trees, corn, or the like; yet, when the true owner is clearly put out and removed, then he has no longer eſtate or poſſeſſion, but right only, and has no election to be in poſſeſſion or not in poſſeſſion, as that caſe ſtands, and therefore clearly he cannot now grant this term; and if the leſſor brings an action of debt for his rent due at Michaelmas, the leſſee ſhall plead that he did enter upon him and put him out, and he continued his poſſeſſion at the term, for he cannot have rent out of that land that he himſelf poſſeſſes; and if the leſſor after ſuch expulſion dies, the land ſhall deſcend in poſſeſſion to the heir, and the executor ſhall not claim that that was a leaſe; for a term never bears a que eſtate; but it is true, that there are certain caſes wherein a poſſeſſion cannot be gained; per Hobart Ch. J. Hob. 322. Paſch. 17 Jac. in caſe of Elvis v. York (Archbiſhop) & al'.

† [84]

(B) Reſcous.

[*By whom. Stranger.*]

1. IF a man *diſtrains for a rent-ſervice*, and a *ſtranger reſcues* the diſtreſs *in the name of the tenant*, this is a diſſeiſin of the rent. 56 H. 3. Itinere Stafford, 16. per Curiam.]

2. If lord and tenant are, and the tenant detains the rent, and the *lord diſtrains* for it, and *two ſtrangers make reſcous, the tenant being abſent*, they are all diſſeiſors, and yet the force is only in thoſe two that made the reſcous; per Dyer and Weſton. Mo. 53. pl. 155. Paſch. 5 Eliz.

(C) *What Act* ſhall be ſaid a Diſſeiſin.

[1. IF *baron and feme purchaſe* lands *in fee*, and after the *baron is attainted of felony*, and the *king ſeiſes* the land, and after the *lord, of whom it is held, upon his ſuggeſtion hath it delivered to him* out of the hands of the king *as his eſcheat*, this is a diſſeiſin to the wife, who had a joint eſtate with her huſband; for it was delivered out of the hands of the king by a *falſe ſuggeſtion, and ſo a diſſeiſin to the feme.* 4 Aſſ. 4. adjudged.]

Br. Aſſiſe, pl. 114. cites S. C. Brooke ſays, it ſeems that the king did not take but for year, day, and waſte, and then the entry of the lord by the livery obtained by falſe ſuggeſtion made the diſſeiſin, and was no diſſeiſin during the poſſeſſion of the king. ——— Br. Reſeiſer pro Rege, pl. 16. cites S. C. ——— Br. Forfeiture de Terres, &c. pl. 28. cites S. C. ——— Tit. Aſſiſe (E), pl. 1. cites S. C. ——— Fitzh. Aſſiſe, pl. 166. cites Mich. 4 E. 3. 47. S. P.

[2. If a man *deviſes capite lands to his youngeſt ſon*, and dies, which is void for a third part, and after the *deviſee enters into the whole generally*, which is an entry for the eldeſt ſon alſo, *and* after *leaſes the whole* to another for years, yet this is not any diſſeiſin to the eldeſt, for *one tenant in common cannot be ouſted without* * *an actual ejectment.* M. 40, 41 Eliz. B. R. between HEMPSLEY AND BRICE, per Curiam.]

* [85] Cro. E. 639. pl. 41. Hemſley v. Price, S. C. & S. P. held accordingly per tot. Cur. præter Fenner. ——— Mo. 546. pl. 729. Himley v. Brice. S. C. adjudged no diſſeiſin becauſe there was no expulſion, but held that leaſe for life with livery would have made it a diſſeiſin. ——— Where there were two copartners of an houſe, and the one entered generally, and made a leaſe for life by the name of all that his houſe, &c. the queſtion was, whether all or the moiety only of the houſe paſſed? Popham and Fenner held that the entire houſe paſſed; for when he ſays all that my houſe, &c. that intended the whole houſe, and by his livery made he gained the intire and gave the intire, although by his general entry it is not intended that he entered into more than to what he had right; but Gawdy e contra; for as his entry prima facie does not gain more than he had right to demand, no more ſhall this leaſe; and Foſter at the bar cited, that it was adjudged in this court in REIGNOLD'S CASE, according to the opinion of Popham. Cro. E. 615. pl. 4. Trin. 40 Eliz. Gerry v. Holford.

[3. *So* it will be *if* the *deviſee levies a fine of the whole.* Ibidem, per Curiam.]

[4. If a man *leaſes ſeveral acres* for years, *rendering one intire rent*, and † the *leſſee is ouſted of one acre by a ſtranger, and* afterwards this notwithſtanding *pays the intire rent to the leſſor*, yet this

† Fol. 659. Brownl. 230. Dame

Pett's caſe, S. C. but no judgment.

this ſhall not continue ſeiſin of the leſſor of the whole, but he is diſſeiſed of the ſaid acre. M. 11 Ja. B. R. dubitatur.]

[5. If a *man hath an houſe and locks it, and departs*, and *another comes* to his houſe, *and takes the key* of the door into his hand, *and ſays that he claims the houſe to himſelf in fee*, without any entry into the houſe, this is a diſſeiſin of the houſe. P. 15 Ja. B. PLOT'S CASE, admitted clearly upon evidence at the bar in an aſſiſe taken by default.]

Br. Diſſeiſin, pl. 42. (41.) cites S. C. —— Fitzh. Aſſiſe, pl. 237. cites S. C. —— Br. Aſſiſe, pl. 263. (262.) cites S. C.

[6. If *A. cuts trees in his own ſoil*, and *B. that has common there, ſays the ſoil is his ſoil, and commands him that he cut nothing*, &c. upon which *A. departs out of the land*, yet this is not any diſſeiſin to him, for he that has no right cannot be ſeiſed of a freehold by parol. 26 Aſſ. 17. adjudged.]

Br. Diſſeiſin, pl. 42. (41.) cites S. C. —— Br. Aſſiſe, pl. 263. (262.) cites S. C. —— Fitzh. Aſſiſe, pl. 237. cites S. C.

[7. If a man that has *right to enter into lands, in coming towards the land is diſturbed from entering*, this is a diſſeiſin. 26 Aſſ. 17.]

Br. Aſſiſe, pl. 61. (60.) cites S. C. If my tenant pays his rent to a ſtranger without coertion, he is a diſſeiſor, and if by coertion, both are diſſeiſors. Br. Diſſeiſin, pl. 97. cites 23 H. 3. and Fitzh. Aſſ. 434. —— Litt. f. 588, 589. and Co. Litt. 323. b. S. P. —— S. P. by Hobart Ch. J. Hob. 322. —— 9 Rep. 51. a. S. P. reſolved. —— Cro. C. 303. Paſch. 9 Car. B. R. per Cur. S. P. —— 2 Sid. 75. Paſch. 1658. B. R. in caſe of Crouch v. Wills. S. P. and cites Litt. —— If one receives my rents without my conſent, I may charge him as my receiver, or make him a diſſeiſor, at my election; per Roll Ch. J. and Curiam. Sty. 407. Hill. 1654.

[8. If a *ſtranger receives of my tenant by voluntary payment*, without coercion of diſtreſs, the *rent due to me*, this is a diſſeiſin to me at my *election*. 40 Aſſ. 19.]

[9. If a man *enters into my houſe by my ſufferance, without claiming any thing from me*, this is not any diſſeiſin. 11 E. 3. Aſſiſe, 86. adjudged.]

* [86]

S. C. cited Arg. 2 Le. 147. in pl. 182. Berry v. Goodman. —— Ow. 96. S. P. Arg. in S. C. —— In an ejectment the caſe was, the king was ſeiſed of lands in fee, and a ſtranger intruded, and the king grants this land to J. S. in fee, and the intruder continues poſſeſſion, and dies ſeiſed; the queſtion was, if this deſcent ſhall take away the entry of J. S. Johnſon ſaid it ſhall not, for none will affirm that an intruder ſhall gain any thing out of the king, but that the land ſhall paſs to the patentee, and the continuance of the intruder in poſſeſſion, and his dying ſeiſed, ſhall not take away the entry; for he cannot be a diſſeiſor, becauſe he gained no eſtate at the beginning. Cook contra; by this continuance of poſſeſſion he ſhall be accounted a diſſeiſor, and the freehold out of the patentee, for another eſtate he cannot have, for tenant at ſufferance he is not, for he comes in at firſt by a title; but a further day was given Cook to ſhew cauſe why judgment ſhould not be given againſt him. Ow. 95. Hill. 31 Eliz. Beron v. Goodyne.

[10. If the *king* be *ſeiſed in fee of the manor of B.* and a *ſtranger erects a ſhop in a vacant plat of the manor, and takes the profits* thereof *without paying any rent to the king*, and after the *king grants over the manor in fee*, and the *ſtranger continues* afterwards * in the ſhop, and occupies it as before, yet this *continuance is not any diſſeiſin, becauſe the firſt entry was not* any diſſeiſin. D. 9. 10 El. 266. 10 Co. 4. ADAMS AND LAMBERT, 103. reſolved.]

[11. [*So*] if a man *enters into* certain land, *parcel of a manor* which is *in ward of the king* by reaſon of the nonage of J. S. *and takes*

takes the profits as owner thereof, and after *J. S. ſues livery*, and after the *intruder continues the poſſeſſion*, and the taking the profits as before, yet the continuance ſhall not be any diſſeiſin to J. S. becauſe the firſt entry was not any diſſeiſin. M. 17 Ja. B. R. between the lord SANDS AND the college of CORPUS CHRISTI in OXON, reſolved per Curiam, and the jury directed accordingly.]

[12. If there be *tenant at ſufferance*, and a *ſtranger not having any right to the land makes a leaſe to him by indenture, rendering rent, without putting* the tenant at ſufferance *out of poſſeſſion*, and the tenant pays the rent to the ſtranger, this is not any diſſeiſin to him that had right. P. 3 Ja. B. R. between PRENSON AND STONE, per Curiam, upon evidence.]

[13. If *guardian by nurture makes a leaſe by indenture* to one, being under the title of the infant, *rendering rent to himſelf*, which is paid accordingly, yet this is not any diſſeiſin to the infant. P. 3 Ja. B. R. per Tanfield.]

[14. If *guardian in chivalry continues the poſſeſſion of the land in ward after the full age* of the ward, *without title*, this *is a diſſeiſin* to the heir, becauſe he *comes in by the law*, and therefore the continuance beyond the time which the law hath limited, and againſt the truſt repoſed in him by the heir, and the law makes it a diſſeiſin to the heir, who was never out of poſſeſſion, but the guardian was ſeiſed in his right. 7 H. 4. 42. per Culpepper.]

If a guardian after the full age of the heir continues in poſſeſſion, he is no tenant at ſufferance, but an abator, againſt whom an aſſiſe of mortdanceſtor lies. Co. Litt. 578.——He is an abator becauſe his intereſt comes by act in law. Co. Litt. 271. a.——Ow. 28. Arg. cites S. C. that the eſtate ſhall be judged in fee.—— 2 Inſt. 134. S. P. and ſays this is proved there by the ſtatute of Marlbridge, cap. 16.——Ow. 96. Arg. ſays, that if a guardian continues in poſſeſſion after the heir is of full age, he is no diſſeiſor, nor ſhall gain any eſtate.

[15. If *leſſee for years holds over his term*, yet he is not any diſſeiſor, becauſe he *comes in by the act of the party*; but he is called (*) a tenant at ſufferance; tempore H. 8. f. 356. † 9 H. 7. 24. per Curiam. Dubitatur, ‡ 22 E. 4. 38. b.]

* Fol. 660.

† Br. Diſſeiſin, pl. 63. (62.) cites S. C. & S. P. unleſs the leſſor enters in fact.

‡ Br. Eſtates, pl. 46. cites S. C. but Brooke ſays, that it ſeems to him that he is not a diſſeiſor before regreſs of the leſſor, but he continues by his firſt entry, and therefore this ſeems to be the reaſon why writ of entry ad terminum qui præteriit lies againſt ſuch termor as holds over his term.

If a *termor holds over* his term there, an eſtate in fee is conſeſt to be in him by matter of law. But it is a doubt whether he be a diſſeiſor or not. But it ſeemeth not, for a *treſpaſs lies not againſt him before regreſs*. Arg. Ow. 28. cites 22 E. 4. 38.

[87]

16. If *guardian takes feoffment* [*of the infant*] *in cuſtodia ſua* this is diſſeiſin, and he ſhall be impriſoned if the infant will bring aſſiſe againſt him, and the matter be found, quod nota. Br. Aſſiſe, pl. 451. cites 8 E. 2. and Fitzh. Aſſiſe, 395. Itinere Canc.

Br. Diſſeiſin, pl. 95. (94.) cites S. C.

17. If a man will *diſtrain for rent-ſervice by doors and windows*, and one prohibits him, this is a diſſeiſin, but not with force and arms. Br. Aſſiſe, pl. 465. cites 3 E. 3. and Fitzh. Aſſ. 469.

18. If *two infants are jointenants*, and the *one releaſes to the other*, by which *he holds the whole*, this is a diſſeiſin as it is ſaid; for it ſeems that the releaſe of an infant is void as to the intereſt of the

land; contra if he made livery. Br. Diſſeſin, pl. 19. cites 7 Aſſ. 17.

19. *Guardian* of an infant *infeoffed J. N. of the land of the* infant, and the infant brought aſſiſe without entry, and the plaintiff recovered; for *the entry of the feoffee is a diſſeiſin*, quod nota and this ſeems to be by the ſtatute of *Weſtminſter* 2. *cap.* 25. which wills, that where a guardian or termor makes a feoffment, that as well the feoffor as feoffee ſhall be taken for diſſeiſors. Br. Diſſeiſin, pl. 22. cites 8 Aſſ. 28.

20. If *A. has common in the land of B.* and *B. comes with his* family *and incloſes the land* ſo that A. cannot uſe his common, there *B. and his family are diſſeiſors. So if the family come in aid of him.* Br. Diſſeiſin, pl. 79. cites 8 Aſſ. 18.

21. In aſſiſe the *father infeoffed his ſon within age*, and after the *father entered to the uſe of the infant as his ward, and* after *infeoffed J. S.* and the father died, and the *infant brought aſſiſe* againſt the feoffee *without entry*, and becauſe the entry of the father was to the uſe of the infant, and the feoffee by his entry was a diſſeiſor, therefore the infant recovered. Br. Diſſeiſin, pl. 94. cites 8 E. 3. 432. and Fitzh. Aſſiſe, 146.

Br. Diſſeiſin, pl. 25. cites 9 Aſſ. 19. S. P.

22. Where *a man is diſturbed of the mean, by which he cannot take his profit of a thing, this is a diſſeiſin of the thing itſelf.* As of miſturning of water by which the mill cannot grind, aſſiſe lies of the mill, and of diſturbing my way to my common, aſſiſe lies of the common as it is ſaid elſewhere. Br. Aſſiſe, pl. 148. cites 9 Aſſ. 19.

Br. Diſſeiſin, pl. 28. cites S. C.

23. Note, per Cur. in aſſiſe that where a man *gives to the tenant in the aſſiſe all the tenements which he had in B. except a chamber in which he lay ill, and after the ſeiſin he gave the chamber and removed himſelf into the hall;* if this removal be by the ſufferance of the feoffee, claiming nothing to his own uſe, and ſo pleaded or given in verdict, this is not a diſſeiſin; quod nota; and ſo ſee that *entry by ſufferance claiming nothing to his own uſe* is not a diſſeiſin. Br. Tenant per Copie, pl. 7. cites 11 Aſſ. 6.

Br. Diſſeiſin, pl. 30. cites S. C.

24. In aſſiſe *baron and feme purchaſed the lands in fee*, and after the *baron aliened to his youngeſt ſon in fee within age*, and after the *baron and feme entered into the tenements with aſſent of the feoffee* who was yet *within age*; and after the baron died, and the feme continued ſeiſin and died, and the eldeſt ſon entered as heir, and the youngeſt who was infeoffed brought aſſiſe and recovered by award; for the aſſent was void, becauſe he was within age, and ſo the *entry of the baron and feme a diſſeiſin*, quod nota. Br. Aſſiſe, pl. 169. cites 11 Aſſ. 14.

Br. Diſſeiſin, pl. 34. cites S. C.—— So if a man makes a deed of *feoffment with letter of attorney to deliver ſeiſin upon condition*, and *he delivers it ſimply*, the attorney is a diſſeiſor, and the feoffor may ſay that nothing paſſed by the deed. Br. Diſſeiſin, pl. 71. cites 1 H. 4. 3.

25. A man made *ſimple deed of feoffment* and letter of attorney accordingly, and the *attorney delivered the ſeiſin upon condition*, and therefore a diſſeiſin by award. Quære, where it is of two acres and livery of ſeiſin of the one, for in one caſe he exceeds his warrant, and in the other he diminiſhes it. Br. Feoffments de Terres, pl. 25. cites 12 Aſſ. 24.

26. In

26. In aſſiſe it was found that the *conuſor upon a ſtatute-merchant after execution ſued againſt him, took the conuſee by force and ſwore him that he ſhould render him the land*, and *after he voluntarily releaſed all actions of debt and treſpaſs, and alſo voluntarily ſurrendered the land*, and this oath he took for fear of death, and therefore notwithſtanding that the ſurrender was made at large, yet becauſe it was made by reaſon of diſtreſs before, therefore Perning adjudged it a diſſeiſin when the conuſee entered by ſuch ſurrender. Br. Dureſs, pl. 11. cites 14 Aſſ. 20.

27. A man *leaſes for life rendering rent with clauſe of re-entry for non-payment*, and came after and *diſtrained* for the rent, *and being poſſeſſed of the diſtreſs re-entered*, and this was awarded a diſſeiſin, inaſmuch as he entered being poſſeſſed of the diſtreſs. Br. Diſſeiſin, pl. 81. cites 14 Aſſ. 11.

28. *Tenant in tail is bound in a ſtatute-merchant and dies*, and *execution is ſued againſt the iſſue*, this is diſſeiſin; becauſe by ſuch execution there is *no garniſhment* made *to the heir*. Br. Aſſiſe, pl. 214. cites 17 Aſſ. 21. S. P. nor he has not day in court to plead. Br. Diſſeiſin, pl. 41. cites S. C.

29. *Tenant in tail* was *bound in a ſtatute-merchant* and *died*, and the *conuſee made his executors and died*, the *executors ſued execution againſt the iſſue*, and *made joint eſtate to two*, and *the ſame day the iſſue brought aſſiſe*, and all this found, by which the plaintiff recovered, and yet the jointenancy was pleaded, but becauſe the joint-eſtate was made the day of the teſte of the writ, and the executors were named who were tenants the day of the writ, and the ſeiſin and diſſeiſin found, therefore the plaintiff recovered; for *the execution was a diſſeiſin to the iſſue*, quod mirum; for it is *made by the ſheriff by writ* as it ſeems. Br. Aſſiſe, pl. 406. cites P. 18 E. 3. Fitzh. Aſſ. 77. Br. Diſſeiſin, pl. 92. cites S. C.

30. *Guardian* in chivalry *aſſigned dower to one who was not the wife of the ward's father*; if *ſhe enters* ſhe is a diſſeiſoreſs as to the ward. Br. Receipts, pl. 50. cites 21 E. 3. 4.

31. *Reaping of grain with ſickles* is diſſeiſin with force. Br. Brief, pl. 430. cites 21 E. 3. 34. S. P. Br. Diſſeiſin, pl. 104.

32. *If none inhabit or manure the land*, and the rent is demanded, it is diſſeiſin, and aſſiſe lies thereof, and *reſcous, replevin, and incloſure*, are diſſeiſins of *rent-ſervice*; and reſcous, replevin, incloſure, and denier, are diſſeiſins of *rent-charge*; and denier and incloſure are diſſeiſins of *rent-ſeck*; and menace is a diſſeiſin of all thoſe rents; and ſo ſee that the ſuing of replevin is a diſſeiſin of rent-ſervice and rent-charge. Br. Diſſeiſin, pl. 103. cites 21 E. 3. 4.

33. In aſſiſe it was ſaid, that *ſovent diſtreſs* is no diſſeiſin but *where the lord diſtrains*; for if a ſtranger diſtrains, the tenant may make reſcous as it ſeems; quære, for the plaintiff durſt not demur. Br. Diſſeiſin, pl. 46. cites 27 Aſſ. 51. Br. Diſtreſs, pl. 33. cites S. C.

34. If a man *incroaches 10 s. rent of my tenant* by diſtreſs *who holds of me by 10 s. rent*, yet this is no diſſeiſin to me; for it cannot be intended my rent, and if I diſtrain, and the tenant and he who incroaches makes reſcous, I ſhall have aſſiſe againſt my tenant alone, and not againſt the incroacher; per Thorpe. But

Brooke ſays, it ſeems that he ſhall have aſſiſe againſt both if he will. Br. Diſſeiſin, pl. 14. cites 24 E. 3. 40.

35. If a *ward infeoffs his guardian in ſocage*, the entry of the guardian upon this feoffment is a diſſeiſin. 2 Roll. Remitter (G), pl. 3. cites 35 Aſſ. 8. adjudged.

36. *So* if attorney be to deliver ſeiſin *after the feoffor's death and he delivers it during his life*, he is a diſſeiſor. 2 Roll, 9. (S) pl. 1. cites 40 Aſſ. 38. Curia.

[89] 37. In an aſſiſe between two *tenants in common*, a *forbidding by word of mouth* to the tenant to pay his rent was adjudged a diſſeiſin. Raym. 371. cites Mich. 47 E. 3. 22. a. pl. 51.

38. *Menace of death*, and *incloſure of land*, ſo that the lord cannot diſtrain, are diſſeiſins of rent-ſervice, quod nota. Br. Diſſeiſin, pl. 87. cites 49 Aſſ. 5.

38. If a man *makes diſſeiſin and carries away goods*, he ſhall be adjudged diſſeiſor with force, and ſhall be impriſoned; per Tremail and Hank. Br. Damages, pl. 51. cites 11 H. 4. 16.

39. If a letter of *attorney be to deliver ſeiſin upon condition, and he delivers it without* condition, this is not good, but is a diſſeiſor. 2 Roll, 9. pl. 14. cites 11 H. 4. 3.

40. When any *diſtrains ſo outrageouſly*, that is, ſo often as the tertenant cannot plough, or duly uſe his ground, this amounts to a diſſeiſin. 2 Inſt. 414. cites the Mirror, cap. 2. ſ. 25.

Co. Litt. 181. a. notes here, that every entry is not a diſſeiſin, unleſs there be an ouſter alſo of the freehold. —— And. 134. pl. 184. Hill. 27 Eliz. S. P. cites 41 E. 3. 40. and 5 E. 4. 6.

41. A diſſeiſin *is* properly where a man enters into any lands or tenements where his entry is not lawful and ouſts him that has the freehold. Litt. ſ. 279.

42. Note for law, *if tenant at will, or at ſufferance, makes feoffment in fee*, he is a diſſeiſor, viz. the tenant at will, by making of the feoffment. Br. Diſſeiſin, pl. 64. cites 3 E. 4. 17.

43. Where the *king enters* into my land *without title*, the *franktenement remains in me*. Br. Diſſeiſin, pl. 65. cites 7 E. 4. 19.

44. If *tenant at will or for years makes a feoffment* he is a diſſeiſor by the common law, and the ſtatute of Weſtm. 2. cap. 25. *quod vivente altero eorum*, is only a recital of the common law. Br. Diſſeiſin, pl. 66. cites 10 E. 4. 18.

45. If *tenant at will, or* tenant *by ſufferance* at will, *make a leaſe for years*, this is a diſſeiſin to the firſt leſſor, and the tenant at will thereby gains franktenement; by all the juſtices. Br. Diſſeiſin, pl. 68. (67.) cites 12 E. 4. 12.

46. If *an infant makes a leaſe for years*, and the *leſſee enters*, the infant ſhall have aſſiſe; per Brian, and affirmed by Huſſey, Fineux, and Frowicke. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

47. *And* if a man makes *a leaſe by dureſs*, and the *leſſee enters*, the leſſor ſhall have aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

48. *But* if an *infant makes a feoffment, and* makes *livery*, the infant ſhall not have aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

49. *So* of *feoffment and livery by dureſs*, the feoffor ſhall not have aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

50. *But* if the *infant, or a man in priſon, makes letter of attorney to deliver ſeiſin*, there they ſhall have aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

51. *But* where a man *leaſes for* term de *auter vie, or* for *years, and ceſty que vie dies, or the term expires*, the leſſor *ſhall not have aſſiſe againſt the occupier without entry in fact.* Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24. per Brian, and affirmed by Huſſey, Fineux, and Frowike, quod fuit conceſſum per tot. Cur. and Brooke ſays, it ſeems to be good law.

52. Leſſee for life makes deed of feoffment, and delivers it, and makes letter of attorney to A. who *enters and makes livery accordingly*; adjudged that the *attorney* is a diſſeiſor. 4 Le. 7. pl. 29. 26 Eliz. B. R. King v. Cotton.

53. If a *wife grants a rent charge*, or makes a *leaſe*, and the *grantee enters*, this is a diſſeiſin; Arg. Goldſb. 13. pl. 13. Paſch. 28 Eliz. [90]

54. Where a man has poſſeſſion of lands, his continuance therein cannot gain to him any intereſt, or increaſe his eſtate, without ſome other act done of later time. If the guardian *continues in poſſeſſion* after the full age of the heir, he is not a diſſeiſor, nor has any greater eſtate in the lands. And upon the book of 21 E. 3. 2. this caſe was collected; the tenant of the king dies, his heir within age; a ſtranger intrudes; the heir at full age ſues his livery out of the king's hands; the intruder dies in poſſeſſion. The ſame deſcent ſhall not take away entry. 2 Le. 147. pl. 182. Trin. 30 Eliz. B. R. in caſe of Berry v. Goodman.

55. If *copyholder in fee* dies ſeiſed, and the lord *admits a ſtranger* to the land who enters, he is but tenant at will, and not a diſſeiſor to the copyholder who has the land by deſcent, becauſe he comes in by the aſſent of the lord, &c. 3 Le. 210. pl. 274. Trin. 30 Eliz. B. R. Anon.

56. Woman tenant in tail marries; huſband makes feoffment in fee and dies; *wife without any entry made leaſe for years.* The freehold is not reduced without entry. Le. 122. pl. 165. Trin. 30 Eliz. B. R. Page v. Jordan.

58. *General entry* amounts to a diſſeiſin. As if *A. makes leaſe* for years *of the land of B.* leſſee enters by force of that leaſe; now leſſor *without any entry* is a diſſeiſor. Le. 122. pl. 165. Trin. 30 Eliz. B. R. Page v. Jordan.

59. If *tenant at will, or* for *years, or at ſufferance, make a leaſe for years*, this is a diſſeiſin, and a tenant at will doth thereby gain a freehold, and claims a greater eſtate than he ought; per all the juſtices. Ow. 28. Rouſe's caſe.

But if *leſſee at will makes a leaſe for years to commence in futuro*, it is not a *preſent diſſeiſin*. Noy, 56. in caſe of Cooper v. Columbell.

60. *Leſſee pur auter vie holds over* after the death of ceſty que vie; he is only tenant at ſufferance, and not diſſeiſor, and has no fee. Ow. 27. 29. Rouſe's caſe.

But if he holds over againſt the will of his leſſor, then he is a diſſeiſor. 2 Le. 45. pl. 59. Hill. 29 Eliz. B. R. Arg. in caſe of Rouſe v. Artois, S. C. cites 10 E. 4. ——So if he does act, after ſuch continuance of poſſeſſion contrary to the will of his leſſor, he is a diſſeiſor. Ibid. cites S. C.

4 Le. 30. pl. 84. S. C. in totidem verbis. —— But if a *ſtranger enters upon the king's farmer*, he by

61. A *copyholder of inheritance* of a manor in the hands *of the king is outſed* [by J. S.] it was held in ſuch caſe, that he [J. S.] has not gained any eſtate ſo as he may make a leaſe for years, upon which his leſſee may maintain ejectment, but he has only a poſſeſſion againſt all ſtrangers. 3 Le. 221. pl. 294. Paſch. 30 Eliz. B. R. Anderſon v. Hayward.

ſuch entry hath gained the eſtate for years, and if he makes a leaſe to another, his leſſee may maintain ejectment 3 Le. 206 pl. 265. Paſch. 30 Eliz. in the Exchequer. —— It was ſaid by Bacon, the king's ſolicitor, to be adjudged, 40 Eliz. in the Exchequer, that where *the king made a leaſe for life, and the leſſee was outſed by a ſtranger*, that the ſame ſhould be ſaid a diſſeiſin of the particular eſtate contrary to the common ground, viz. that a man cannot be diſſeiſed of a leſs eſtate than of a fee-ſimple.

62. If *conuſor of a fine* ſur conuzance de droit come ceo, &c. *continues poſſeſſion*, he is a diſſeiſor, and not tenant at will or ſufferance, and a præcipe lies againſt him. Goldſb. 82. pl. 24. Hill. 30 Eliz.

[91]

63. If *tenant pur auter vie is diſſeiſed and dies*, yet he remains a diſſeiſor, and the occupancy does not qualify ſuch diſſeiſin; ſaid Arg. 2 Le. 121. pl. 167. Mich. 33 Eliz.

64. *A. ſeiſed* of land *makes a feoffment* thereof *to B. upon condition to convey it to A. for life*, remainder *to the eldeſt ſon of A. in fee. A. takes the profits, and makes a leaſe* of the land *to C. for years*, and yet *continues the poſſeſſion* in himſelf. B. acknowledges a ſtatute to a ſtranger. The years expire. A. makes a feoffment of this land with warranty to his ſecond ſon. B. enters in the life of A. and infeoffs the elder ſon. This feoffment was good and lawful, and ſo adjudged and affirmed in error. Reſolved, that A.'s taking the profits, and making a leaſe for years, was a diſſeiſin to B. and ſuſpended the condition. Ceſtuy que uſe at common law, or *ceſtuy que truſt*, at this day, *takes the profits*; it is not a diſſeiſin; for the *feoffee conſentit tacendo*, and in the principal caſe there was neither uſe nor truſt, but an eſtate paſſed upon condition. Jenk. 253. pl. 44.

65. A. *tenant for life*, the remainder *in fee to B.*—*A. made a leaſe for years to* J. S. The *leſſee entered. A. granted* the tenements *to C. habendum from* the feaſt of *Michaelmas following for life. J. S. attorns. C. enters, and makes a leaſe at will, to whom A. levied a fine* come ceo, &c. *B. entered.* In this caſe it was reſolved, that when C. entered by colour of the grant, he was a diſſeiſor. 2 Rep. 55. b. the 3d reſolution, Mich. 39 & 40 Eliz. in Buckler's caſe.

67. A diſſeiſin *is* when one enters intending to uſurp the poſſeſſion, and to ouſt another of his freehold. Cro. C. 303. cites Co. Litt. 153. b.

This caſe is queſtioned, 3 Mod. 150. and ſays, that it is not known what

68. If *tenant at will grants over his eſtate* to another, and the *grantee enters*, he is a diſſeiſor, and the leſſor may have an action of treſpaſs againſt the grantee, for although the grant was void, yet it amounted to a determinatiou of his will. Co. Litt. 57. a.

ground Lord Coke had for ſuch opinion, that the Year-books quoted in the margin will not warrant it; for they are in no ſort parallel; that the caſe in 27 H. 6. 3. is no more than that tenant at will cannot grant over his eſtate, becauſe he has no certain or fixed intereſt in it, and much to the ſame purpoſe is the book of 22 E. 3. there cited.

69. If

69. If *bargainor after inrolment* continues poſſeſſion, he is a diſſeiſor; for the ſtatute transfers the franktenement to the bargainee. Noy, 106. Bellingham v. Alſop.

70. When the *leſſee* by his own act or ſufferance *does a thing* in alteration of the poſſeſſion, of which by common intendment the *leſſor* cannot have or take notice, there the law will not prejudice the leſſor, ſo as to make it a diſſeiſin. Arg. Brownl. 230. Mich. 11 Jac. in Dame Pett's caſe.

71. If *A.* be *ſeiſed of a great cloſe*, where, &c. and a *ſtranger enters and occupies part* of the cloſe, yet notwithſtanding *A. continues the poſſeſſion of the reſidue*. The queſtion was, whether this ſhall preſerve his poſſeſſion in the reſidue, and he ſhall be judged to be in poſſeſſion of that becauſe it is an intire thing? Haughton was of opinion that it was a diſſeiſin, and Doderidge ſaid, it would be miſchievous if it ſhould. Brownl. 230. Mich. 11 Jac. Pett's caſe.

72. Father dies, the *eldeſt ſon beyond ſea*, the youngeſt may enter; but if he keeps out his brother after his *return*, he is now diſſeiſor. Per Doderidge J. Palm. 416. Paſch. 1 Car. B. R. Mayo v. Strumpling.

73. *Entry of leſſee by deed for years before the term* is no diſſeiſin, unleſs an expulſion is alleged. Cro. J. 684. pl. 2. Hill. 21 Jac. B. R. Brookbank v. Taylor. [92] Such * entry is a diſſeiſin,

though he continued his poſſeſſion after the commencement of the term. Lev. 45. Hennings v. Brabaſon. —— Clayt. 27. Metcalf v. Stavely. ——— 8 Mod. 53. Sheers v. Lammas, but no judgment. ——— But a judged, 54. Macdonald v. Weldon; that it is no diſſeiſin where the continuance in poſſeſſion was † by the *conſent of leſſor*. ——— If there was any agreement or aſſent that the leſſee ſhould enter, it cannot be any diſſeiſin. Arg. Le. 296. in caſe of Crisp v. Golding. ——— And if *rent incurs afterwards*, debt lies for the leſſor on the privity of contract. Cro. E. 169. Alexander v. Dyer. ——— For the leſſee cannot deſtroy the contract, unleſs he makes a feoffment. Per Jones J. Godb. 384. pl. 472. Paſch. 3 Car. B. R. Green v. Moody. ——— He hath not but for years in reſpect of his claim. See Godb. 385. in caſe of Green v. Moody.

* Cro. E. 766. in caſe of Douglaſs v. Shank. † Cro. E. 906. Waller v. Campion.

74. If a man receives my rent, it is at my election if I will charge him with a diſſeiſin, by bringing an aſſiſe or other action, or have an account. Cro. C. 303. in pl. 6. Paſch. 9 Car. B. R. Litt. ſ. 588, 589. S. P.

75. There were *two tenants in common of an houſe*, and *one of* them *nailed up the doors*, and made up a wall againſt the houſe *to prevent the others getting into the houſe*, and this was reſolved no diſſeiſin, and ſo the jury was diſcharged. All. 8. Paſch. 23 Car. B. R. Water's caſe.

76. Leaſe dated 24 June to commence a die datus, *leſſee enters the ſame* 24 *June*, he is a diſſeiſor. Sid. 8. pl. 3. Mich. 12 Car. 2. C. B. Goodgaine v. Wakefield. 2 Le. 121. pl. 167. Mich. 33 Eliz. in the Exchequer. Arg. S. P.

77. *Leaſe by ceſty que truſt* to T. is no diſſeiſin but only at the election of the truſtee, but it is good between leſſor and leſſee at leaſt. Keb. 24. pl. 71. Paſch. 13 Car. 2. B. R. in caſe of Thorn v. Burton.

78. A man cannot be diſſeiſed of an *undivided moiety*. 2 Salk. 423. pl. 10. Hill. 1 Ann. B. R. Reading v. Royſton. Two tenants in common of an *advowſon*, one alone preſents, yet at the next avoidance they may join, and if they are diſturbed, quare impedit

impedit lies as in the caſe of coparcenors. Quære. And. 63. Harris v. Nicholls. —— Cro. E. 18. S. C. per 3 J. makes a difference between grantees of coparcenors, and mere tenants in common, that in the firſt caſe an uſurpation of one ſhall not put the others out of poſſeſſion; but that perhaps would be otherwiſe in the laſt, unleſs they were ſuch as derived their eſtates from coparcenors, and yet 22 E. 3. 9. is that between ſtrangers in blood, or where two make compoſition to preſent by turn, if one uſurp upon the turn of the other, this ſhall not put him out of poſſeſſion; but Anderſon doubted.

79. If a *leaſe* be made *to A. which in truth determined before it began*, and *A. leaſes to B.* the ſame land *rendering rent*, and for rent arrear *A. diſtrains*, B. brings treſpaſs, and A. avows, and in the pleadings of A. the determination of the leaſe to A. appears, whereupon B. inſiſted that A. had failed in his title, and that the leaſe to A. failing, the leaſe by A. to B. muſt fail alſo. But it was anſwered, that if B. has failed in deriving to himſelf a lawful ability to make a leaſe to B. then the conſequence will only be that the *entry* which A. ſet forth to be *virtue of ſuch leaſe* muſt be taken to be a diſſeiſin, and a *tortious fee ſimple ſufficient to ſupport the leaſe*. See 10 Mod. 265. Mich. 1 Geo. B. R. Potter v. Pinkney.

[93]

(C. 2) What is a Diſſeiſin. Act in Law.

1. IF a man *recovers land by default againſt a feme covert*, this is a diſſeiſin, and ſhe and her baron ſhall have aſſiſe, and if the baron dies the feme ſhall recover by aſſiſe, and if ſcire facias be ſued upon ſuch recovery by ſcire facias the feme ſhall extort the execution; per Trench, which was denied becauſe the judgment ſtands in force, and execution is awarded of damages, et quod habeat corpus coram rege at a certain day. Br. Error, pl. 86. cites 24 E. 3. 24. 43. But Brooke ſays, quod mirum, becauſe it ſeems that the matter is error.

2. In aſſiſe if the *plaintiff makes title*, and the *defendant counterpleads it*, the aſſiſe ſhall not inquire of the ſeiſin and diſſeiſin (as was touched by the Court) if they find the title for the plaintiff, but inquire over of the damages only; for the defendant *is a diſſeiſor by his counter-plea of the title of the plaintiff*, quod nota, and the title was found for the plaintiff and he recovered. Br. Diſſeiſin, pl. 47. cites 27 Aſſ. 65.

3. In aſſiſe, becauſe the *tenant had confeſſed eſtate in the plaintiff, and pleaded in bar* that which was adjudged no bar, the aſſiſe was awarded in right of damages, and he adjudged a *diſſeiſor by his counter-plea*, and was taken, quod nota. Br. Diſſeiſin, pl. 48, cites 28 Aſſ. 21.

4. An *infant* ſhall not be adjudged a diſſeiſor *by his conuſance or nient dedire*, and therefore when he had pleaded that ne unques * accouple againſt the plaintiff, and this is certified againſt him, the aſſiſe was taken in point of aſſiſe, and found for him, and the plaintiff barred, quod nota. Br. Diſſeiſin, pl. 52. cites 28 Aſſ. 52.

* Original is (accompt)

5. A man *granted a rent and died before attornment*, and after the *tertenant paid the rent to the grantee*, and he received it, and

the

the heir of the grantor brought aſſiſe againſt the pernor of the rent, who *counterpleaded the aſſiſe by the grant and attornment*, and it was found as above, and by judgment the plaintiff recovered, and the *pernor adjudged a diſſeiſor for the counter-plea of the aſſiſe without title*, quod nota. But *if the pernor* above *had not counterpleaded the aſſiſe* he had not been a diſſeiſor by the receipt of the rent, where the tenant paid him gratis, *but* there *the tenant is a diſſeiſor* as it ſeems. Br. Diſſeiſin, pl. 61. cites 40 Aſſ. 19.

(C. 3) Diſſeiſin with Force. What is.

1. *MOWING the land, fiſhing, cutting*, &c. which cannot be done ſine manus opere are diſſeiſins with force and arms; per Wilby. Brooke ſays, quære, for they are clearly diſſeiſins, but *quære of force*. Br. Diſſeiſin, pl. 33. cites 11 Aſſ. 25.

2. Lord and tenant, and the *lord came to diſtrain* for the rent, and the *tenant would not ſuffer him to enter the houſe to* diſtrain, *but interrupted him with force*, and therefore he was adjudged a diſſeiſor. Br. Diſſeiſin, pl. 53. cites 29 Aſſ. 49.

3. A diſſeiſor made diſſeiſin but not with force, and by examining it appeared that *the diſſeiſſor had cut wood*, but this was *after his firſt entry*, and notwithſtanding this he was adjudged a diſſeiſor with force and arms, quære. Br. Diſſeiſin, pl. 55. cites 30 Aſſ. 50. [94]

4. If a man levies my rent of my tenant by *coercion of diſtreſs*, this is a diſſeiſin with force, and he ſhall go to priſon, quod nota bene, and yet the tenant might have thereof treſpaſs, for it is a double tort. Br. Diſſeiſin, pl. 62. cites 43 Aſſ. 9.

5. *Two* may be *diſſeiſors*; and the *one with force*, and *the other not*, as if I command one to make a diſſeiſin and he makes a diſſeiſin with force, and alſo if one enters with force to my uſe, and after I agree, he is a diſſeiſor with force and I am not ſo, and thoſe caſes will anſwer the books of aſſiſes, for in thoſe caſes they were preſent but in theſe not, and ſo I hold that he which is *preſent when force is made*, is a diſſeiſor with force; per Anderſon. Goldſb. 42. Paſch. 29 Eliz. in caſe of Dickſey v. Spencer.

(D) *What Perſon* may be a Diſſeiſor.

[1. *A Feme covert* ſhall not be a diſſeiſoreſs *by the act of the baron*. 7 E. 4. 7. b. * 12 E. 4. 9. b.] * Br. Diſſeiſin, pl. 67. (66.) cites

S. C.——Fitzh. Diſſeiſin, pl. 3. cites S. C.——F. N. B. 179. (G) S. P.——See (F) pl. 3. &c.

2. In aſſiſe the *father made feoffment in fee upon condition and died*, having *two daughters*, the *one of full age*, and the *other an infant*, and the *eldeſt thinking the condition broken, which was not* broken, *entered claiming for her and her ſiſter* who was an infant; ſhe of full age is *diſſeiſoreſs* only, and the other who is an infant not, Br. Diſſeiſin, pl. 43. cites S. C.

not, for nothing veſted in her; per Skipwith. Br. Ent' Cong. pl. 60. cites 26 Aſſ. 39.

3. If my *tenant pays* his *rent to a ſtranger without coertion*, he alone is diſſeiſor, and *if by coertion* both are diſſeiſors. Br. Aſſiſe, pl. 455. (454.) cites 23 H. 3. and Fitzh. Aſſiſe, 439.

* But they did not aſſiſt in making of the ditch, 8 E. 3. 29, 30. pl. 3.

4. Aſſiſe *by making of a ditch by the defendant* where his ſervants came in aid, but they did not * manure the land, and yet they were diſſeiſors, quod nota. Br. Aſſiſe, pl. 448. (447.) cites 8 E. 3. and Fitzh. Aſſiſe, 145.

5. An *infant purchaſed*, and *one as his guardian takes him and made feoffment and died*, and the *feoffee was adjudged a diſſeiſor* by the ſtatute of *Weſtminſter* 2. *cap.* 25. For living either of them the ſaid writ ſhall hold place, and therefore the taking of the infant only as guardian is no diſſeiſin, quod nota, by judgment. Br. Aſſiſe, pl. 449. cites 8 E. 3.

6. A man *recovered againſt him who had nothing, and infeoffed B.* and one C. delivered ſeiſin, and the aſſiſe was brought againſt B. and C. and the plaintiff recovered, the feoffor not being named; and ſo ſee the *attorney who delivered ſeiſin was a diſſeiſor*. Br. Diſſeiſin, pl. 27. cites 10 Aſſ. 22.

Br. Diſſeiſin, pl. 32. cites S. C. Brooke ſays, et ſic vide, that *K made no diſſeiſin till the diſturbance.*

7. In aſſiſe *N. and A. his feme were ſeiſed* and *leaſed to W. and his heirs for* 17 *years*, *W. died within the term, and P. his ſon and heir* † *entered and levied a fine to M. who rendered to P. and K. his feme in fee*, and *P. died*, and *N. died*; the *term expired*, and *A.* who durſt not approach in the life of N. *offered now to enter*, and *K. diſturbed him*, and the ſaid *A. brought aſſiſe againſt K.* and recovered, and damages to the time of the diſturbance; for K. was no diſſeiſor till the diſturbrnce; for ſhe was covert before, and *P. was diſſeiſor alone till K. was ſole and made the diſturbance*. Br. Aſſiſe, pl. 172. cites 11 Aſſ. 21.

† [95]

S. P. Br. Diſſeiſin, pl. 96. cites 20 H. 3. and Fitzh. Aſſiſe, 432.

8. A *villein made a feoffment* of his land which he held in villeinage, the *feoffee* is no diſſeiſor; per Cur. Br. Aſſiſe, pl. 454. cites 20 E. 3.

Br. Coverture, pl. 35. cites S. C.

9. Aſſiſe *againſt the baron and feme and W. N.—W. made default*, and the aſſiſe was awarded againſt him by default, the *baron and feme pleaded record in bar of aſſiſe, which was denied*, and they were *adjourned*, at which day the *baron made default*, and the *feme was received* notwithſtanding the ſtatute of Weſtminſter 2. cap. 25. Quod habeantur pro diſſeiſitoribus abſque recognitione aſſiſæ. And ſo ſee that *feme covert by reaſon of the receipt is not bound by it to be a diſſeiſor*; for it ſeems to be the act of the baron. Br. Aſſiſe, pl. 186. cites 13 Aſſ. 1.

Br. Diſſeiſin, pl. 37. cites S. C. and 17 Aſſ. 14. accordingly, where the counſellor

10. In aſſiſe a man *leaſed land for life*, *rendering rent*, and *went beyond ſea*, the *tenant for life died*, and *T. N. counſelled H. W. the heir of the leſſor to enter, who entered and infeoffed P.* And the *leſſor came and would have entered*, and *P. diſturbed him*, and he brought aſſiſe againſt P. and the counſellor, and omitted him who entered, and the plaintiff recovered, for the *counſellor is diſſeiſor*, and ſo it

is ſufficient if diſſeiſor, &c. be named in the writ, quod nota. Br. Aſſiſe, pl. 193. cites 14 Aſſ. 12.

was awarded to priſon; for the diſſeiſin was vi et armis. —— Br. Diſſeiſin, pl. 40. cites 17 Aſſ. 14. —— S. P. and ſo of him who commands. Br. Diſſeiſin, pl. 45. cites 27 Aſſ. 30.

11. In aſſiſe, the *tenant vouched record and failed* at the day, he is a diſſeiſor by the ſtatute. Br. Aſſiſe, pl. 202. cites 15 Aſſ. 16.

12. In aſſiſe, the *father made feoffment in fee upon condition and died*, having *two daughters*, the *one of full age*, and the *other an infant*, and the *eldeſt thinking the condition broken, which was not* broken, *entered, claiming for her and her ſiſter* who was an infant, ſhe of full age is *diſſeiſoreſs* only, and the other who is an infant not, for nothing is veſted in her; per Skipwith. Br. Ent. Cong. pl. 60. cites 26 Aſſ. 39. Br. Diſſeiſin, pl. 43. cites S. C.

13. If one *enters claiming as guardian* of the body and land where he had no right, and after deviſes over the wardſhip, ſuch *deviſee* is a diſſeiſor as well as his grantor. Br. Diſſeiſin, pl. 85. cites 28 Aſſ. 11. but adds quod mirum eſt! for that he was not the firſt who entered, but the deviſee of him.

14. Aſſiſe *againſt an infant who pleaded record and failed* at the day, yet he may plead other matter, and ſhall not be a diſſeiſor notwithſtanding the ſtatute wills that they ſhall be taken for diſſeiſors, & concord' 33 E. 3. and there per Finch. the aſſiſe ſhall be at large; quod quære. Br. Aſſiſe, pl. 460. cites 36 E. 3.

15. *A. has right to recover in a formedon againſt B.* tenant of the land. *A. by covin* with C. *cauſes C. to diſſeiſe B.* to the intent that C. ſhould make default in a formedon againſt him, and *that A. ſhould recover by default*. A. recovers the land againſt C. accordingly by this covin, by default, or confeſſion. A. enters. He is not remitted. B. enters, and A. ouſts him. Reſolved, by all the ſages in parliament, that this covin makes A. a *diſſeiſor of his own land*. 3 Rep. 77. Farmer's caſe. Coke has many caſes to this effect. Fraus & dolus nemini patrocinentur. Jenk. 46. pl. 88. cites 41 Aſſ. 28. [96]

16. *Leſſee for life is diſſeiſed.* He in the *reverſion ouſts the diſſeiſor*. The diſſeiſor brings an aſſiſe againſt him; and it well lies during the life of leſſee for life. Jenk. 52. pl. 99. cites 44 Aſſ. 35.

17. Aſſiſe againſt *baron and feme; they pleaded in bar and confeſſed an ouſter*, and the plaintiff traverſed the bar, and after the *baron made default*, and the *feme was received and pleaded the ſame plea*, and the plaintiff traverſed it, and the aſſiſe found for the plaintiff, and that he was ſeiſed and diſſeiſed, but that there is not any diſſeiſor named in the writ. Digg ſaid, the baron by his plea confeſſed an ouſter, and the feme has maintained the ſame plea, and ſo diſſeiſor by confeſſion; per Tank. the aſſiſe is not taken upon the plea of the baron, and *when the feme was received the baron was out of court*, and his plea nothing of record to prejudice his feme, and a feme covert cannot be ſaid a diſſeiſor by her plea, & concord' Belk. & adjornatur. Br. Aſſiſe, pl. 24. cites 44 E. 3. 23.

18. If

18. If *tenant for years*, or guardian, *aliens for life*, *the remainder* over *in fee*, he in *remainder* who *enters after death of tenant for life is a diſſeiſor* as well as the leſſee for life; for all is but one and the ſame eſtate in law. Br. Ent. Cong. pl. 27. cites 50 E. 3. 21.

Where the *king* enters by a void or inſufficient office, or enters without title, and

19. If the *king enters* by title, or *without title*, the *party cannot enter upon him*, nor is he a diſſeiſor; and this ſeems to be, *where he enters without record or office this is without title*, but there *he ſhall ſue by petition*, nor the king in this caſe is not a diſſeiſor. Br. Ent. Cong. pl. 95. cites 3 E. 4. 24, 25.

grants the land by patent, aſſiſe lies againſt the patentee; for the king cannot be a diſſeiſor, and therefore the *patentee* is diſſeiſor; for inſufficient office does not give ſeiſin to the king. Br. Office devant, &c. pl. 42. cites 7 E. 4. 16. and 22. —— Br. Diſſeiſin, pl. 65. cites 7 E. 4. 17. S. C. & S. P.

20. The *king cannot* be a diſſeiſor. Br. Office devant, &c. pl. 42. cites 7 E. 4. 16 and 22.

Br. Diſcent, pl. 15. cites 21 H. 7. 35. S. P. per Fineux. —— 10 Mo. 125. Arg. ſays

21. If a *monk diſſeiſes* a man *to the uſe of a ſecular man*, this is no diſſeiſin; for he has no capacity to take franktenement, and it ſeems that though the ſecular man agrees afterwards he has no franktenement; per Fineux Ch. J. Keilw. 91. b. pl. 3. Trin. 22 H. 7.

that the authorities are many that a monk may be a diſſeiſor; but that it particularly appears to be ſo for this, that a writ of aſſiſe lies againſt a monk, and the judgment in ſuch writ is, quod recuperet ſeiſinam, which ſuppoſes a monk to have a freehold.

22. If I diſſeiſe one *to the uſe of the dean and chapter*, they cannot agree but by writing. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

23. The *king cannot be diſſeiſed*, but all intruders are but treſpaſſors to him, and if he will he may charge them by actions of account, as bailiffs, yet he may if he will bring a writ of right of advowſon; per Hobart Ch. J. Hob. 322. Paſch. 17 Jac. in caſe of Elvis v. York (Archbiſhop) & al'.

24. An *infant* cannot be a diſſeiſor. Arg. Godb. 364. pl. 456. Trin. 2 Car. B. R. in caſe of Aſhfield v. Aſhfield.

25. If an *infant makes letter of attorney to make livery* and ſeiſin, and the attorney makes livery accordingly, he is a diſſeiſor. Arg. Godb. 387. in pl. 474. Paſch. 3 Car.

[97]

(E) By *Agreement*.

Br. Diſſeiſin, pl. 67. (66.) cites S. C. —— Fitzh. Diſſeiſin, pl. 3. cites S. C.

[1. AS if the *baron diſſeiſes* another *to the uſe of the feme*, the feme is not a diſſeiſoreſs by this act of the baron. 12 E. 4. 9. b.]

[2. *So* it ſhall be *though the wife agrees* to it *during coverture*, for her agreement is void.]

[3. If one *man diſſeiſes another to the uſe of a feme covert*, if the *feme agrees* during the coverture, yet ſhe is not any diſſeiſoreſs, for her agreement is void.]

[4. *So*

[4. *So* if the *baron agrees* to the diſſeiſin, this ſettles an eſtate in the feme; but ſhe ſhall not be a diſſeiſoreſs by the agreement of the baron. 12 E. 4. 9. b.]

Br. Diſſeiſin, pl. 67. (66.) cites S. C. —— Fitzh. Diſſeiſin, pl. 3. cites S. C. ——— Br. Agreement, pl. 4. cites S. C.

[5. The *ſame* law *if both agree*, yet the feme is not a diſſeiſoreſs. Contra, 15 E. 4. 15. b. admitted.]

Br. Diſſeiſin, pl. 11. (12.) cites S. C. but not S. P. ——— If a man *diſſeiſes another to the uſe of baron and feme*, and the *baron after agrees*, the franktenement by this is in him and his feme, but thereby the feme ſhall not be a diſſeiſoreſs. Br. Diſſeiſin, pl. 67. cites 12 E. 4. 9.

[6. *But after the death of the baron*, if the *feme agrees* to the diſſeiſin ſhe ſhall be a diſſeiſoreſs. 12 E. 4. 9. b. Curia.]

Br. Diſſeiſin, pl. 67. (66.) cites S. C. ——— Fitzh. Diſſeiſin, pl. 3. cites S. C. ——— Br. Agreement, pl. 4. cites S. C.

[7. If a man diſſeiſes another *to the uſe of an infant*, yet the infant ſhall not be a diſſeiſor by his agreement thereto. Dubitatur, 2 E. 3. 32.]

By diſſeiſin to the uſe of an infant, the infant is not diſſeiſor nor tenant without actual entry; for *agreement of an infant* to a tort does not make him a tort feiſor et adjornatur. Br. Aſſiſe, pl. 46. cites 3 H. 4. 16. in the written book. ——— Br. Diſſeiſin, pl. 5. cites S. C. Brooke ſays, and ſo ſee that he who may agree is a diſſeiſor by his agreement, as well as tenant. Br. Diſſeiſin, pl. 5. cites 3 H. 4. 17. S. C.

It was adjudged in writ of error, that if two diſſeiſe *another to the uſe of an infant*, and the infant agrees to it, yet he is not diſſeiſor nor tenant; for agreement of an infant is void; *but if he enters*, then he is by this tenant, quod nota. Br. Agreement, pl. 9. cites 3 H. 4. 17. in the written book. ——— Brooke ſays, and ſo ſee that the franktenement ſhall not be adjudged in him by the entry of the two to his uſe, till the infant himſelf agrees to it by his actual entry. Ibid.

8. If the *bailiff of an infant, who lies in a cradle*, diſſeiſes a man to the uſe of the infant, the bailiff only is a diſſeiſor; and if an infant commands a man to enter into another's land which he does, he who enters only is diſſeiſor. Br. Diſſeiſin, pl. 16. cites 2 Aſſ. 2.

9. If a man makes *diſſeiſin of common*, &c. and *J. N. comes in aid* of him, J. N. is a diſſeiſor. Br. Diſſeiſin, pl. 21. cites 8 Aſſ. 18.

10. If a man *grant a ſeigniory with condition of payment*, and non-payment, and *the grantor tenders the money according to the condition*, and the *grantee refuſes it*, and after the *tertenant pays the rent of the lord to the grantee*, and the grantor brings aſſiſe, this ſhall be againſt the tertenant and the grantee; for the grantee is tenant of the rent, by the receipt by him had after the tender according to the condition. Br. Diſſeiſin, pl. 82. cites 15 Aſſ. 22.

11. In aſſiſe of rent it was found that the *reſcous* of the diſtreſs taken by the plaintiff was made *by a ſtranger*, to which reſcous the *tertenant named in the aſſiſe agreed*, and therefore the aſſiſe well brought againſt him only, and he a diſſeiſor by the agreement. Br. Diſſeiſin, pl. 38. cites 15 Aſſ. 11. [98]

12. Land *deſcended to an infant*, and one *J. N. entered, claiming ward only, and deviſed it to W. N. and died*, and *W. N. entered*, and the infant brought aſſiſe againſt him, and *he was awarded a diſſeiſor as well as his grantor*. Quod mirum; for he was not the firſt who entered,

entered, but the deviſee of the diſſeiſor. Br. Diſſeiſin, pl. 85. cites 28 Aſſ. 11.

13. If a man *does an act in my right where I have no right*, there if *I agree thereto* after, I am a treſpaſſor. And by the ſame conſequence in other caſe diſſeiſor by agreement, as it ſeems. Br. Diſſeiſin, pl. 99. cites 38 Aſſ. 9.

S. P. For all is but one and the ſame eſtate. Br. Diſſeiſin, pl. 3. cites 50 E. 3. 22.

14. Per omnes præter Finchden; if *tenant for* term of *years aliens for terms of life or in tail the remainder over*, and *the tenant for* term of *life dies*, or if the tenant *in tail dies without iſſue*, and he in *remainder enters*, there he in remainder is a diſſeiſor as well as he who aliened, and this by the ſtatute of Weſtminſter 2. cap. 25. For the *entry of him in remainder is an agreement to the firſt livery*; for the ſtatute of Weſtminſter 2. cap. 25. wills quod vivente altero eorum locum habet prædictum breve. Br. Diſſeiſin, pl. 86. cites 43 Aſſ. 45 & 59. And adds nota, that there are not ſo many of the pleas in this year.

Br. Aſſiſe, pl. 10. cites S. C.

15. If a man enters into land and makes diſſeiſin to my uſe, and *takes the profits to my uſe*, this does not make me a diſſeiſor till I agree to it. Br. Agreement, pl. 10. cites 37 Aſſ. 8.

16. If I leaſe land at will, and *my tenant at will enters into the land adjoining, claiming to my uſe, and paſtures the ſoil, and cuts wood, and cuts oaks*, by which the tenant of the franktenement thereof *voids the poſſeſſion, and brings aſſiſe*, and this matter is found, but *the leſſor has nothing of the profit*, but the diſſeiſee might have taken the profits if he would, and that the leſſor *did not command his tenant ſo to do*. But the jury ſaid, that they thought that forafmuch as the leſſor after he knew that his tenant had ſo occupied, did not make him to make gree to the diſſeiſee, that therefore the leſſee agreed to the acts of his leſſee at will. But per Cur. *this is no agreement*, and therefore by award the leſſor was no diſſeiſor; and from hence ſee clearly, that if there had been an agreement, the leſſor by this had been a diſſeiſor, quod nota. Br. Diſſeiſin, pl. 59. cites 37 Aſſ. 8.

S. P. Br. Diſſeiſin, pl. 104.

16. If my *bailiff diſſeiſes another to my uſe*, and I agree to it after, I for this am a diſſeiſor; per Clam. Br. Ejectione, &c. pl. 8. cites 38 Aſſ. 9.

Br. Diſſeiſin, pl. 67. cites S. C.

17. Where diſſeiſin is made by the one to the uſe of another, this *does not gain franktenement to the other till the other agrees*, and by agreement he is a diſſeiſor, and tenant of the franktenement; but *agreement of the baron* ſhall not make the feme to be diſſeiſor, but contra, if *ſhe agrees after the death of her huſband*. Br. Agreement, pl. 4. cites 12 E. 4. 9.

Kelw. 91. b. 92. a. is a quære of a diſſeiſin made by a feme covert to the uſe of her baron; per Fineux.

18. If one who has not capacity as *feme covert diſſeiſes another to the uſe of her baron, without his aſſent*, the franktenement is not in him, and aſſent after does not make a diſſeiſin in him; but contra of an aſſent before. Br. Diſſeiſin, pl. 15. cites 21 H. 7. 35. Per Fineux.

It is regularly true that a *feme*

19. Upon evidence it was held by Anderſon, that if a *feme covert ejects one*, and that afterwards the *huſband aſſents*, that yet the

the huſband is not an ejector; for an ejectment is made in an inſtant, and * has not a continuance; otherwiſe of a diſſeiſin. Noy, 52. 37 & 38 Eliz. Broth v. Archer.

covert cannot be a diſſeiſoreſs *by her commandment* or procurement precedent, *nor by her aſſent or agreement ſubſequent*, but by her actual entry or proper act ſhe may be a diſſeiſoreſs. Co. Litt. 357. b.

(F) *By what Perſons, and to whom* it may be made.

[1. AN *infant of* the age of 18 *years* may be a diſſeiſor with force *by actual entry*. 12 H. 4. 22. b.]

[2. An *infant* may be a diſſeiſor by actual entry. 3 H. 4. 17.] Br. Aſſiſe, pl. 46. cites 3 H. 4. 16. S. C.——Br. Agreement, pl. 9. cites S. C.——Br. Diſſeiſor, pl. 5. cites S. C.

[3. *So* may a *feme covert* by actual entry. 9 H. 4. 6. † 12 E. 4. 9. b. Curia. 7 E. 4. 7. b.] † S. P. Br. Diſſeiſin, pl. 67. (66.) cites 12 E. 4. 9. S. C.——Fitzh. Diſſeiſin, pl. 3. cites S. C.——Co. Litt. 357. b. S. P. ——But without actual entry ſhe ſhall not. F. N. B. 179. (G).

[4. *But* an *infant* ſhall *not* be a diſſeiſor *by agreement* to a diſſeiſin to his uſe. 3 H. 4. 17. 12 H. 4. 22. b.] Br. Aſſiſe, pl. 46. cites S. C.—— Br. Agreement, pl. 9. cites S. C.——Br. Diſſeiſor, pl. 5. cites S. C.

[5. If the *baron and feme enter into land in the right of the feme where ſhe hath no right*, the *feme* is not a diſſeiſoreſs. 9 H. 4. 6. ſee ‡ 35 Aſſ. 5. Contra 28 Aſſ. 37. Curia, for this ſhall be taken to be the act of the huſband only.] S. P. Br. Diſſeiſin, pl. 67. cites 12 E. 4. 9. ——‡ Br. Aſſiſe, pl. 340. (339.) cites S. C.—— Br. Coverture, pl. 41. cites S. C.—— Fitzh. Aſſiſe, pl. 321. cites S. C. but that is that the writ abated by the not naming of the feme.——Br. Aſſiſe, 287. (286.) cites S. C. that where the baron is dead after the diſſeiſin is made by them, the writ ſhall abate; for the feme has now loſt the name of the feme, and in aſſiſe there ought to be diſſeiſor and tenant, quod nota.

[6. If a *man takes a diſtreſs for rent iſſuing out of the land of a feme covert*, and *the baron and feme make reſcous*, they both are diſſeiſors. 21 E. 4. 53. Curia.] Br. Diſſeiſin, pl 89. (88.) cites S. C. and Brooke ſays, et ſic vide, that a feme covert may be diſſeiſor, quod nota bene.——Ibid. pl. 70. (69.) cites S. C. by Brian Ch. J. quod fuit conceſſum.

7. If the *baron diſcontinues the land of his wife, the feme being in poſſeſſion, and* diſagreeing to the feoffment, *claiming her firſt eſtate*, the feme is a diſſeiſoreſs thereby. 21 E. 3. 6. b.]

8. In aſſiſe it was found that land was *given to baron and feme in tail*, the *baron went out of the country*, and the *feme infeoffed O. who leaſed to the feme for life*, the *baron died, and the feme died without iſſue*, and the *donor entered*, and O. ouſted him, and the entry of the donor adjudged lawful; for the feoffment of the feme was a diſſeiſin to the baron, and by the re-taking of eſtate ſhe was remitted, and therefore the reverſion in the donor and his entry lawful; per tot. Cur. Br. Remitter, pl. 17. cites 9 Aſſ. 20. Br. Diſſeiſin, pl. 24. cites S. C. ſays, it is a diſſeiſin to the baron, and therefore a void feoffment, and therefore the feoffee only is a diſſeiſor, as it ſeems.

9. Aſſiſe

9. Aſſiſe againſt an *infant* who *pleaded releaſe of the plantiff in bar*, and it was admitted; and it was ſaid there that by his plea, he *ſhall not be attainted diſſeiſor by reaſon of his infancy*. Br. Diſſeiſin, pl. 26. cites 10 Aſſ. 1. & concordat the ſame year, p. 13.

10. In aſſiſe it was ſaid, that before the poſſeſſion of the king none can make diſſeiſin to the tenant of the franktenement. But by the reporter, if the *king be ſeiſed in auter droit*, and *a man abates upon the poſſeſſion of the king*, this is a diſſeiſin to the tenant of the franktenement; quære. Br. Diſſeiſin, pl. 56. cites 31 Aſſ. 1.

11. A man cannot gain franktenement by entry *upon the king nor upon the farmer* of the king, nor this cannot veſt in him as a diſſeiſor nor by diſſeiſin. Br. Diſſeiſin, pl. 4. cites 2 H. 4. 7.

12. Where a man *abates upon the poſſeſſion of the king in land which he has in ward*, yet the franktenement remains in the heir, by which he cannot deveſt the poſſeſſion out of the king, &c; per Gaſcoign and Hulſ. Br. Diſſeiſin, pl. 6. cites 8 H. 4. 17. & concordat H. 21 E. 3. fol. 1, 2. Brooke ſays, from hence it ſeems that a man cannot be a diſſeiſor ſo long as his termor remains upon the land.

13. Aſſiſe againſt divers, who pleaded nul tort, &c. The aſſiſe found that all the defendants were diſſeiſors, but that one of them made the diſſeiſin with force. Harper thought the verdict not good, but Dyer and Weſton e contra; for that the force and diſſeiſin are two diſtinct things; for force is aided by the ſtatute, and is not incident to every diſſeiſin; for it ſhould be inquired by the aſſiſe if they, or any of them, had done the diſſeiſin with force; and if leſſee for years be re-ouſted with force, and he in reverſion brings an aſſiſe, and the diſſeiſin is found with force, yet the force is not puniſhable; for the force was to the leſſee for years. Mo. 53. pl. 155. Paſch. 5 Eliz. Anon.

14. The *queen as dutcheſs of Lancaſter* cannot be diſſeiſed; for though ſhe be not ſeiſed in jure coronæ, yet it is in ſeiſin of the queen, and cannot be taken from her in reſpect of her perſon; reſolved. Ow. 15. Paſch. 36 Eliz. B. R. Rot. 41. Leigh's caſe.

(F. 2) Diſſeiſin by one, where it ſhall be ſaid a Diſſeiſin by others.

1. IF *two ſiſters have title of action where their entry is tolled*, and the *one enters for her and her ſiſter*, this does not make the other to be a diſſeiſor. Br. Diſſeiſin, pl. 76. (75.) cites 14 E. 3. 3. and 42.

If A. diſſeiſe one to the uſe of B. who knows not of it, and B. aſſents to it, in this caſe, till the agreement A. was tenant of the land, and after agreement B. is tenant of the land, but both of them be diſſeiſors; for omnis ratihabitio retrotrahitur & mandato equiparatur. Co. Litt. 180. b.

2. If one makes a *deſſeiſin to my uſe without my commandment with force*, and *afterwards I agree* to the diſſeiſin, I am diſſeiſor, but all *the force is only in the coadjutor*; but *if he agrees ſpecially to the diſſeiſin with force*, then peradventure he ſhall be guilty of the force alſo; per Dyer and Weſton. Mo. 53. in pl. 155. Paſch. 5 Eliz. Anon.

(G) What *Perſon* may be a Diſſeiſor.

To the Uſe of another.

[1. A *Feme covert* cannot make a diſſeiſin *to the uſe of her huſband.* 8 H. 14. b. Curia (becauſe though ſhe gains an eſtate by her entry, yet ſhe has not power to diſpoſe thereof to another, being covert, as ſhe ought if ſhe could make a diſſeiſin to another uſe). Contra 21 H. 7. 35.] Br. Diſſeiſor, pl. 15. cites S. C.

[2. A *feme covert* cannot diſſeiſe a man *to the uſe of a ſtranger*, for the cauſe aforeſaid. Contra 21 H. 7. 35.] Fol. 661.

A feme covert cannot diſſeiſe another, but to the uſe of another, for ſhe herſelf cannot take any thing; but ſhe may diſſeiſe one to the uſe of another. Br. Diſſeiſin, pl. 15. cites S. C.

[3. *But* it ſeems a *monk may* diſſeiſe a man to the uſe of another, becauſe he is not capable of an eſtate to his own uſe. 21 H. 7. 35. admitted.] Br. Diſſeiſin, pl. 15. cites S. C. —— Keilw. 91. b. pl. 3. Trin. 22 H. 7. per Fineux, S. P. that it is no diſſeiſin.

[4. A *corporation aggregate* cannot make a diſſeiſin to the uſe of another. 8 H. 6. 14. b.] Br. Corporations, pl. 24. cites S. C. by Cand. but it ſeems the contrary if one enters for them by authority in writing under their common ſeal, where their entry is not congeable.

[5. If a *corporation aggregate* diſſeiſes one to the uſe of another man, they *are diſſeiſors in their natural capacity.* 8 H. 6. 14. b.] Br. Corporations, pl. 24. cites S. C.

[6. If a *man brings an infant* with him *into the lands of J. S. and there claims the lands to the uſe of himſelf and the infant*, yet the infant is not any diſſeiſor, becauſe he made no claim. 26 Aſſ. 39. per Skipwith.]

7. Treſpaſs upon the 5 R. 2. The defendant pleaded bar by J. and his feme, and gave colour. The plaintiff ſaid, that before the ſaid J. and his feme any thing had, *W. S. was ſeiſed in fee and infeoffed the plaintiff in fee, who was ſeiſed, till by the defendant diſſeiſed, to the uſe of J. and his feme, to which diſſeiſin J. and his feme agreed*, &c. Jenney ſaid, that now he ought to plead that all three diſſeiſed him by reaſon of the agreement; but Littleton J. ſaid, no; for there is a *diverſity where a man is privy to the diſſeiſin at firſt, and where not;* for where I *command a man to enter unlawfully for me*, both are diſſeiſors, and ſo it ſhall be pleaded; for *there the franktenement is in me immediately; but* in the caſe of the diſſeiſin to the uſe, &c. the franktenement *is not in ceſtuy que uſe before agreement;* quod nota. And ſo it ſeems that *he who agrees and was not privy before is tenant only by his agreement, but not diſſeiſor.* Contra of him who commands, &c. Br. Diſſeiſin, pl. 12. cites 15 E. 4. 15.

8. The *demandant and others* in a præcipe *did diſſeiſe the tenant to the uſe of the others*, and the writ did not abate, for the *demandant*

was a diſſeiſor, but gained no tenancy in the land, for that he *was but a coadjutor*. Co. Litt. 180. b.

*9. A man *diſſeiſes tenant for life to the uſe of him in the reverſion*, and after he in the *reverſion agrees* to the diſſeiſin; it is ſaid that he in the reverſion is diſſeiſor in fee, for by the diſſeiſin made by the ſtranger the reverſion was deveſted, which (they ſay) cannot be reveſted by the agreement of him in the reverſion, for that it makes him a wrong-doer, and therefore no relation of an eſtate by wrong can help him. Co. Litt. 180. b. 181. a.

(H) Who ſhall be ſaid no Diſſeiſor *at the Election* of the Tenant.

S. P. and ſo if he enters claiming as guardian by nurture where he is not, and cites 49 E. 3. 10. 40 E. 3. Accompt, 35. and 33 H. 6. 2. and ſays, that many other books are ſo; per Jones, Berkley, and Crooke. Cro. C. 303. Paſch. 9 Car. ——— S. P. Arg. Cart. 162.

[1. IF a *man enters* into the land of another, *claiming as guardian where the land is not held of him, or where he ought to be guardian*, though he is a diſſeiſor at the election of the heir, yet the heir may elect him to be no diſſeiſor. 28 Aſſ. 11. adjudged; for ſuch guardian after entry granted the ward over, and the grantee entered, and he adjudged a diſſeiſor, and therefore the firſt guardian was no diſſeiſor by election, for if he was a diſſeiſor, the ſecond guardian could be no diſſeiſor to him.]

Cro. C. 302, 303. pl. 6. S. C. in B. R. and the judgment in C. B. was reverſed by three juſtices, but Richardſon Ch. J. contra. And the reporter adds a nota, fol. 166. at the end of the caſe, that Sir Robert Heath Ch. J. of C. B. and Crawley J. Baron Denham, and Baron Trevor, agreed with this judgment in B. R. and conceived, that it would be very miſchievous if it ſhould be adjudged otherwiſe. But Sir Humphry Davenport ſeemed to doubt whether the leſſee for years ought not ſtrictly to be taken for the diſſeiſor and tenant. ——— Jo. 315. pl. 3. Blundell v. Baugh. S. C. in B. R. and the judgment in C. B. reverſed. ——— Litt. Rep. 372. Vaugh v. Blundell, S. C. in C. B. adjornatur. ——— Lat. 53. Jones J. ſaid, that if leſſee at will makes a leaſe for years, and the leſſee enters, there this is a diſſeiſin at the election of him that has the franktenement, and not otherwiſe; and cited the caſe of Parſley [Powſeley] v. Blackman, and cited Mich. 7 Car. Blundſden's caſe, adjudged in C. B. that leſſee for years only was the diſſeiſor. ——— S. C. cited Cart. 162. Arg. as reſolved that it is no diſſeiſin but at election, and if it be a diſſeiſin, that the tenant at will is the diſſeiſor, and not the tenant for years. ——— 3 Mod. 197. cites S. C. held that the making the leaſe was no diſſeiſin of the freehold; for it was found in that verdict, that he occupying at will, and entering by his father's [the leſſor's] aſſent, the leaſe was alſo intended to be made by his aſſent.

Cro. C. 302, 303. pl. 6. S. C. in B. R. and the judgment in C. B. was reverſed by three juſtices, but Richardſon Ch. J. * contra. And the reporter adds

[2. If leſſee *at will makes a leaſe for years*, this is a diſſeiſin at the election of the leſſor at will that hath the fee, for if he diſpoſes of the land as if no diſſeiſin had been, then it is no diſſeiſin. P. 9 Car. B. R. between BLUNDEN AND BAUCH, adjudged in a writ of error per Curiam; contra Richardſon; and the judgment given to the contrary in Banco by the Court againſt Darby reverſed accordingly. Intratur, Hill. 7 Car. B. R. Rot. 1106. where after the leaſe for years made by the leſſee at will, the leſſee at will and leſſor at will joined in a fine, and declared the uſes of a fee, and adjudged good. This was for the manor of Blechingly, which concerned the Earl of Nottingham.]

[3. *And* in the argument of this caſe, another caſe was vouched to be adjudged between POWSELY AND BLACKMAN accordingly. Tr. 18 Ja. Rot. 130. B. R.]

[4. But

[4. But judgment was given the 20 Jac. where after a *leaſe for years* made *by tenant at ſufferance upon a mortgage*, the *deviſe of* * *the mortgagee* was adjudged good, and ſo no diſſeiſin at his election.]

The caſe was, a man *mortgaged lands by deed inrolled upon payment of money at the end of five years*, and by the indenture it was *agreed that the mortgagor ſhould enjoy and take the profit* of the lands *in the interim*. The *mortgagor made a leaſe for ſix years*; the *leſſee entered and ſurrendered his intereſt to the mortgagee*, at the day *the money was not paid*; the mortgagee without any entry deviſed the term and died. Adjudged that the deviſe was good, which it could not be if the ſaid leaſe was a diſſeiſin nolens volens to the mortgagee. Jo. 316. Paſch. 9 Car. B. R. cited per Cur. as adjudged in B. R. 5 or 15 Jac. Powſeley v. Periman. [Blackman.] ——— Cro. J. 659. pl. 9. Hill. 20 Jac. B. R. the S. C. adjudged per tot. Cur. accordingly. ——— 2 Roll. Rep. 241. 284, 285. S. C. adjudged that the deviſe was good; but the reporter ſays that no reaſon was given. ——— Bridgm. 12. Poneſley v. Blackman, S. C. after many arguments adjudged accordingly. —— Palm. 201. S. C. adjudged accordingly. —— S. C. cited per Cur. Cro. C. 304. Paſch. 9 Car. B. R.

[5. If a man *enters into the land of an infant by his aſſent*, this is a diſſeiſin to the infant at his election; for the infant cannot prejudice himſelf by his aſſent. 11 E. 3. Aſſ. 87. adjudged.]

Infant leaſes for years, rendering rent, and leſſee enters, it is at the election of the infant to charge him in aſſiſe, or bring debt for the rent, or accept the rent at his full age. Cro. C. 303. Hill. 9 Eliz. B. R. per three juſtices, cites 1 E. 4. 6. and Ibid. 306. Richardſon Ch. J. agreed to this caſe.

[6. If A. be ſeiſed of lands in fee, and a *ſtranger enters* upon him *by colour of a leaſe for years, which is void, and pays the rent* to him, this is not any diſſeiſin at election; for if A. after covenants to ſtand ſeiſed to the uſe of himſelf in tail, the eſtate ſhall well riſe. P. 6 Ja. B. MOLINEUX's caſe, per Curiam.]

[7. If *A. ſeiſed in fee makes a* deed of *leaſe*, by which he demiſes it *to B. habendum a die datus for life, with a letter of attorney in the deed to make livery*, and reſerving 6 s. 8 d. rent, and the *attorney makes livery the ſame day* of the date, according to the form of the charter, and the *leſſee enters, claiming it by force of the indenture and livery, and pays the ſaid rent* to the leſſor according to the form of the indenture; this is not any diſſeiſin to A. at his election, though prima facie he was a diſſeiſor, yet inaſmuch as (†) he claimed but a leaſe, and paid his rent accordingly, the leſſor may elect that he ſhall not be a diſſeiſor. Mich. 10 Car. B. R. between ‡ BULL AND WIAT, intratur Trin. 9 Car. Rot. 514. upon a ſpecial verdict for a garden in Briſtol. The Court ſeemed at firſt e contra; but after they gave a peremptory rule for judgment for the plaintiff upon the non-attendance of the defendant, by which they adjudged it to be no diſſeiſin at election, where the caſe was, that the *heir of the leſſor after the leaſe* made *ſuffered a common recovery of the land upon a præcipe brought againſt him without any entry into the land*, and by conſequence it was adjudged, that this recovery was good. But it ſeems that they adjudged it upon the laſt point of the recovery. Et P. 11 Car. B. R. between SIR KENELM DIGBY AND JORDAN, per Curiam, upon evidence at the bar, reſolved, that *this is an abſolute diſſeiſin, becauſe the leſſee entered claiming his eſtate for life*, and that it had been *otherways if he had claimed as leſſee at will.*]

‡ Cro. C. 388. pl. 21. S. C. ruled that if cauſe were not ſhewn, &c. judgment ſhould be entered for the plaintiff; † Fol. 662. for that the ſuffering a recovery was an eſtoppel to him and all under him to ſay that ſhe was not tenant of the freehold.

[8. If *A. leaſes the demeſnes of a manor for years to B. and after aſſures a jointure of the ſame land to his wife* for her life, *and after aliens*

aliens the fee, and *the alienee enjoys the rent* by the hands of the termor, and after *A. dies*, and the *wife enters claiming her jointure, and there keeps court*, &c. and *B. aſſents* thereto, *and attorns* to the wife, and pays to her the rent; this is a *diſſeiſin to the alienee or not at his pleaſure*, notwithſtanding the continuance of the poſſeſſion of the termor. D. 2 El. 178. pl. 38.]

[104] 9. In *aſſiſe of rent or common*, be it in *groſs or appendant*, a man is in ſeiſin and out upon diſturbance made at his pleaſure; for he may chuſe to take for diſſeiſin or not. Br. Seiſin, pl. 17. cites 8 Aſſ. 4.

10. In aſſiſe it was found that the *plaintiff at full age was diſſeiſed, and afterwards came upon the land, and put his foot within*, but *took no profits*, and *the other ouſted him*, and by award he recovered damages for the firſt diſſeiſin; the reaſon ſeems to be inaſmuch as it is at the election of the plaintiff if he will take this matter for a ſeiſin or not, and the *diſſeiſor, who is a tortious ſeiſor, cannot plead it*; for this was found by verdict at large. Br. Diſſeiſin, pl. 84. cites 26 Aſſ. 24.

Co. Litt. 55. a. 11. If one enters and *claims as guardian in ſocage*, or by *nurture*, where he is not, the infant may bring aſſiſe, or charge him as guardian, thereby admitting him to be in without wrong. Cro. C. 303. cites 49 E. 3. 10. 40 E. 3. Accompt, 35. and 33 H. 6. 2.

12. If a man *receives my rent of my tenant*, this is no diſſeiſin to me, but at my pleaſure; contra if I bring thereof aſſiſe. Br. Diſſeiſin, pl. 100. cites 15 E. 4. 8.

S. C. cited Jo. 317. per Cur. 13. If *leſſee for years ſurrenders* his eſtate to the leſſor, and *yet continues in poſſeſſion, and always after pays the rent to the leſſor*, this was held not to be any diſſeiſin to the leſſor, but at his pleaſure. D. 62. a. pl. 33. Paſch. 38 H. 8. Pennington v. Morſe.

14. *Leſſor by his bailiff diſcharged his leſſee at will*, and nevertheleſs he continues poſſeſſion and pays his rent; it is at leſſor's election to take him as diſſeiſor. Jo. 317. cites it as 2 Eliz. the caſe of Hayman v. Hatch.

4 Le. 48. pl. 126. S. C. cited per Coke in the very ſame words. —And. 134. pl. 184. Hill. 27 Eliz. Skipwith v. Conies, S. C. 15. *Grandfather tenant* in tail [*at will*] *father and ſon* The *grandfather died*; the *father entered and paid the rent to the leſſor, and died in poſſeſſion*; adjudged that it was not any deſcent. For the paying the rent explains by what title he entered, and ſo he ſhall not be a diſſeiſor but at the election of another; cited by Coke. Arg. Le. 121. pl. 163. as adjudged in C. B. Skipwith's caſe.

and ſtates it that after the father's death *the ſon likewiſe entered* generally, *and paid the rent*, and this was adjudged to be no diſſeiſin. ——— The words (in tail) are miſprinted, and ſhould be (at will), and ſo they are in Anderſon.

Le. 121. pl. 163. S. C. in totidem verbis. 16. L. *tenant in tail leaſed for years to J. S. who aſſigned over to P. the plaintiff's father. L. died. W. his ſon entered upon P. who re-entered. W. without other words demiſed the lands to P. for life*, the *remainder to Joan his wife for life*, the *remainder to P.'s ſon for life, with warranty*, and a *letter of attorney to re-enter and deliver ſeiſin* accordingly. *P. died before the livery executed*, and afterwards the *attorney made livery to Joan. W. died. E. the ſon and heir*

heir of W. entered on Joan his wife. Joan re-entered and leaſed to the plaintiff, who upon ouſter brought an ejectment. It was inſiſted that P. by his entry was not a diſſeiſor but at the election of W. for when P. accepted ſuch a deed from W. it appears his intent was not to enter as diſſeiſor; and it was not found that P. had any ſon and heir at the time of his death, and if not then there was no deſcent, and there is no diſſeiſin found, that P. expulit L. out of the land; and judgment was given againſt the plaintiff. 4 Le. 48. pl. 126. Trin. 30 Eliz. B. R. Piers v. Leverſuch.

17. A *tenant for life*, the *remainder in fee to B. A. makes a leaſe for years*, and afterwards *grants the reverſion to C. habendum* tenementa prædict. *from Midſummer next* following *for the life of the grantor*. After *Midſummer the leſſee for years attorns; the years expire; C. the grantee enters and leaſes at will to D. to whom A.* the grantor *levies a fine come ceo. B. in the remainder enters*. Reſolved that when C. * enters by colour of this void grant, he is a diſſeiſor; and a diverſity was taken between a grant made by agreement of the parties, which ſtands not with the rules of law, and which never can by any ſubſequent act (as by livery or attornment) be made good, and a grant good at the commencement, but to have its perfection by ceremony ſubſequent, as in the caſe of a charter of feoffment if the feoffee enters before livery he is no diſſeiſor; for the charter is good, and the agreement of the parties accords with the law, and it may be made good by livery ſubſequent. 2 Rep. 55. a. b. Mich. 39 & 40 Eliz. C. B. Buckler's caſe.

Cro. E. 450. pl. 18. and Ibid. 585. pl. 15. Buckler v. Hardy. S. C. adjudged, but not on this point. — Mo. 423. pl. 591. S. C. adjudged, but not on this point. — 2 And. 29. pl. 19. Buckley v. Hardy, S. C. adjudged, but not on S. P.

* [105]

18. *Copyholder* or *leſſee for years* or *at will levies a fine* of his lands ſo holden among other lands, and yet pays his rent, this fine ſhall not bind; for it is no diſſeiſin but at election. 3 Rep. 77. b. Hill. 44 Eliz. in Canc. Farmer's caſe.

2 And. 176. pl. 98. S. C. reſolved by all the juſtices at Serjeant's Inn (except two). — Jenk. 253. pl. 45. S. C. reſolved by all the judges of England. — S. C. cited per Cur. Jo. 317.

19. Tenant at will made a leaſe *from year to year*. Per Dyer and Manwood, it is no diſſeiſin, and denied the book of 12 E. 4. 12. but Harper J. e contra. 4 Le. 35. pl. 95. 15 Eliz. C. B. Anon.

If *leſſee at will leaſes for years*, and the leſſee enters, it is a diſſeiſin at the election of him who has the franktenement, and not otherwiſe. Per Jones J. Lat. 53. 1 Car. Gerrard v. Norris.

20. If *A. leaſe land to B.* reſerving a rent, &c. *B. pays* his rent *to C.* this is no diſſeiſin to A. unleſs he will. 2 Sid. 75. Paſch. 1658. Crouch v. Wills.

Cro. C. 303. pl. 6. Paſch. 9 Car. B. R. per Cur. S. P. in caſe of Blunden v. Baugh.

21. *Tenant in tail of a rent grants the ſame in fee* and dies. The iſſue has his election; if he will *diſtrain* he is in poſſeſſion; but if he brings *formedon* he is out of poſſeſſion. Co. Litt. 57. b. cited per Archer J. Cart. 58.

22. *Executor de ſon tort of a term* is a diſſeiſor only at the election of the lord or the reverſioner. 2 Show. 458. Hill. 1 & 2 Jac. 2. B. R. Norwich (Mayor) v. Johnſon.

(I) *Who* ſhall be ſaid a *Diſſeiſor* or not.

A Man *cannot qualify his own Wrong.*

D. 134. b. pl. 11. Mich. 3 & 4 P. & M. Kirton v. Birling S.C.

[1. IF a *diſſeiſor makes a leaſe for years or at will*, and the *diſſeiſee enters* upon him, and after the *leſſee re-enters, claiming his firſt eſtate*, yet he is a diſſeiſor, becauſe he cannot qualify his own tort. D. 3. 4 Ma. 134. 11.]

[2. If a *man enters into my land, claiming a leaſe for years*, he is a diſſeiſor. 9 H. 6. 21. 31. b.]

Br. Diſſeiſor, pl. 85. (84.) cites S. C. —— Br. Aſſiſe, pl. 280. (279.) cites S. C.

[3. *So* if a man enters *claiming as guardian where he is not guardian*, he is a diſſeiſor. 9 H. 6. 31. b. 28 Aſſ. 11. adjudged.]

[106]

Fitzh. Aſſ. pl. 130. cites S. C.

[4. *So* if a man enters into land, claiming *as tenant by ſtatute-merchant when he has no right*, &c. he is a diſſeiſor. 24 E. 3. 31. adjudged.]

[5. If *guardian in chivalry aſſigns dower* to one, as the wife of the father of the ward, *where ſhe was not* his *wife*, ſhe is a diſſeiſoreſs to the heir, though ſhe enters as tenant in dower. 21 E. 3. 5.]

[6. If a man *leaſes for years to another and his heirs*, and after the *leſſee dies*, and his next *heir claiming the land, enters* into the land; though this is but a chattel, ſo that the heir hath no right thereto, yet becauſe *he claims but the term*, he is no diſſeiſor. 11 E. 3. 88. adjudged.]

[7. If a *copyholder leaſes* for years *by licence* of the lord, *and* after *enters upon the leſſee*, and ouſts him, this *is a diſſeiſin to the lord* of the freehold. M. 11 Jac. B. R. per Coke.]

[8. If the *king guardian continues the poſſeſſion after the full age of the heir*, he does not gain the fee thereby, becauſe he hath right to continue it till livery ſued. 7 H. 4. 43.]

Fol. 663. * Tit. Eſtate (D. c), pl. 3.

[9. If the *guardian holds* himſelf *in after the full age* of the heir *without cauſe*, he is a diſſeiſor. 7 H. 4. 43. but a tenant at ſufferance, for which, vid. the diviſions under title * Eſtate, 1 Rol. Abr. 861. D.]

[10. *But* if *leſſee for years holds over his term*, he is no diſſeiſor. 7 H. 4. 43.]

11. If *tenant for years, or a guardian, makes a leaſe for life, the remainder in fee*, and tenant for life enters, he is a diſſeiſor, becauſe he takes the firſt livery; and ſo it is of him in the remainder for life or in fee, if he enter. 2 Inſt. 413. Marg. cites 50 E. 3. 22.

12. A *man and a woman executors ſued execution of a ſtatute*, and the *man granted his eſtate to the baron of the feme, co-executrix, and died*,

died. The *baron granted his eſtate to another, who entered and was ſeiſed;* and alſo the *baron and feme ſealed an indenture of grant of their eſtates to another, and delivered to him the obligation of the ſtatute, but not ſeiſin,* by which *entered claiming ſuch eſtate only,* yet he is a diſſeiſor, by reaſon that the grant is void, and a diſſeiſor by his claim nor otherwiſe cannot qualify his eſtate. Br. Diſſeiſin, pl. 78. cites 24 E. 3. 31. and 63.

13. *Mayor and commonalty* cannot *diſſeiſe another unleſs to the uſe of themſelves;* per Cand. Contra it ſeems if one enters for them by authority in writing under their common ſeal, where their entry is not lawful. Br. Corporations, pl. 24. cites 8 H. 6. 1. 4.

14. If there be two jointenants, and the grantee of a rent-charge diſtrains for the rent, and one of them makes reſcous, *they are both diſſeiſors;* for a diſtreſs for the rent is a demand in law, and then the non-payment is a denial and diſſeiſin, but he that made the reſcous is the only *diſſeiſor with force.* Co. Litt. 161. b.

15. If a man *enters into land* of his own wrong, *and takes the profits,* he cannot qualify his own wrong by ſaying he holds it at the will of the owner. Co. Litt. 271. a.

(K) Who ſhall be ſaid a Diſſeiſor. [107]

By Command.

[1. IF a man *commands J. S. to enter* into certain land *in his name, if he hath right thereto, or in the name of his couſin, if he hath right,* if J. S. enters accordingly, yet if the *commander or his couſin have no right,* he ſhall not be a diſſeiſor, but J. S. only; for his *command was conditional.* 34 Aſſ. 12. adjudged.] Br. Diſſeiſin, pl. 57. cites S. C. for he made J. S. a judge of his right, and therefore it was his folly to enter where the commander had no right; quod nota. ——Br. Entry Congeable, pl. 72. cites S. C.——Fitzh. Aſſiſe, pl. 315. cites S. C. and J. S. who entered was awarded the diſſeiſor.

[2. *So* if a man ſays to J. S. that where his anceſtor died ſeiſed of certain land, he commands him *to enter* into it *in his name if his anceſtor died ſeiſed of a fee, otherwiſe not;* if J. S. enters in his name, yet if the *anceſtor of the commander did not die ſeiſed of a fee,* J. S. only is the diſſeiſor, and not he that commanded him, for his command was conditional. 34 Aſſ. 12.] See ſupra, pl. 1. and the notes there.

[3. If a man *commands J. S. to diſſeiſe J. D. and he does it* accordingly, the *commander* is a diſſeiſor as well as J. S. * 22 Aſſ. 99.] * This is miſprinted; no ſuch point being there.

[4. [*So*] If a man *commands his bailiff to make a diſſeiſin,* and he does it accordingly, the commander is a diſſeiſor. 27 Aſſ. 30. adjudged.] Fitzh. Aſſiſe, pl. 254. cites S. C.

[5. If a man *counſels another to make a diſſeiſin,* and does it accordingly, the *counſellor* is a diſſeiſor. 27 Aſſ. 30. adjudged.] Fitzh. Aſſiſe, pl. 254. cites S. C. ——Co. Litt. 180. b. S. P. and that aſſiſe lies againſt him.

[6. If a man *makes a leaſe for years of the land of another out of the land*, and the *leſſee enters*, the *leſſee* only is the diſſeiſor, and not the leſſor. P. 10 Ja. B. Contra 23 H. 8. f. 27.]

[7. If *leſſee at will makes a leaſe for years*, and the *leſſee for years enters*, the *leſſee at will* is the diſſeiſor, and not the leſſee for years, for that otherwiſe the leaſe for years would be void. P. 9 Car. B. R. between BLUNDEN AND BAUGH, in a writ of error upon a judgment in Banco, reſolved per Curiam, præter Richardſon, and the judgment given in Banco by Richardſon, then being chief juſtice there, and by the Court, præter Harvey, reverſed accordingly. Intratur, Hill. 7 Car. B. R. Rot. 1106. This was for the manor of Blechingly, which belonged to the Earl of Nottingham.]

Fr. Diſſeiſin, pl. 68. (67.) cites S. C.—Fitzh. Diſſeiſin, pl. 4. cites S. C.

[8. If *tenant at will or ſufferance makes a leaſe for years*, the *leſſee at will and tenant at ſufferance* are the diſſeiſors, and not the leſſee for years. 12 E. 4. 12. b. by all the juſtices.]

F. N. B. 179. (G) S. P.—But a man of full age may be a diſſeiſor, if he commands another to enter into land. Ibid.

9. Aſſiſe againſt an infant and others; the diſſeiſin was found by *command of the infant to his own uſe*, but he *was not preſent*, and the infant was acquitted of the diſſeiſin by judgment, for he *cannot conſent*, and becauſe one came vi & armis to make the diſſeiſin, all the * others were adjudged to priſon; and ſo ſee of treſpaſs. Br. Diſſeiſin, pl. 35. cites 12 Aſſ. 33.

* [108]

10. Lord and tenant by *rent-ſervice*. The *lord diſtrained*. The *tenant commanded N. to make reſcous, who did ſo*. The aſſiſe is well brought againſt the tenant only; for he is tenant, and is diſſeiſor by the command, and ſo diſſeiſor and tenant named, &c. Br. Diſſeiſin, pl. 54. cites 29 Aſſ. 59.

Litt. Rep. 372. Arg. cites S. C. and ſays, that a material implication will not ſerve, as ſaying, *do if you will*; and ſays it was agreed there, that this is no diſſeiſin to his uſe.

11. If *a man ſays that he will diſſeiſe J. N. to my uſe*, and *I ſay that I am content*, he is ſole diſſeiſor, and this is no command but a ſufferance. Br. Diſſeiſin, pl. 15. cites 21 H. 7. 35.

12. If a man *diſſeiſes a ſtranger to the uſe of W. N. by my command*, it is a tort in me. Per Pollard. Br. Diſſeiſin, pl. 15. cites 21 H. 7. 35.

13. If *A. leaſes the land of J. N.* to me for years *rendering rent*, and the *leſſee enters and pays the rent to the leſſor*, the leſſor is a diſſeiſor. Br. Diſſeiſin, pl. 77. cites it as ſaid for law T. 25 H. 8. for *this countervails a command to enter*, and he who commands is a diſſeiſor, quod nota by his void leaſe.

(K. 2) Who is Diſſeiſor by Failer of Record pleaded.

1. 13 *E.* 1. *cap.* 25. *IF the defendant fails to make good the exception which he pleads, he ſhall be adjudged a diſſeiſor without taking the aſſiſe, and ſhall give to the plaintiff double damages, and ſhall ſuffer a year's impriſonment.*

2. In aſſiſe the baron and feme pleaded record in bar and failed at the day, and the *feme was received*, and *was no diſſeiſor by the failure of the record*, notwithſtanding the ſtatute of Weſtminſter 2. cap. 25. Br. Diſſeiſin, pl. 36. cites 13 Aſſ. 1. Br. Aſſiſe, pl. 186. cites S. C.

3. In *aſſiſe* if the *tenant vouches record and fails at the day, he is a diſſeiſor without confeſſing the aſſiſe by the ſtatute of Weſtminſter* 2. *cap.* 25. Br. Failer de Record, pl. 5. cites 15 Aſſ. 16.

4. *And* where a man fails of his record at the day, &c. he *is not excuſed to ſay that the juſtices before whom the record remains was in Wales, and cannot be found. But* by ſome he is excuſed to ſay *that the record remains in C. B. which court was always after cloſed ſo that he could not have the record*; quære. Br. Failer de Record, pl. 5. cites 15 Aſſ. 16.

5. In mortdanceſtor the *tenant vouched*, and the *demandant granted the voucher*, and the *vouchee vouched record and failed* at the day, and yet the aſſiſe was not awarded of the damages as in aſſiſe of novel diſſeiſin, but the aſſiſe was at large upon the points, &c. For the ſtatute ſays, that by failer in aſſiſe habeantur pro diſſeiſitoribus, &c. and *no diſſeiſor is in aſſiſe of mortdanceſtor*. Br. Failer de Record, pl. 10. cites 29 Aſſ. 11.

6. If an infant *pleads record in aſſiſe and fails at the day*, he ſhall not be diſſeiſor by the ſtatute. Br. Coverture, pl. 76. cites 36 E. 3. [109] Br. Diſſeiſin, pl. 98. cites S. C.

and Fitzh. Aſſiſe, 443. and concordat 33 E. 3. ibid. N. 67. quod nota. ——— Br. Failer de Record, pl. 13. cites S. C. and 33 E. 3. S. P. accordingly; for corporal puniſhment ſhall not be againſt an infant.

7. An *infant* ſhall not be a diſſeiſor by failer of record, for *corporal puniſhment* ſhall not be againſt an infant. Br. Failer de Record, pl. 13. cites 36 E. 3. and 33 E. 3.

8. Attaint in aſſiſe the *baron and feme pleaded record* in Bank *and failed* at the day, and the *baron made default*, and the *feme was received*, and therefore the baron was adjudged a diſſeiſor by the ſtatute by the failer of his record; for judgment cannot be given upon the failer of the record by reaſon of the receipt. Br. Diſſeiſin, pl. 72. cites 11 H. 4. 51.

(L) Diſſeiſin *by Officers.*

[1. IF a man *recovers ſeveral houſes in an aſſiſe*, and after the *tenant reverſes it in a writ of error*, and a writ of *execution iſſues* to the ſheriff *to put them in poſſeſſion* of the houſes which he loſt

loſt by the judgment, though the tertenants are ſtrangers to the recovery, and therefore ought to be ouſted without a ſcire facias againſt them, yet if *he does execution* putting them out of poſſeſſion *by force of this writ*, he ſhall not be any diſſeiſor, becauſe he *hath the direct authority of the Court to do it*. P. 15 Ja. B. R. per Curiam, reſolved between FLOYD AND BETHEL.]

Fol. 664.

[2. The *ſame* law is *in all caſes where the execution is of a judgment in which the demand was of a thing certain*, if the ſheriff make execution of this thing, he is no diſſeiſor. P. 15 Ja. B. R. between FLOYD AND BETHEL, reſolved per Curiam.]

[3. *But where the execution is in the generalty* without mentioning any thing in particular, there the *ſheriff ought to make execution of the right thing at his own peril*, otherwiſe he will be a diſſeiſor, for he is bound to take notice thereof, and he hath no warrant from the Court to make execution but of the right thing. P. 15 Ja. B. R. between FLOYD AND BETHEL, reſolved per Curiam. 6 R. 2. Aſſ. 71.]

(M) In what Caſes a Diſſeiſin *of what Part ſhall be* a Diſſeiſin *of the Whole.*

Br. Aſſiſe, pl. 76. cites S. C.——

[1. IF a man be *diſſeiſed of part of a corody*, this is not any diſſeiſin of the whole. 22 H. 6. 10.]

Br. Diſſeiſin, pl. 10. cites 15 E. 4. 5. S. P.——If the corody be to take four loaves and four flaggons of drink every week, he is diſſeiſed of the loaves; this is no diſſeiſin of the drink, but if diſſeiſed of two loaves only, this is a diſſeiſin of all four. 8 Rep. 50. a. cites 22 H. 6. 9. b. and 12 Aſſ. 23.

[110]

Br. Aſſiſe, pl. 76. cites S. C.——

[2. If a man be diſſeiſed *of part of the profits of an office*, this is not any diſſeiſin of the whole office. 22 H. 6. 10.]

Br. Diſſeiſin, pl. 10. cites 15 E. 4. S. P.

[3. If a *man holds of me* 20 *s. rent*, and *diſſeiſes me of* 10 *s. thereof*, this is a diſſeiſin of the whole. 22 H. 6. 10. b.]

Br. Aſſiſe, pl. 76. cites S. C. for entry or livery of ſeiſin

[4. If a man ſeiſed of a *manor* which *extends into ſeveral counties*, and one *diſſeiſes me of an acre in one county*, this is not any diſſeiſin of the reſidue of the manor. 22 H. 6. 10. b.]

in one county, in name of things in two counties, ſhall not ſerve but for the one county; per Paſton. ——Br. Diſſeiſin, pl. 10. cites S. C.

Br. Aſſiſe, pl. 121. cites S. C.

5. If *five coparceners* are, and the *one takes more profits than he ought* to take, this is a diſſeiſin to the others, though he relinquiſhes part to the others; but if the others *take this little part it ſhall abate the writ*. Br. Diſſeiſin, pl. 18. cites 7 Aſſ. 10.

6. Diſſeiſin of one *parcel of an office*, or of the *profits of an office*, is no diſſeiſin of the whole. Br. Diſſeiſin, pl. 10. cites 22 H. 6. 10. per Paſton.

7. If one *diſſeiſes me of part of a houſe, and I am in poſſeſſion of the reſt* of it, it is at my election whether I will admit myſelf out of poſſeſſion of the houſe or not. Sty. 341. Mich. 1652. Cydall v. Spencer & al'.

(N) Where it is purged.

1. *IF the iſſue* in tail *enters* after the death of his anceſtor *upon the diſcontinuance within age, and aliens in fee*, he ſhall not have formedon, but *dum fuit infra ætatem*, becauſe the *diſſeiſin is not purged by the diſcontinuance*. Br. Formedon, pl. 47. cites 7 E. 4. 19.

2. If a man *leaſes for life*, the *remainder* over *to another for life*, if he in *remainder diſſeiſes tenant for life*, and after the *tenant for life dies*, he in remainder is not now any diſſeiſor; for by the death of the tenant for life, he in remainder is now ſeiſed by his remainder, and the fee reveſted to him in reverſion; for there he in remainder cannot enter after the diſſeiſin, inaſmuch as there is a meſne remainder between them. Br. Diſſeiſin, pl. 74. cites 19 H. 6. 22.

3. If *a man diſſeiſes my father*, and *I enter upon the diſſeiſor*, and after *my father dies*, now *I ſhall retain* againſt the diſſeiſor, and yet the diſſeiſor may have action of treſpaſs againſt me for my firſt entry; for *aſſiſe lies againſt me in the life of my father*; per Brian and his companions. Brooke ſays quære inde; for diſſeiſor cannot make title. And ſo ſee that the deſcent of the right after ſhall change his matter. Br. Diſſeiſin, pl. 90. cites 21 E. 4. 78.

4. If the *diſſeiſee levies a fine to a ſtranger*, the diſſeiſor ſhall retain the lands for ever; becauſe the diſſeiſee againſt his own fine cannot claim; but by the fine *the right is extinct, of which the diſſeiſor ſhall take advantage*. Mo. 423. pl. 591. Paſch. 37 Eliz. adjudged both in C. B. and in B. R. Buckler v. Harvey. 2 Rep. 55. a. 56. a. Buckler's caſe, S. C. and the ſixth point there it was ſaid accordingly. —— Gouldſb. 162. pl. 96. Hill. 43 Eliz. S. P. put by Coke Attorney-general to the Court; but Popham and Gawdy thought that diſſeiſor ſhould not take advantage of it. —— Mar. 105. pl. 180. Reeve and Crawley Juſtices held that this fine ſhall enure only by way of eſtoppel, and eſtoppels bind only privies to them, and not ſtrangers, and therefore the diſſeiſor here ſhall not * take benefit of it, and therefore did conceive 2 Rep. 56. a. to be no law. —— Diſſeiſee levied a fine, and declared the uſe of it by deed to the conuſee. Bridgman held that this ſhall not enure to the diſſeiſor; but if no uſe had been declared, then it ſhould enure to the uſe of the diſſeiſor, and extinguiſh the right of the diſſeiſee. Lev. 128. Hill. 15 & 16 Car. 2. at Lent aſſizes at Southwark. Peterborough (Counteſs) v. Bludworth.

* [111]

5. If a *leaſe for life* be made, the *remainder for life*, the *remainder in fee*, and he in *remainder for life diſſeiſes the tenant for life*, and then *tenant for life dies*, the diſſeiſin is purged, and he in the remainder for life has but an eſtate for life; and ſo note a diverſity, where the particular eſtate for life is precedent, and when ſubſequent. Co. Litt. 276. a. By the death of the diſſeiſee, that wrongful fee is turned into a rightful eſtate by operation of law. 8 Mod. 53. Arg.

6. Rights, and the *purging of wrongful acts are always favoured in law*, and therefore where a diſſeiſin or abatement is made, and the diſſeiſee brings his ejectment, and has a verdict and judgment for him, (but no execution) yet an entry being found as being in the declaration of ejectment, that *entry will purge the diſſeiſin, and the* MS. Rep. Hill. 12 Ann. C. B. Goodtitle v. Riſden & al'.

the continuing in poſſeſſion afterwards is only as a treſpaſſor. See Hill. 12 Ann. B. R. Goodtitle v. Riſden. The caſe was as follows, viz.

In eject' firmæ the plaintiff declared, that Brown Forteſcue, 13 April anno reginæ nunc 9, did demiſe to the plaintiff two meſſuages, two gardens, &c. with appurtenances in Clauton in com' Devon' habend' a 25 die ejuſd' menſis Aprilis for ten years then next following, and that James Forteſcue poſtea ſcilicet eodem 13 April' anno ſupradict' did demiſe the ſame tenements (as above), &c. and alſo that Brown Forteſcue poſtea ſcilicet eodem 13 die Aprilis anno nono ſupradict' did demiſe the ſaid tenements (as above); that by virtue thereof the plaintiff entered, and was poſſeſſed until the defendants ejected him, &c. On not guilty pleaded, and upon a trial at Devon aſſiſes, the jury find a ſpecial verdict, viz. they find that Leonard Pote was ſeiſed of and in the premiſes with the appurtenances in his demeſne, as of fee, and being ſo ſeiſed 3 Martii, 16 Jac. 1. by a certain indenture made between him of the one part, and Richard Gedge, and John Mayne, of the other part, did infeoff the ſaid Richard and John, habend' to them and their heirs, to the uſe of Leonard for his life, and after his deceaſe, then to the uſe of * M. the wife of John Pote, ſon and heir apparent of the ſaid Leonard for the term of her life, and after the deceaſe of Leonard and M. to the uſe of the ſaid John Pote, and the heirs male of his body lawfully begotten, or to be begotten, upon the body of the ſaid M. and for default of ſuch iſſue to the uſe of the heirs males of the body of the ſaid Leonard Pote, lawfully begotten upon the body of Willmot his late wife, deceaſed, and for default of ſuch iſſue to the uſe of the right heirs of the ſaid Leonard Pote. That M. died in the life-time of Leonard, and Leonard died ſeiſed of ſuch eſtate in the premiſes as aforeſaid, after whoſe death the ſaid John Pote entered, and was ſeiſed in his demeſne as of fee tail, and had iſſue by M. Leonard his eldeſt ſon, John his ſecond ſon, and Thomas his third ſon; that John Pote the father died ſeiſed, &c. and that the premiſes deſcended to the ſaid Leonard as the ſon and heir of the body of the ſaid John Pote the father, begotten on the body of M. whereupon Leonard the ſon entered, and was ſeiſed in fee-tail, remainder as aforeſaid; and being ſo ſeiſed the ſaid Leonard the ſon, 22 die Martii 1688, died thereof ſeiſed without iſſue; that John the ſecond ſon died in the life-time of the ſaid Leonard alſo without iſſue. They find that Leonard the ſon in his life-time married one Eliz. Pine, who ſurvived him, and immediately after his death entered, &c. into the premiſes, and during her life continued the poſſeſſion thereof; [112] that one John Truebody in her life-time, viz. Trin. 2 W. & M. in C. B. impleaded the ſaid Eliz (after the death of her ſaid huſband) & al' in a plea of treſpaſs and ejectment (inter al') of the premiſes upon the demiſe of the ſaid Thomas Pote, narrando verſus eos inde (inter al') modo & forma ſequen' videlicet Devon' ff. Johannes Raw, Eliz. Pote, & al' attach' fuerunt ad reſpond' Johanni Truebody gent' de placito quare vi & armis quinq' meſuag'

* The true name was (Richawrd), which being an odd Chriſtian name for a woman, is changed into (M).

meſuag', &c. quæ prædict' Tho. Pote dimiſiſſet ad terminum, &c. intraverunt & ipſum Johannem Truebody a firma ſua prædict' ejecerunt, &c. et unde idem Johannes Truebody, &c. ad tunc querebatur quod cum prædict' Tho. Pote 1 Aprilis 2 W. & M., &c. dimiſiſſet eidem Johanni Truebody tenementa prædict' &c. habend' eidem Johanni Truebody a 25 die Martii tunc ult' præterit' uſque finem termini quinq' annorum ex tunc prox' ſequen' plenar' complend' & finiend' virtute cujus quidem dimiſſionis prædict' Truebody in tenement' prædict', &c. intravit & fuit inde poſſeſſionat' & ſic inde poſſeſſionat' exiſten' prædict' Johannes Rawe & al' poſtea ſcilicet eodem 1 die Aprilis anno ſecundo ſupradict' apud Clauton, &c. vi & armis, &c. in tenementa, &c. cum pertinentiis quæ præfat' Thomas Pote eidem Johanni Pote in forma prædict' dimiſit ad terminum qui nondum præteriit intraverunt & ipſum Johannem Truebody a firma ſua prædict' ejecerunt, &c. Upon not guilty pleaded and iſſue thereupon, in quo quidem placito talit' proceſs' fuit in eadem Cur., &c. quod poſtea ſcil' term' Sancti Mich. anno ſecundo ſupradict' prædict' Johannes Truebody per Cons' ejuſdem Cur. recuperavit verſus præfat' Johannem Raw, Eliz. Pote & al' terminum ſuum prædict' (inter al') de & in tenement' prædict' cum' pertin', &c. ad tunc ventur' & ſuper inde Johannes Truebody petiit breve dictorum nuper regis & reginæ de habere fac' eidem Johanni Truebody poſſeſſion' termini ſui prædict' ad tunc ventur' de & in tenement' prædict', &c. per ipſum ſic ut præfertur recuperat' prout per record & proceſs', &c. They further find, that after the ſaid judgment, and before any entry by the ſaid Thomas Pote, or by the ſaid John Truebody, a fine was levied a die Sancti Mich. in Tr' ſeptiman' anno regni W. & M. ſecundo between John Forteſcue jun. gen' quer', and the ſaid Thomas Pote deforc' of the ſaid premiſes, &c. unde placitum convention' fact' inter eos, &c. ſcil' quod the ſaid Tho. Pote did acknowledge the ſaid premiſes to be the right of the ſaid John, ut illa quæ idem Johannes habuit de dono ipſius Thomæ, &c. prout, &c. They further find, that the ſaid fine levied of the premiſes was, and by a certain indenture dated 1 die Maii, anno tertio W. & M. and made between the ſaid Tho. Pote of the one part, and the ſaid John Forteſcue of the other part, was, at the time of the levying thereof, to have been had and levied to the uſe of the ſaid Thomas Pote and his heirs for ever; that the ſaid Thomas Pote afterwards, ſcil' 2 die Junii, anno 5 W. & M. entered upon the ſaid premiſes, and was thereof ſeiſed, &c. and being ſo ſeiſed, he the ſame day by an indenture made between him of the one part, and the ſaid Brown Forteſcue of the other part, and then ſealed and delivered by the ſaid Thomas upon the ſaid premiſes, &c. in conſideration of 500 l. paid to him by the ſaid Brown Forteſcue, did demiſe to the ſaid Brown Forteſcue the ſame premiſes, &c. habend' for the term of 1000 years, by virtue whereof the ſaid Brown Forteſcue entered, and was poſſeſſed, &c. They further find, that the ſaid Eliz. Pote poſtea ſcil' 26 die Martii anno Domini 1710 died, and that after her death the ſaid

Anthony Riſdon, and others, entered into the ſaid premiſes, and were thereof ſeiſed, &c. and that afterwards the ſaid Brown Forteſcue, by virtue of the ſaid demiſe, entered into the premiſes, &c. and was thereof ſeiſed, &c. and being ſo poſſeſſed, poſtea ſcil' die & anno in narr' inde mentionat', did demiſe to the ſaid
[113] George Goodtitle the premiſes, &c. That the ſaid George Goodtitle by virtue of the ſaid demiſe entered, &c. and was poſſeſſed, &c. upon whoſe poſſeſſion the ſaid Anthony & al' re-entered & ipſum Georgium a firma ſua prædict', &c. inde ejecerunt prout idem Georgius interius verſus eos inde queritur ſed utrum, &c.

This ſpecial verdict was argued Paſch. 12 Ann. by Serjeant Prat for the plaintiff, and Serjeant Hooper for the defendant; and in Mich. term following it was argued by Serjeant Pengelly for the plaintiff, and by Serjeant Cheſhire for the defendant; and in Hill. term following the court of C. B. ſcil' Lord Trevor Ch. J. Blencowe, Tracy, and Dormer, gave judgment for the plaintiff.

The Ch. J. delivered the opinion of the Court as follows, viz. that upon this ſpecial verdict three queſtions had been made and argued at the bar; 1ſt, Whether, as this ſpecial verdict was found, Elizabeth Pote, who was the wife of Leonard Pote, muſt be taken to have entered by diſſeiſin or abatement, and to have gained an inheritance by wrong? Whether this entry muſt imply a diſſeiſin or entry by abatement, or muſt be ſuppoſed to be a wrongful entry to him who had the right?

In the next place, Whether the recovery in the ejectment that was proſecuted by Thomas Pote againſt Elizabeth (ſuppoſing there had been a diſſeiſin), has not purged that diſſeiſin, and re-veſted the eſtate in Thomas? And,

3dly, Admitting there was a diſſeiſin to him, and that that diſſeiſin was not purged, then whether the fine levied by him, who was diſſeiſed, to John Forteſcue, who was a ſtranger and had nothing in the eſtate, did not work by way of extinguiſhment, and for the benefit of the defendant, the right of the leſſor of the plaintiff being extinguiſhed by the fine?

Theſe were the queſtions argued at the bar. Now if either of them be with the plaintiff, he has a good title; for if there were no diſſeiſin, or if the diſſeiſin was purged, or if there was no extinguiſhment by the fine, it is plain he had a good title, unleſs it had been deſtroyed by theſe wrongful acts.

That as to the firſt queſtion, whether it was a diſſeiſin or not, and as to the third queſtion, whether the fine levied by a diſſeiſee to a ſtranger, to the uſe of him and his heirs, did work by way of extinguiſhment or not, the Court, as to either of them, would not deliver any opinion at all; but upon the ſecond queſtion the Court were of an opinion, that the recovery in ejectment had purged the diſſeiſin. When an ejectment is brought, the plaintiff declares upon an entry. 1ſt, He declares of a demiſe or leaſe made to him by his leſſor, and then of an entry by the plaintiff, and then that afterwards the defendant entered upon him and ejected him;

now

now all this is confeſſed by the rule of the Court, and this confeſſion is in nature of an eſtoppel, that the entry will purge the diſſeiſin, therefore, after a recovery in ejectment, the plaintiff or his leſſor may bring an action for the meſne profits from the time of that entry. This is the conſtant practice, the defendant has confeſſed the entry; as to himſelf he is concluded from denying it afterwards, he is accounted a treſpaſſor, and the meſne profits ſhall be recovered againſt him.

There is nothing plainer in the law, than that rights, and the purging of wrongful acts, are always favoured; therefore where the plaintiff has recovered his eſtate, and an entry is found by the jury, that entry purges the diſſeiſin, and the continuer in poſſeſſion afterwards is but as a treſpaſſor, though there was a diſſeiſin it is now purged; but whether there was a diſſeiſor or not, or whether fine levied by a diſſeiſee will extinguiſh the right, it is not neceſ- [114] fary in this caſe for the Court to give any opinion upon at all; ſo the plaintiff muſt have his judgment. Judgment pro quer' per tot. Cur.

(O) What Actions, &c. Diſſeiſee may have againſt Strangers.

1. IF the *tenant* of the land *with warranty be diſſeiſed* by a ſtranger, he ſhall not have this writ during this diſſeiſin, becauſe he is not tenant of the land during the diſſeiſin, and the writ ſuppoſes him tenant. 11 H. 3. Rot. 3. between SIMON OF ABENDUN AND REGINALD DE MESSEBURY agreed and adjudged. 2 Roll. Warrantia Chartæ (D), pl. 6.

2. *So* if a *ſtranger takes unjuſtly redditum terræ* (that is, as it ſeems, takes the profit of the land, by which is intended a diſſeiſin) from the tenant, or of the tenant, he ſhall not have this writ; for he *may have his aſſiſe* if he will. 11 H. 3. adjudged. 2 Roll. Warrantia Chartæ (D), pl. 7.

(P) What Charge of Diſſeiſor ſhall bind Diſſeiſee.

1. YOungeſt ſon diſſeiſes the elder. In aſſiſe or other action it is found by falſe oath againſt plaintiff. Then the youngeſt grants a rent-charge, and dies without iſſue. Before attaint brought he muſt hold the land charged; for he *comes in now as heir to his brother*. The attaint is gone by his death, and no remitter contrary to the recovery. D. 5. b. pl. 1. Trin. 24 H. 8.

2. Diſſeiſor leaſes for life, and *grants reverſion to diſſeiſee*. Diſſeiſee *accepts the rent* of leſſee. Quære, if diſſeiſee ſhall ouſt leſſee? D. 30. b. pl. 207. Hill. 28 H. 8. in Canc. Compton v. Brent.

(Q) Power of Diſſeiſee or Diſſeiſor as to Strangers.

1. IF a man is diſſeiſed, and the *diſſeiſor makes feoffment*, and the *diſſeiſee re-enters*, he ſhall have action of *treſpaſs* as well againſt the diſſeiſor as againſt the feoffee, and recover all his damages, ſo that by divers writs every one ſhall be charged for his time of the damages. Br. Treſpaſs, pl. 31. cites 33 H. 6. 46.

2. If *diſſeiſor takes the beaſts* of a ſtranger *damage-feaſant* upon the land, *and after diſſeiſee re enters*, yet diſſeiſor may juſtify the keeping the beaſts taken before the re-entry, till agreement be made with him. Kelw. 40. pl. 3. Mich. 17 H. 7.

[115] 3. A diſſeiſor *makes a leaſe* for life or years, the diſſeiſee ſhall not have action of *treſpaſs vi & armis* againſt him, becauſe he comes in by title. For this *fiction of law*, that the franktenement hath always been in the diſſeiſee, ſhall not have *relation* to make him that comes in by title to be a treſpaſſor vi & armis. Arg. Godb. 318. cites 11 Rep. 51. [Mich. 12 Jac.]

4. If a man enters on another, and makes a leaſe for life, he gains a reverſion, and ſhall *maintain* an action of *waſte*. Arg. Godb. 318. pl. 417. Paſch. 21 Jac. in Scacc.

(R) Writ and Pleadings.

1. IF *five coparceners* are, and the one *takes more of the profits than he ought* to take, this is a diſſeiſin to the others, though he relinquiſhes part to the others, but if the others *take this little part, it ſhall abate the writ*. Br. Diſſeiſin, pl. 18. cites 7 Aſſ. 10.

2. In aſſiſe, if *diſſeiſor named* in the writ comes *in proper perſon, he may plead in abatement of the writ*. Br. Diſſeiſin, pl. 20. cites 8 Aſſ. 2.

3. In mortdanceſtor of rent, the *pernor of the rent* was not ſuffered to plead *hors de ſon fee*, and therefore it ſeems that this is only for the tertenant. Br. Diſſeiſin, pl. 80. cites 12 Aſſ. 38.——But it ſeems, 2 H. 6. 1. that *ſtranger to the avowry* ſhall plead this plea well, but there he *had intereſt* in the land, contra of pernor. Br. Diſſeiſin, pl. 80.

4. A *diſſeiſor ſhall not plead recovery in abatement* of the writ, *neither by concluſion, nor miſneſmer*, nor otherwiſe, without *ſhewing the record immediately*; for he cannot loſe the land by failure of record, as the tenant may; therefore the aſſiſe was awarded immediately; quod nota. Br. Aſſiſe, pl. 413. cites P. 20 E. 3.

5. The diſſeiſor *ſhall not plead record in abatement of the writ, nor by concluſion*; per Skipwith. But per Grene, diſſeiſor ſhall plead *miſneſmer of the plaintiff*, or *that the feme plaintiff is covert baron*. But Shard e contra of the coverture, nor *record unleſs he ſhews it immediately*; for if the record be denied, he cannot loſe the land by failer of the record; per Thorpe, diſſeiſor may plead that

that he was *auterfoits acquit of the diſſeiſin.* Br. Diſſeiſin, p 93. cites 20 E. 3. Fitzh. 120.

6. Præcipe quod reddat againſt *perner of the rent,* who *ſaid* that he *is tenant of one houſe out of which,* &c. *and W. N. not named, is tenant of the other houſe out of which,* &c. *abſque hoc that he is pernor of any rent of this houſe,* and a good plea, and the demandant was compelled to maintain his writ; for if there is not all the tenants nor pernors named, this is not well. Br. Diſſeiſin, pl. 73. cites 21 E. 3. 24.

7. Entry, ſuppoſing *that the tenant entered by W. and K. his feme,* and the tenant *ſaid that the feme's name was J.* priſt; and the demandant was compelled to maintain his writ that her name was K. for *known by the one name and the other is no plea,* Br. Enter en le per, pl. 16. cites 21 E. 3. 47, 48.

8. In aſſiſe, diſſeiſor ſhall not plead *ancient demeſne,* nor any but the tertenant, and he who takes upon him the tenancy, quod nota. Br. Diſſeiſin, pl. 83. cites 21 Aſſ. 2.

9. In aſſiſe, diſſeiſor ſhall not plead *that the plaintiff was ſeiſed* [116] *the day of the writ purchaſed;* for this is for him to plead who takes upon him the tenancy, quod nota, by award. Br. Diſſeiſin, pl. 44. cites 26 Aſſ. 49.

10. *Aſſiſe againſt B. and A.* and *B. pleaded to the aſſiſe as tenant* of the franktenement; and *A. pleaded that the plaintiff was ſeiſed* of the franktenement *the day of the writ purchaſed, and yet is,* where the plaintiff *had elected B. for tenant before,* and from hence it ſeems that the diſſeiſor may plead this plea to the writ, quod nota. Br. Diſſeiſin, pl. 51. cites 28 Aſſ. 41.

11. In aſſiſe, it was ſaid by Aſcue J. that among the aſſiſes anno 28, is, that bailiff nor diſſeiſor cannot plead, that there are *two vills of the ſame name in the ſame county, and none without addition.* Br. Diſſeiſin, pl. 9.

12. In aſſiſe, the bailiff of the diſſeiſor pleaded, *that the plaintiff never had any thing, and if,* &c. nul tort. Fiſh ſaid his maſter had nothing in the franktenement, therefore he ſhall not have the plea, and the opinion of the Court was with him, and therefore it ſeems that the diſſeiſor ſhall not have the plea. Br. Diſſeiſin, pl. 49. cites 28 Aſſ. 24.

13. It was the opinion of the Court, that the diſſeiſor ſhall not plead, *that there are two S.'s in the ſame county,* ſcil. *Great S. and Little S.* and none without addition, judgment of the writ, *nor other plea, but miſnoſmer of his proper name,* and ſo was the opinion of the Court; and it ſeems that theſe words (no other plea) are *intended no other plea of miſnoſmer, but miſnoſmer of his proper name.* Br. Diſſeiſin, pl. 50. cites 28 Aſſ. 38.

14. In aſſiſe, the *tenant pleaded in bar by ſtatute made by himſelf to the plaintiff, who had the land after in execution by extent,* which *plaintiff was after condemned at the ſuit of C. in 40 l. and this land delivered in execution by elegit,* as a chattel, *which eſtate C. the defendant has.* The *plaintiff ſaid that he had the land in execution by the ſtatute,* ut ſupra, and was ſeiſed till by the defendant diſſeiſed, *abſque hoc that C. had ever any thing* in this land, priſt, and the

other e contra; and ſo ſee that in pleading by tenant by ſtatute-merchant, *he ſaid that he was ſeiſed, and yet it is only a chattel.* Br. Aſſiſe, pl. 348. cites 38 Aſſ. 4.

15. *Diſſeiſor made feoffment to a feme ſole*, who *took baron*, and writ of *entry was brought againſt both, ſuppoſing that the feme entered by the diſſeiſor, and not that the baron and feme entered by the diſſeiſor*, and the writ awarded, quod nota; and it ſeems that the writ had been good alſo, if the entry of both had been ſuppoſed by the diſſeiſor of this part, contra of the part of the demandant, as in 5 H 7. Br. Enter en le per, pl. 34. cites 39 E. 3. 25.

16. Aſſiſe *by baron and feme*, quod diſſeiſivit eos, the *defendant ſaid that he himſelf was ſeiſed in fee, and leaſed to B. C. for life, who aliened to the feme and her firſt baron*; the *plaintiff made other title*, upon which they were *at iſſue out of the point of aſſiſe*, viz. that the leſſee had fee, and *found for the plaintiff*, and *that the feme was ſeiſed and diſſeiſed before the eſpouſals, and that the baron never had ſeiſin*; Hache demanded judgment of the writ, which is, quod *diſſeiſivit eos, where the baron was not ſeiſed*, & non allocatur, but ſeiſin awarded to the plaintiff, for an *ouſter was confeſſed* by the defendant in his plea before, and therefore ought not to have inquired of the ſeiſin and diſſeiſin, and ſo the verdict void. Br. Aſſiſe, pl. 369. cites 44 Aſſ. 6.

17. Entry in the poſt of *diſſeiſin to the brother of the demandant*, the tenant *pleaded feoffment of this ſame brother to J. N. que eſtate he has, judgment ſi actio*, and held a good bar; quod mirum! for it ſeems argumentative. Br. Enter en le per, pl. 10. cites 2 H. 4. 19.

[117] 18. Writ of entry *ſur diſſeiſin* made to J. N. the *tenant pleaded feoffment of this ſame J. N. made to another, que eſtate he has*, and held a good bar; quod mirum! for it ſeems only argumentative. Br. Bar, pl. 14. cites 2 H. 4. 19.

19. *Feme covert is enfeoffed, writ* of entry is brought, *ſuppoſing the entry to be by baron and feme*, as land cannot revert to the feme covert but to the baron alſo: but otherwiſe it ſhall be where *the feme enters and after takes baron*, ſo that he finds the feme ſeiſed; for there the writ of entry ſhall ſuppoſe the entry of the feme only. Br. Enter en le per, pl. 12. cites 7 H. 4. 17.

20. Pernor of the profits ſhall not plead *ancient demeſne*, nor *releaſe of right, fine, recovery*, nor ſuch like, by que eſtate, as it ſeems, unleſs in ſpecial caſes; but he may plead *all actions, or traverſe the* * *diſſeiſin, or the pernancy of the profits*, &c. Br. Diſſeiſin, pl. 91. cites 1 H. 5. Fitzh. 381.

* Orig. is (difference).

But Ibid. ſ. 8. ſays, that in writ of intruſion upon the poſſeſſion of his anceſtor,

21. In writ of entry ſur diſſeiſin made to the anceſtor, the writ was, *quæ clamat eſſe jus et hæreditatem ſuam*, by which the writ was abated. Thel. Dig. 105. lib. 10. cap. 14. ſ. 1. cites Mich. 20 E. 2. Brief, 851. but cites 10 H. 6. contra.

and in every writ where a man demands a fee ſimple upon the poſſeſſion of his anceſtor, he ought to have theſe words, quæ clamat eſſe jus et hered ſuam, cites the Regiſter, 228, 229. but contra in Nat. Brev. 191. but in no writ of his own poſſeſſion, unleſs in cui in vita. Mich. 10 H. 6. 9.

22. In

22. In treſpaſs, iſſue was tendered *that J. N. defendant did not diſſeiſe the plaintiff to the uſe of W. P.* and the other e contra, and by Danby and Davers it is negative pregnant; but if he ſays that *non diſſeiſivit modo & forma*, it is good to all intents. Br. Negativa, &c. pl. 5. cites 33 H. 6. 37.

23. In *aſſiſe*, they were *adjourned for variance between the writ and the patent*, to Weſtminſter, and there to H. ſuch a day, at which day the parties appeared, and the one *defendant took the tenancy* upon him, *and pleaded in bar*, and the *other ſaid that the plaintiff after the laſt continuance had entered into parcel* of the land put in view and now in plaint, and demanded *judgment of the writ*, and there it is agreed that the diſſeiſor ſhall have this plea to the writ. Br. Diſſeiſin, pl. 1. cites 35 H. 6. 11, 12. Br. Aſſiſe, pl. 14. cites S. C.

24. *And* it is ſaid that *he ſhall have every plea which goes in excuſe of damages*, as this plea does, *and every plea which goes in bar and does not meddle with the right of the land*, as *releaſe of all actions perſonal*; quod nota, It is agreed that this is a good bar in aſſiſe, *but* he ſhall *not* plead releaſe *of all the right*, for this goes to the right of the land. Br. Diſſeiſin, pl. 1. cites 35 H. 6. Br. Aſſiſe, pl. 14. cites S. C.

25. *But* per Priſot and Finch. he may plead to the writ, *that at another time the plaintiff brought writ of a higher nature againſt him*, and he may plead that *no tenant of the franktenement named in the writ*, and *that the plaintiff has nothing, unleſs jointly with one J. N. not named* in the writ, who is in full life; for *thoſe pleas do not go in extinguiſhment, but in excuſe of damages*, and therefore by the entry into part the aſſiſe is gone, and he cannot recover any damages. And ſo ſee that *entry into part goes to all the writ*; for the damages are entire, quod nota, by which the plaintiff ſaid that he did not enter, and the others e contra. Br. Diſſeiſin, pl. 1. cites 35 H. 6. 11, 12. and ſays ſee 14 H. 6. fol. in fine, and 28 Aſſ. 41. Br. Aſſiſe, pl. 14. cites S. C.

26. In præcipe quod reddat the tenant *ſaid that J. S. was ſeiſed till by him diſſeiſed before the writ purchaſed, which J. S. has entered upon him pending the writ*; judgment of the writ, and a good plea. Br. Diſſeiſin, pl. 101. cites 5 E. 4. 5, 6. and ſuch a plea was awarded good anno 15 E. 4. and ſo ſee that for his advantage *to abate the writ*, &c. the *tenant may confeſs a diſſeiſin to a ſtranger*. Br. Diſſeiſin, pl. 101. [118]

27. A man may *confeſs, that he himſelf did a diſſeiſin* for his benefit. Br. Diſſeiſin, pl. 11. cites 15 E. 4. 5. As in dower, the *tenant ſaid that before the writ purchaſed A. B. was ſeiſed in fee, till by this tenant diſſeiſed, and that the 10th day of October A. re-entered*, judgment of the writ, and a good plea per tot. Cur. And it is *no replication that A. entered by covin*; for his entry was lawful, and a man cannot do right by covin. Br. Brief, pl. 192. (bis) cites 15 E. 4. 4.

28. In *aſſiſe againſt diſſeiſor and tenant*, the *diſſeiſor may plead to the diſſeiſin, and in bar and in excuſe* of the tort, *but he cannot meddle with the land*; for the tenant only ſhall plead to the right of the tenancy. Br. Diſſeiſin, pl. 75. cites 13 H. 8. 14. Per Brudnel.

29. *And* in aſſiſe *againſt pernor and tenant*, the tenant ſhall plead a diſcharge of the tenancy only; but the *pernor may plead to the tort, and ſhall intitle himſelf to the rent* out of it if he can. Br. Diſſeiſin, pl. 75. cites 13 H. 8. 14. Per Brudnel.

(S) Pleadings. What Plea is a Confeſſion of a Diſſeiſin.

1. IN aſſiſe, they are at iſſue upon *hors de ſon fee;* the ſeiſin and diſſeiſin ſhall not be inquired; for it is confeſſed *implicative* by the plea, quod nota bene. Br. Aſſiſe, pl. 429. cites 10 E. 3. 41.

2. In aſſiſe, the *tenant pleaded a deed in bar, and waved it*, there the aſſiſe ſhall not inquire of the diſſeiſin, but only of the ſeiſin; for he is diſſeiſor by his plea; per Parninge. Br. Aſſiſe, pl. 416. cites M. 13 E. 3.

3. *Releaſe pleaded by the defendant* is a confeſſion of the diſſeiſin, ſo that the ſeiſin and diſſeiſin ſhall not be inquired. Br. Aſſiſe, pl. 417. cites 22 E. 3. 4.

(T) Entry in the per, &c. Pleadings.

1. ENTRY brought *by a feme, in that the tenant had not entry unleſs by the ſame feme*, and the tenant *ſaid that ſhe and her baron demiſed to him*, judgment of the writ and a good plea, and ſhe put to her cui in vita; for it was in writ of entry ad terminum qui præteriit. It ſeems that ſhe may enter if there be no deſcent after the diſcoverture. Br. Entry en le per, pl. 43. cites 6 E. 2. Itinere Cant.

2. If writ of entry be *brought in the poſt which may be within the degrees it ſhall abate.* So if it be brought in the per, or in other degree within the degrees where it ſhould be in the poſt, this ſhall abate. Br. Enter en le per, pl. 39. cites Vet. N. B. tit. Brief de non compos mentis, and Brief de Entry dum fuit infra ætatem, and Fitzh. tit. Brief, 286. 438. and 440. and 17 E. 3.

3. Entry ſur diſſeiſin *againſt a man and his feme in the quibus, the feme not having entry unleſs by R. who wrongfully, &c. diſſeiſed* [119] *his father*, and *not ſuppoſing the entry of the baron*, and yet the writ awarded good, and if the *baron aliens and retakes to him and his feme*, yet this ſhall not change the degrees; for the feme is remitted. Br. Entre en le per, pl. 25. cites 39 E. 3. 25.

4. Entry ſur diſſeiſin *of rent*, the *tenant made bar of rent-charge*, and the *demandant made title to the rent-ſervice*, and good per Cur. For it may be that he has both there, and brings the action of the one, and there the tenant ſhall have new anſwer, and this to the writ if he will in this caſe, and ſo he had there; for the bar was not pleaded to this rent-ſervice. Br. Entre en le per, pl. 35. cites 12 E. 4. 10, 11.

5. Writ of entry *againſt the baron and feme*, the *writ ſhall be that the feme had not entry unleſs by N.* &c. and *not that the baron and feme had not entry unleſs by N.* &c. Br. Enter en le per, pl. 36. cites 7 H. 7. 2.

6. Entry in the poſt, *ſuppoſing that the tenant had not entry unleſs after the diſſeiſin which J. S. made to his anceſtor*, &c. And the tenant *ſaid, that before that the anceſtor any thing had, T. was ſeiſed in fee and leaſed to B. for term of life, and B. infeoffed N. by which the leſſor entered for alienation to his diſinheritance, and died ſeiſed, and the land deſcended to the tenant as heir*, &c. and per tot. Cur. this is no plea, becauſe he does not traverſe the diſſeiſin alleged by J. S. nor he does not confeſs nor avoid it; and per Vaviſor, *in writ of entry the diſſeiſin ought to be confeſſed, and avoided or traverſed.* But *otherwiſe* it is *in aſſiſe*; for there it is ſufficient to plead feoffment of a ſtranger, and give colour to the plaintiff; contra in writ of entry ſur diſſeiſin. Br. Enter en le poſt, pl. 22. cites 15 H. 7. 16, 17.

7. In writ of entry *in the poſt*, the tenant *ſaid that he was ſeiſed till by the plaintiff diſſeiſed, upon which he entered*, and a good plea. And the ſame law in treſpaſs. Br. Enter en le per, pl. 46. cites 16 H. 7. 4.

(U) Pleadings. Traverſe in what Caſes.

1. ENTRY in the per, by which the *tenant had not entry but by J. who diſſeiſed the demandant*, the tenant *ſaid that the demandant enfeoffed J.* and no plea without ſaying *abſque hoc that J. diſſeiſed the demandant*; for plea contrary to the ſuppoſal of the writ is no plea without traverſing the point of the writ. Br. Enter en le per, pl. 15. cites 38 E. 3. 2.

2. If a man is diſſeiſed, he may have *aſſiſe, or writ of entry* in nature of aſſiſe, at his pleaſure. Br. Enter en le poſt, pl. 14. cites 9 H. 5. 9.

3. In entry ſur diſſeiſin, *it is no plea that the plaintiff infeoffed him, unleſs he traverſes the diſſeiſin.* Br. Traverſe per, &c. pl. 299. cites 4 H. 6. 29.

4. In treſpaſs, the *defendant pleaded his franktenement at the time*, &c. per quod, &c. the *plaintiff ſaid that before that the defendant any thing had, P. was ſeiſed in fee and infeoffed him, by which he was ſeiſed till the defendant entered and did the treſpaſs, and he freſhly re-entered*, and becauſe the defendant acknowledged the treſpaſs, judgment, &c. the *defendant ſaid that J. N. was ſeiſed in fee, and died ſeiſed, and W. his heir entered and died, and he as heir to him, and ſhewed how, &c. entered and of ſuch eſtate was ſeiſed at the time of the treſpaſs*, &c. and held no plea; for he has not traverſed the diſſeiſin in the replication, nor confeſſed and avoided it. Br. Traverſe per, &c. pl. 61. cites 7 H. 6. 33. [120]

5. In *treſpaſs* the *defendant ſaid that he was ſeiſed*, &c. *till by A. diſſeiſed, who infeoffed the plaintiff, upon whom the defendant entered*, of which entry the plaintiff has brought this action, and the *plaintiff ſaid that before the defendant or the ſaid A. any thing had, W. was ſeiſed*, and *ſo conveyed the deſcent to the ſaid A. and that the defendant abated after the death of the anceſtor of the ſaid A. upon whom A. entered and infeoffed the plaintiff, and after the defendant did the*

treſpaſs, of which he has brought his action, and prayed his damages, and by the opinion of the Court the *title is not good without traverſing the diſſeiſin alleged in the bar.* Br. Traverſe per, &c. pl. 13. cites 9 H. 6. 32.

6. *For* it is ſaid there and the ſame year, fol. 19 and 30, that *where diſſeiſin is alleged by ſuppoſal*, as *in writ of declaration*, as in aſſiſe or writ of entry ſur diſſeiſin, there it is ſufficient to plead matter of bar as above, withont traverſing the diſſeiſin; *but* where it is alleged *in bar, title, or other pleading*, there it ought to be confeſſed and avoided or traverſed, quod nota, and in the caſe above the plaintiff has not done the one nor the other. Br. Ibid.

7. Treſpaſs *againſt R. who pleaded* that *his franktenement*, &c. the *plaintiff ſaid that before R. any thing had, W. was ſeiſed and infeoffed the plaintiff, who was ſeiſed till by N. diſſeiſed, who infeoffed the ſaid R. upon whom the plaintiff freſhly re-entered, and the treſpaſs meſne between the diſſeiſin and the re-entry*, to which the *defendant ſaid, that E. was ſeiſed in fee, and infeoffed the ſaid R.* and no plea without traverſing the diſſeiſin to the plaintiff. Br. Traverſe per, &c. pl. 292. cites 21 H. 6. 5, 6.

8. Where the diſſeiſin is *alleged by way of conveyance to the title or poſſeſſion of the plaintiff*, it is not traverſable, and eſpecially where the *plaintiff and defendant convey from one and the ſame perſon.* Arg. D. 365. b. 366. a. pl. 34. Mich. 21 & 22 Eliz. in Ld. Crumwell's caſe, cites 21 and 30 H. 6. 2. and 5 E. 4. and 4 & 5 H. 7.

9. In aſſiſe, the tenant may ſay *that his father was ſeiſed, and died ſeiſed*, without traverſing the diſſeiſin ſuppoſed in the writ or plaint. Br. Traverſe per, &c. pl. 279. cites 22 E. 4. 39.

10. Formedon *againſt pernour of the profits of the day of the title accrued;* per Littleton the ſtatute does not give action but where the defendant is tenant of the franktenement the day of the action accrued, and where the defendant takes the profits the day of the writ purchaſed, and ſo the defendant may traverſe any of the points; contra in aſſiſe or action founded upon diſſeiſin, there he ſhall traverſe the diſſeiſin or the prender of the profits. Br. Traverſe per, &c. pl. 216. cites 4 E. 4. 38.

For more of Diſſeiſin in general, ſee Aſſiſe, Diſcent, Entry, and other proper titles.

Diſtreſs.

(A) *Damage-Feaſant.* What Things may be taken Damage-Feaſant.

[1. A *Grayhound* may be taken damage-feaſant *running after coneys in a warren.* 2 E. 2. Fitzh. Diſtreſs, 20.]

[2. *So* a man may take a *ferret* that another hath brought into his warren and taken coneys with. 2 E. 2. Fitzh. Avowry, 182.]

[3. If a man brings *nets and gins* through my warren I cannot take them out of his hands. 7 E. 3. Avowry, 199.]

[4. If a man rides upon my corn I cannot take his horſe damage-feaſant. 7 E. 3. Avowry, 199.] Sid. 440. in a nota at the end of pl. 9.

Hill. 21 Car. 2. B. R. the Chief Juſtice ſaid, that a horſe on which a man is riding may be diſtrained damage-feaſant, and it ſeems he ſhall be led to the pound with the rider on his back.

[5. *Shocks of corn* may be taken damage-feaſant, 21 H. 7. 39. b. by all the juſtices.] Br. Diſtreſs, pl. 30. cites S. C.——

Fitzh. Avowry, pl. 263. cites S. C. and Trin. 14 H. 7.——S. P. accordingly, per Cur. obiter. Lat. 8. Hill. 1 Car. B. R. in caſe of Stilman v. Chance.

6. Treſpaſs for taking a grayhound with a collar, the defendant pleaded that the *dog* was *courſing a hare in his land*, and thereupon he took him and led him away; upon demurrer this was adjudged an ill plea. Cro. J. 463. pl. 10. Hill. 15 Jac. B. R. Athill v. Corbett.

7. Treſpaſs for cutting the plaintiff's nets and oars; the defendant juſtified, for that he was ſeiſed in fee of a ſeveral fiſhery, and that the plaintiff with others *endeavoured* to row on the water, and *with their nets to catch his fiſh*; and thereupon to preſerve his fiſhing, he cut the nets, and oars, &c. adjudged no good plea, for he might have taken the nets and oars, and detained them as damage-feaſant. Cro. Car. 228. pl. 5. Mich. 7 Car. B. R. Reynell v. Champernoon.]

8. If *ten head* of cattle *are doing damage*, one cannot *take one* of them and keep it till he be ſatisfied for the whole damage, but may bring treſpaſs for the reſt. Per Holt Ch. J. 12 Mod. 660. Hill. 13 W. 3. in caſe of Vaſpor v. Edwards.

(B) The *Goods of whom* may be taken Damage-Feaſant.

Fol. 665.

[1. IF the *lord agiſts the cattle of a ſtranger in the common* of the tenants where he himſelf hath right to feed the common, though he hath the freehold, yet a tenant may take the cattle damage-feaſant. 30 E. 3. 27.]

[122] 2. In avowry it was held that where J. is amerced in a leet for receiving of W. by a year and a day, who was not put in decennary, the lord cannot diſtrain J. but by his proper beaſts, and not by the beaſts of another in his cuſtody, by reaſon that *the offence aroſe upon the perſon;* contra where it ariſes by the ſoil, as for rent-ſervice or damage-feaſant; note the diverſity, for it is good as it ſeems, but the plaintiff paſſed over gratis. Br. Diſtreſs, pl. 3. cites 41 E. 3. 26.

3. Note, It was ſaid that if *the king grants a rent out of his manor*, the manor is not charged, but the perſon by petition; the reaſon ſeems to be inaſmuch as a man cannot diſtrain upon the king, nor have aſſiſe or other action againſt him. Br. Charge, pl. 37. cites 13 E. 4. 5, 6.

4. *Leſſor cuts wood*, and puts it into his cart, and *leaves it on the land for a month*, and then will carry it away; leſſee may diſturb him, for he may diſtrain this damage-feaſant for the wrong to him; per Doderidge. (N. B. In the caſe in judgment the leſſee had covenanted not to diſturb the leſſor in felling or carrying away, &c.) Palm. 504. Hill. 3 Car. B. R. Hayward v. Fulcher.

5. The *cattle of a ſtranger* cannot be diſtrained unleſs they were *levant and couchant*, but it muſt come on the other ſide to ſhew that they were not ſo; per Keeling. Mod. 63. in pl. 6. Trin. 22 Car. 2. B. R.

(C) *Who, in reſpect of his Eſtate*, may take Cattle Damage-Feaſant.

[1. *A Commoner* may juſtify the taking of the cattle of a ſtranger upon the land damage-feaſant. 30 E. 3. 27.]

[2. If there be a *ſhack common* in a town where every one knows his part, but it lies in common, yet *no commoner may* avow the taking of cattle damage-feaſant *in any part* of the common *but in that which is his own part.* Mich. 8 Jac. B. BODERIDGE'S CASE, per Curiam.]

Br. Avowry, pl. 29. cites S. C. — The land-holders had common for all beaſts levant and couchant upon their eſtates; the plaintiffs were both intitled to this common, and the plaintiff putting in more cattle than were levant and couchant upon his eſtate, the defendant

[3. If a man hath *common for ten cattle*, and he puts in more, the *ſurpluſage above the ten may be taken* damage-feaſant. 46 E. 3. 12. b.]

defendant diſtrained them; and the queſtion was, whether one commoner might diſtrain another in this caſe? It was agreed in this caſe, that one commoner might have an action upon the caſe againſt another that put in more than were levant and couchant, and that the lord might in ſuch caſe diſtrain; and that where a commoner was intitled to a common for a certain number of cattle, as for ten or any other certain number, there if he ſurcharged, another commoner might diſtrain. It was likewiſe agreed, that if a ſtranger, who has no right of common, put in cattle, any commoner might diſtrain; but this was ſaid to be a caſe not yet reſolved, whether one commoner could diſtrain another for a ſurcharge in the caſe of levancy and couchancy; and ſo the Court took time to conſider till the next term. Freem. Rep. 273. pl. 300. Paſch. 1698. C. B. Dixon v. James.

4. If a man hath a freehold in a market-place, and corn is brought thither on the market day, and ſet down, he cannot juſtify the taking it there damage-feaſant. Cro. Eliz. 75. pl. 34. Mich. 29 & 30 Eliz. B. R. The Mayor of Launceſton's caſe.

(D) Diſtreſs Damage-Feaſant. *In what Caſes* it may be. [123]

[1. IF a *man takes my cattle and puts them into the land of another* man, the tenant of the land may take the cattle damage-feaſant, though J. who was the owner was not privy to the cattle being damage-feaſant, and he may keep them againſt me till ſatisfaction of the damages. Trin. 15 Jac. B. R. between ROBINSON AND WALLER, per totam Curiam.]

2. If a *man comes to diſtrain* damage-feaſant, *and ſees the beaſts there, but the owner drives them out*, he cannot diſtrain them damage-feaſant, but is put to his action of treſpaſs; for in ſuch caſe, though otherwiſe in the caſe of rent arrear, the beaſts ought to be damage-feaſant at the time of the diſtreſs; per the reporter in a nota. 9 Rep. 22. a. cites 16 E. 4. 10. b. and 2 E. 2. Avowry, 180.

Co. Litt. 161. a. S.P. —Pl.C. 38. a. S. P. —But Ibid. Marg. cites that in a writ of reſcous brought by one named Rich, Hill. 6 R. 2. and abridged by Fitzh. tit. Reſcous, pl. 11. it is held that for damage-feaſant the party who had the view may purſue and take the beaſts in other land, &c.

Diſtreſs damage-feaſant *in the ſtricteſt diſtreſs* that is; for the thing diſtrained *muſt be taken in the very act*; for if they are once off, though on *freſh purſuits*, you cannot take them; per Holt Ch. J. 12 Mod. 661. Hill. 13 W. 3. in caſe of Vaſper v. Edwards.

3. Treſpaſs againſt A. who *juſtified for diſtreſs for his lord*; the *plaintiff ſaid that he had a cloſe adjoining in which beaſts were put, and they eſcaped and went into the other's lands, where treſpaſs, &c. and the plaintiff freſhly purſued them, and before that he could take them out the defendant took them*, and yet the diſtreſs is well taken, per Cur. notwithſtanding the freſh ſuit, and that they were not levant and couchant; for they *were there without authority*. Br. Treſpaſs, pl. 281. cites 7 H. 7. 1.

4. S. brought an *ox-hide to Leadenhall in London to ſell it*, and W. diſtrains it damage-feaſant, and juſtifies as ſervant to the mayor, to whom that place appertained for the incorporation; adjudged that the diſtreſs is not lawful, for it was brought there to be ſold pro bono publico; for *goods brought to a market* and expoſed to ſale ſhall not be diſtrained. Noy, 19. Mich. 15 Jac. cites the caſe of Sawyer v. Wilkinſon.

5. A.

5. A. ſuffered his *cattle* to *eſcape into* B. *his neighbour's ground, the fences being out of repair, which B. ought to make*, and the cattle being there levant and couchant, without any freſh purſuit made, *were diſtrained for rent due from B.* and per Cur. the diſtreſs is not lawful; for though the fault was in B. for not repairing the fences, yet it was A.'s fault to ſuffer them to be levant and couchant there without making any freſh purſuit after them; and rent is due of common right, and the land is the debtor, where the landlord muſt reſort for his rent, and is not to inquire whoſe cattle they are, or how they came there. 2 Roll. Rep. 124. Mich. 17 Jac. B. R. Gill v. Gawen.

S. C. cited by Powell J. 2 Lutw. Appendix, 1580. in caſe of a diſtreſs for rent.

6. The *cattle of a ſtranger* cannot be diſtrained, unleſs they were *levant and couchant;* but it muſt come on the other ſide to ſhew that they were not ſo; per Kelynge. Mod. 63. pl. 6. Trin. 22 Car. B. R. Jordan v. Martin.

——2 Keb. 669. pl. 34. S. C. and per Curiam, præter Twiſden, it muſt be averred levant and couchant, but it not being poſitively averred that the plaintiff was a ſtranger, the Court will never intend it ſo.

[124]

7. If *turves* are *lying on a common damage-feaſant* a commoner may diſtrain them, but he cannot juſtify the burning them, 2 Jo. 193. Paſch. 34 Car. 2. B. R. Broomhall v. Norton.

(D. 2) For Rent. By whom. In reſpect of his Eſtate.

1. IN aſſiſe it was ſaid for law, that where *rent-charge deſcends to a daughter*, and after *the land deſcends to the ſame daughter and to her two ſiſters*, nothing is extinct but the third part of the rent, and yet the daughter, who has the rent, *cannot diſtrain* for the other two parts of the rent *till partition* be made; for ſhe is ſeiſed of the land per my et per tout with the other two ſiſters till partition be made. Br. Diſtreſs, pl. 37. cites 34 Aſſ. 15.

2. In ſcire facias upon a fine, it was agreed, where *upon a fine it is reſerved*, that for not performing of maſſes by the prior of B. (the conuſor) *that the juſtices of C. B. or barons of the Exchequer might diſtrain*, and in this caſe the *conuſee and his heirs might diſtrain.* Br. Diſtreſs, pl. 20.

Br. Grants, pl. 21. cites 46 E. 3. 18.

3. Where it is *reſerved, that* for non-feaſance *the bailiff of the king ſhall diſtrain*, yet the *bailiff of the party may diſtrain.* Br. Diſtreſs, pl. 20.

Br. Execution, pl. 143. cites S. C. and Fitzh. tit. Avowry, 237.

4. *Rent reſerved upon a leaſe for term of life may* be put in execution by elegit, and the plaintiff who recovers may diſtrain for the rent, and yet he has not the reverſion. Br. Diſtreſs, pl. 71. cites 13 H. 4.

5. Where a man *leaſes for* 20 *years*, and the *leſſee leaſes over for* 10 *years* rendering rent, there if he grants the rent to another man he cannot diſtrain; becauſe he has not the reverſion of the term;

term; contra if he had granted to him the reverſion and the rent; note the diverſity. Br. Diſtreſs, pl. 45. cites 2 E. 4. 11.

6. It was ſaid, that if *the king grants a rent out of his manor*, the manor is not charged, but the perſon by petition; the reaſon ſeems to be, inaſmuch as a man cannot diſtrain upon the king, nor have aſſiſe nor other action againſt the king. Br. Charge, pl. 37. cites 13 E. 4. 5, 6.

7. *Ceſtuy que uſe of a rent-charge* for life *executed by the ſtatute*, may diſtrain as incident to the eſtate, the power of diſtreſs is transferred to him by the ſtatute. Mod. 223. pl. 12. Mich. 28 Car. 2. C. B. Boſcawen and Herle v. Cook. 2 Mod. 138. Cook v. Herle. S.C.

8. If a *leaſe for years* be made reſerving rent, *and then leſſor acknowledges a ſtatute* which is extended. The conuſee after the extent ſhall have a debt, or diſtrain and avow for the rent. Per Ventris J. 2 Vent. 328. cites Bro. tit. Statute Merchant, 44, [cites Fitzh. Avowry, 137. 13 E. 4.] and Noy, 74. *But* he that *enters by a power to hold for an arrear* of rent ſhall not. Per Ventris J. 2 Vent. 328. Trin. 1 W. & M.

9. In replevin the defendant avowed, for that W. R. was ſeiſed of the place where, &c. in fee, and being ſo ſeiſed he *granted a rent-charge out thereof to W. W. for life*, that *W. W. is dead*, and that he (the defendant) was his executor, and diſtrained in the place where, for ſo much rent in arrear, and due to his teſtator in his life; but did not aver, that the place where, &c. was then in the ſeiſin of the grantor of this rent, or any other perſon who claimed by, from, or under him; and upon a demurrer to this avowry Holt Ch. J. held, that the executor might diſtrain either on the grantor or any other perſon, who comes in by or through him, and if the plaintiff is not liable to the diſtreſs, it is more natural for him to ſhew it in his replication for his own defence. Beſides, the ſtatute which impowers men to diſtrain, is a remedial law, and therefore ought to be expounded according to equity, and extended accordingly, and the words therein being (executors of tenants for life) may ex vi termini include all tenants for life. 2 Salk. 136. pl. 2. Mich. & Hill. 8 W. 3. C. B. Howell v. Bell. [125]

(D. 3.) Who may diſtrain for Rent, in reſpect of the Eſtate or the Perſon in Poſſeſſion. Of the King, &c.

1. THE *one tenant in common* may hold of the other, and the *other may diſtrain* and make avowry, quod nota. *Contra* it ſeems *between coparcenors* and jointenants *before partition*, for privity. Br. Diſtreſs, pl. 64. cites 31 E. 1. and Fitzh. Avowry, 241.

2. Where a man *has a ſeigniory*, and *this land is ſeiſed into the hands of the king by falſe office*, yet the *lord cannot diſtrain upon the poſſeſſion of the king, though the office be falſe*, this office *being in force*, quod nota; for it appears, tit. Treſpaſs, that a man may traverſe for his ſeigniory. Br. Diſtreſs, pl. 76. cites 44 E. 3. 13.

3. A man cannot diſtrain during the poſſeſſion of the *king*, be he *intitled by office* or not, and if he be intitled by office or record, and grants the land over, then he cannot diſtrain upon the grantee. Contra where the king enters *without office or record*, and grants it over, there he may diſtrain the *patentee*, but not upon the poſſeſſion of the king. Br. Diſtreſs, pl. 46. cites 4 E. 4. 22.

4. If the *king is intitled to the ward of* the heir of the tenant, and the *land is charged with rent-charge*, and the *king commits it over durante minore ætate*, a man cannot diſtrain upon the poſſeſſion of the king, nor upon the poſſeſſion of the committee. Per Keble, quod non negatur. Br. Diſtreſs, pl. 38. cites 1 H. 7. 17.

5. If the *king is intitled by office to the land out of which I have a rent-charge iſſuing*, there I cannot diſtrain upon the poſſeſſion of the king; but if the king *grants the land by patent*, there I may diſtrain; for I am not out of poſſeſſion of the rent by the office. But he who pretends title to the land is out of poſſeſſion thereof by the office, nota diverſity. Br. Diſtreſs, pl. 27. cites 21 H. 7. 1.

6. The land ſubject to a rent-charge is privileged, and diſcharged from diſtreſs while it is in the hands of the king, yet *when* it is *transferred from his poſſeſſion*, then *the diſtreſs there is revived*; for rent is not extinct by the poſſeſſion of the king of the land out of which it iſſues, but the diſtreſs is ſuſpended for the time; but when the king has intirely diſmiſſed himſelf of all the intereſt in the land, then the land is ſubject to ſuch charges and incumbrances as it was before; and this ſeemed by the better opinion. Sav. 125. pl. 194. Mich. 32 & 33 Eliz. Boſden's caſe.

[126] (E.) Diſtreſs. In what Caſes a Diſtreſs may be *of common Right* by a common Perſon. *For what* Thing.

Litt. ſ. 213. S. P. and Co. Litt. 142. a. ſays that Littleton's meaning is, that the lord may diſtrain for his rent of common right, that is, by the common law, without any particular reſervation or proviſion of the party.

[1. FOR *rent-ſervices* a diſtreſs may be taken of common right. 45 E. 3. 15. b. 1 H. 4. 1. b. 3 H. 6. 21.]

Br. Diſtreſs, pl. 15. cites S. C.—— Fitzh. Diſtreſs, pl. 11. cites S. C.

[2. If my tenant holds land to do *ſuit to my hundred*, I may diſtrain for this ſuit if it be arrear. 8 H. 4. 15.]

[3. For *aid to marry* his daughter, *or make his ſon a knight*, a diſtreſs may be taken of common right. 39 E. 3. 34. though it was objected he ought to have a writ to the ſheriff to levy it.]

The lord may diſtrain, but cannot have action of debt, but his executors or adminiſtrators may have action of debt, but cannot diſtrain. Co. Litt. 83. a b. —— Ibid. 102. b. S. P.

[4. The lord may diſtrain *for relief*, but if he dies his executors cannot, but ſhall have an action of debt for it. D. 3. 4 Ma. 140. [pl.] 37. Co. 4. OGNELL, 49. b.]

[5. For

[5. For an *heriot-ſervice* due after the death of every tenant, the lord may diſtrain. 27 Aſſ. 24. admitted.] Br. Heriot, pl. 6. cites S. C. but not for heriot cuſtom.——Fitzh. Avowry, pl. 177. cites S. C.——S. P. admitted, Cro. E. 32 pl. 8. Trin. 26 Eliz. B. R. in caſe of Peter v. Knoll.——Cro. C. 260. pl. 4. Trin. 8 Car. B. R. Major and Brandwood, S. P.——Jones, 300. pl. 2. S. C. & S. P.

6. It was held, that for *ſuit-ſervice* a man may diſtrain, but *not for amercement for ſuch rent*, but for *amercement for ſuit-real*; as at the leet a man may diſtrain; note the diverſity, and it was for 2d. Br. Diſtreſs, pl. 15. cites 8 H. 4. 16.

7. For *rent reſerved upon equality of partition* the parcenor may diſtrain of common right. Br. Diſtreſs, pl. 92. cites 11 H. 4. 3.

8. If one *holds of another by homage, fealty, and 10s. rent*, who takes wife and dies, his *wife* ſhall have the third part of the rent as a rent-ſeck, and yet *in favorem dotis* ſhe *ſhall diſtrain for it*. Kelw. 104. a. pl. 11. Caſus incerti temporis. Ibid. 126. a. pl. 87. S. P.

9. If the *tenant holds of the meſne by 5s.* and the *meſne holds but by 12d.* ſo as he has more in advantage by 4s. then he pays to his lord, *he ſhall have the ſaid 4s. as a rent-ſeck* yearly *of the lord which purchaſed the tenancy*. Litt. f. 232. And *yet he ſhall diſtrain for it*; for ſeeing the fealty is extinct, the law reſerves the diſtreſs to the rent; for, as it has been ſaid in the like caſe, ſeeing the fealty is extinct, the diſtreſs by act in law may be preſerved, quia quando lex aliquid aliqui concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt. Co. Litt. 153. a.——S. P. for the rent was rent-ſervice before, and the nature of the rent is not changed by the act of the meſne. Kelw. 104. a. pl. 11.——And therefore if a man makes a *leaſe for life, reſerving a rent*, and binds himſelf in a ſtatute, and has the rent *extended and delivered* to him, he ſhall diſtrain for the rent, becauſe he comes to it by courſe of law. Co. Litt. 153. a.——But if a *rent-ſervice is made a rent-ſeck* by the grant of the lord, the grantee ſhall not diſtrain for it, for that the diſtreſs remains with the fealty. Co. Litt. 153. a.

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10. It is a maxim in law, that no diſtreſs can be taken for any *ſervices* that are *not put into certainty, nor can be reduced* to any certainty. For id certum eſt quod certum reddi poteſt, for opertet quod certa res deducatur in judicium, and upon the avowry damages cannot be recovered for that which neither has, nor can be reduced to a certainty, and yet in ſome caſes there may be a *certainty in uncertainty*; as a man may hold of his lord to ſhear all the ſheep depaſturing within the lord's manor, and this is certain enough, albeit the lord has ſometimes a greater, and ſometimes a leſſer number there, and yet this uncertainty being referred to the manor which is certain, the lord may diſtrain for this uncertainty; et ſic de ſimilibus. Co. Litt. 96. a.

12. The lord by eſcheat ſhall diſtrain for the *rent after the death of the tenant*, though the reſervation be to the leſſor and his heirs, and both aſſignees in deed and in law ſhall have the rent, becauſe the rent being reſerved of inheritance to him and his heirs is incident to the reverſion, and goes with the ſame. Co. Litt. 215. b.

13. If a *gift in tail, leaſe for life of leſſee, or of another, or for years*, be made rendering rent, ſuch rent is rent-ſervice, and the leſſor may diſtrain for it of common rights. Litt. ſ. 214. And if a man makes a *leaſe at will*, rendering a rent, though the leſſee ſhall not do fealty, yet the leſſor ſhall diſtrain for the rent of common right. Co. Litt. 142. b.

14. If

3 Rep. 22. b. in Walker's caſe, S. P.

14. If *upon a partition between coparcenors a rent is granted* out of part of the lands deſcended for equality of partition, the grantee of common right may diſtrain for this. Co. Litt. 169. b.

15. So if a rent be *aſſigned* out of the lands *to a woman for her dower*. Co. Litt. 169. b.

(E. 2) Taken. How. And where.

S. P. by all the juſtices and ſerjeants, but he cannot have reſcue, becauſe he had not poſſeſſion. Br. Diſtreſs, pl. 30. (bis) cites S. C.

1. WHERE *the lord comes to diſtrain and ſees the beaſts*, and the *tenant perceiving it chaſes the diſtreſs*, &c. the lord may purſue them, and diſtrain well enough; quod nota; and this is where the lord ſees the beaſts as above, and not otherwiſe; for *if they are chaſed out before that he ſees them, he cannot purſue and diſtrain;* nota inde. Br. Reſcous, pl. 13. cites 21 H. 7. 40.

2. One cannot *fling open gates*, or break down an *incloſure*, to take a diſtreſs. Co. Litt. 161. a.

3. *Horſes yoked to a plow* may be ſevered *for damage-feaſant;* but per Manwood J. there is a difference in the books when the diſtreſs is for *rent-ſervice* they cannot be ſevered, for they are an intire diſtreſs, and he claims no intereſt in the land, but only a rent or ſervice with which the land is charged; but in a diſtreſs for damage-feaſant the party claims the land itſelf, and he may have ſeveral actions for treſpaſs for every horſe; for every one of them does treſpaſs. Cro. E. 7. pl. 6. Trin. 24 Eliz. B. R. Tunbridge's caſe.

4. By 2 *W. & M.* 5. it is thought convenient that a conſtable ſhould be preſent, though the act does not requires it. Sir B. Shower's obſervations on ſtat. 2 W. & M. cap. 5.

5. If a landlord comes into a houſe, and *ſeiſes* upon *ſome goods* as a diſtreſs *in the name of all* the goods of the houſe, that will be a
[128] good ſeiſure of all; but he muſt *remove them* in convenient time by common law, and now *ſince the ſtat. of 2 W. & M. immediately, except it be hay or corn;* per Holt Ch. J. 6 Mod. 215. Trin. 3 Ann. B. R. in caſe of Dod v. Monger.

6. Upon a queſtion about taking a diſtreſs, it was held, that a *padlock* put *on a barn's door could not be opened by force* to take the corn by way of diſtreſs; per Ld. Ch. Juſtice Hardwick. Summer aſſiſes at Exeter, 1735.

(E. 3) Sold. In what Caſes it may be.

1. THE *lord of a manor* having a *leet may ſell diſtreſs taken for offence preſented in leet* as the king may, becauſe it is the court of the king, though it be in the hands of a common perſon, and he ſhall cauſe a ſtrange man to be ſworn as the king may; for this

this is for the advantage of the king. Br. Diſtreſs, pl. 39. cites 3 H. 7. 4. Per Fairfax J.

2. *For debt of the king* diſtreſs ſhall be ſold within 40 days. Br. Diſtreſs, pl. 71.

3. *And* per Fairfax, *lord of a leet* of the king may do the like; for this pre-eminence goes with the leet. Br. Diſtreſs, pl. 71. cites 3 H. 7. 4.

4. A diſtreſs taken for an *amerciament in a court leet* may be impounded or ſold at the pleaſure of the lord. 8 Rep. 41. a. Trin. 30 Eliz. C. B. in Grieſley's caſe. Roll. Rep. 76, 77. Mich. 12 Jac. S. P. ——The lord may ſell a diſtreſs taken for a fine. Noy, 17. Hill. 3 Jac.

5. Diſtreſs taken by a bailiff of a *court baron* for not *doing ſuit* and ſervice there, being warned, cannot be *ſold*. Bulſt. 52. Mich. 8 Jac. Hewet v. Norborough.

6. A diſtreſs for an *amerciament in a court baron of the king's manor* cannot be ſold, but a diſtreſs infinite ſhall go. Bulſt. 53. Mich. 8 Jac. Hewett v. Norborough. Yelv. 194. Gomerſall v. Medgate. —— Cro. J. 255. Gomerſall v. Wayte.

7. A farm leaſed *lay in two hundreds*, and the *conſtable of one hundred only, in the preſence of the conſtable of the other* hundred, *ſwore the appraiſers and cauſed the goods* diſtrained in both hundreds *to be ſold*; and per Cur. this is good; for the diſtreſs is entire being made at one time, and the land contiguous; and then where ſuch lands are in two counties, and the goods are diſtrained for one *intire rent* out of thoſe lands, this *is one diſtreſs*, and by the 1 & 2 Ph. & M. 12. ought to be put into one pound; and whereas it was urged, that the *appraiſement* muſt be made by the officers of the pariſh or hundred where the diſtreſs is taken, it was ſaid that the *continuing and driving them to the pound is a taking*. 12 Mod. 76. Walker v. Rumbold, cites Lat. 60. [Paſch. 1 Car.]

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8. 2 *W. & M. ſeſſ.* 1. *cap.* 5. *ſ.* 2. *Diſtreſſes for rent may be ſold in five days after the taking and notice given if not replevied; the diſtrainor with the ſheriff, under-ſheriff, or conſtable of the hundred, pariſh, or place (who are required to aſſiſt therein), ſhall cauſe the diſtreſs to be* appraiſed * *by two appraiſors to be ſworn, and then may ſell for the* † *beſt price towards ſatisfying the rent arrear, charge of diſtreſs, appraiſement, and ſale, leaving the overplus (if any be) for the owner's uſe, in the hands of the ſheriff or conſtable.*

The perſon *diſtraining* muſt give notice, but it need not be immediately, but at any time after the *diſtreſs*; but then the five days are to be computed from the notice, not from the *diſtreſs*. If the party *replevy*, all this is to no purpoſe; therefore before you venture to make any ſale, ſearch the ſheriff's office within the five days.

The rent may be tendered after the five days if no appraiſement, and a tender after appraiſement prevents the ſale, for all is but to have the rent, and no property is in the diſtrainer, but only in the vendee by ſale.

Any perſons may be appraiſors that are of age and capable of being witneſſes; *but* they *muſt be ſworn* by the ſheriff or conſtable for that purpoſe. The *appraiſement* ſhould be *in writing*.

Suppoſe the appraiſement is higher than they can be ſold for, may they ſell them notwithſtanding?

I think they may; for the words are *for the beſt price can be gotten for the ſame*; and it is no ſaid for what they were appraiſed at, or above that rate. But are they bound to carry them to market, or wait for a good chapman? For the words of the act are *beſt price that can be gotten*; and no time is limitted for the ſale, and charges are allowed for it. I do think it moſt adviſeable, if it can be, to get the value ſettled by the appraiſers, and to ſell immediately to the firſt chapman; if not, to wait ſome ſmall,

ſmall, reaſonable, and convenient time, as a week or the like. If you cannot get that price, to ſell to the higheſt bidder. And the next convenient way ſeems to be, by giving notice at the next market, or parish church, of the day and place when and where the goods ſhall be expoſed to ſale; yet I conceive, that after the expiration of the five days, and no replevy, and an appraiſement, the party may carry any portable marketable goods and commodities to the next market, as corn or the like, and there ſell them, and he ſhall have his charges allowed for ſuch carriage, if he could not have a chapman at home; I think it always adviſeable for the buyers to have a bill of ſale of all ſuch goods ſo diſtrained, appraiſed, and ſold, and the ſheriff or conſtable witneſſes thereto. As to the charges, I think the expence in removal of the goods, charges of food for living creatures, and moderate neceſſary expences for tenants and officers, will be allowed within the meaning of this clauſe.

For the *overplus* (if any) to be *left in the ſheriff or conſtable's hands*, it is adviſeable for the *landlord to have a receipt* or other writing teſtifying the ſame.

For the *corn or grain*, the law is the ſame as to ſale, only there it is not to be removed, if to the damage of the owner, otherwiſe it may. Sir Barth. Shower's Obſervations on this ſtatute, ſaid to be printed from a MS. of his in the hands of the author of the Complete Engliſh Copyholder, fol. 160, &c.

† A diſtreſs ſold at an appraiſed price, ſhall be intended to have been ſold at the beſt price, ſince the appraiſers were ſworn. Ld. Raym. Rep. 55. Trin. 7 W. 3. Walter v. Rumbal.

12 Mod. 76. Walker v. Rumbald. S. C. adjudged.—Comb. 336. S. C.—4 Mod. 390. S. C. adjudged.—12 Mod. 53. S. C. adjudged.—Ld. Raym. 53. S. C. held accordingly.

9. *Lands* lying *in two hundreds and two counties contiguous, were demiſed by one leaſe* rendering rent; the leſſor for rent-arrear *diſtrained in both hundreds*, and the diſtreſs not being replevied in five days, the conſtable of the hundred in which the diſtreſs was taken, notice having been given to the owner, adminiſtered the oath upon *ſale of the goods in the other hundred;* and this was held good, it being an intire diſtreſs and not ſeverable, and the hundreds contiguous, ſo that the driving was lawful, and a continuance of the firſt taking. 1 Salk. 247. pl. 1. Trin. 7 W. 3. B. R. Walter v. Rumbal.

10. Diſtreſs *in a leet* of common right may be ſold becauſe it is a *court of record;* otherwiſe of diſtreſſes in courts that are not of record; per Holt. 12 Mod. 330. Mich. 11 W. 3.

11. As to *commiſſioners of ſewers* that is a ſpecial power given them, and of conſequence of that they may ſell; and Callis takes great pains to prove them a court of record, and though ſome acts that order things to be levied by diſtreſs have alſo the words (and ſale), yet no neceſſary inference can be made from that, for ſtatutes very often expreſs matters more plainly than they need for greater caution; per Holt. 12 Mod. 330. Mich. 11 W. 3.

12. Upon a diſtringas in a court-leet *pro certo letæ* the officer cannot ſell the diſtreſs of common right without a cuſtom; per Cur. 1 Salk. 379. Mich. 1 Ann. B. R. in caſe of the King v. Speed.

[130] 13. 11 *Geo.* 2. *cap.* 19. *ſ.* 1. *Goods or chattles conveyed away from the premiſes to prevent the diſtraining them for rent arrear, may be ſeiſed any where within* 30 *days after, and ſold, or otherwiſe diſpoſed of, as if ſeiſed upon the premiſes for ſuch arrears.*

Provided they are not ſold bona fide, and for a valuable conſideration, before ſuch ſeiſure, to any other perſon not privy to the fraud.

(E. 4) Impounded. Where.

See the ſtatutes and ſeveral pleas at (H).

1. 52 *H.* 3. cap. 4. *NONE ſhall cauſe any diſtreſs to be driven out of the county, and if any neighbour do ſo to his neighbour of his own authority, and without judgment, he ſhall be puniſhed by redemption. Nevertheleſs, if the lord do ſo againſt his tenant, he ſhall be but grievouſly puniſhed by amercement.*

2. Treſpaſs for *diſtraining in one county and carrying into another;* the defendant was condemned upon inſufficiency of his plea, and was condemned in damages 10 l. taxed by the Court, and that the defendant ſhould be ranſomed, and capias awarded againſt him. Br. Treſpaſs, pl. 255. cites 30 Aſſ. 38.

3. If a man *holds land in Eſſex of a manor in the county of Hereford*, the lord may diſtrain for his ſervices upon the land, and bring the diſtreſs into the other county to the manor, notwithſtanding the ſtatute of *Marlebridge*, cap. 3. quod nullus duci faciat diſtrictiones, &c. Br. Diſtreſs, pl. 32. cites 1 H. 6. 3.

Br. Action ſur le Statute, pl. 41. cites S. C. and notwithſtanding the ſtatute of Weſtminſter, 1. cap. 16.

4. Treſpaſs for diſtraining in the county of Wilts, and carrying into the county of Southampton, contrary to the ſtatute of Marlebridge, cap. 4. The defendant ſaid, that the place where is a carve of land which the defendant holds of him in the county of Warwick, by which he diſtrained for the rent arrear, and was going towards the county where the manor is, and the place where the writ is brought was in the county of B. which is the way to his manor of B. in the county of Warwick, &c. And per Huſſey, he cannot juſtify, becauſe the ſtatute is in the negative. But per Jenney and Fairfax juſtices, he may juſtify; becauſe the ſtatute ſpeaks, quod ſi vicin' ſupra vicin' hoc fecerit puniatur per redemptionem, & ſi dominus ſuper tenen' ſuum hoc fecerit tunc puniatur per gravem miſericordiam, and therefore per Fairfax, the ſtatute is *intended of diſtreſs for damage-feaſant or rent-charge*, and *not between lord and tenant*. But quære inde; for the ſtatute is *in the negative*, as Huſſey rehearſed; for the parties demurred in law, and no replevin can be made in this caſe; for a replevin ſhall be where the taking was. Br. Diſtreſs, pl. 53. cites 22 E. 4. 11.

5. It was agreed, that if a man puts the diſtreſs in his *ſeveral paſture, this is ſufficient pound-overt;* and by others, præter Fairfax, if he puts them in the ſeveral paſture *of another*, this is a good pound-overt. Quære, for per Fairfax, it ſhall be where the plaintiff may give them food without damage to others, and after iſſue was taken, if they died in default of the plaintiff, or in default of the defendant. Br. Diſtreſs, pl. 41. cites 5 H. 7. 9.

6. If lord or leſſor diſtrains, he cannot make a pound *in the ſame land* for this diſtreſs; per all the juſtices. But per Juſticiarios, if he diſtrains *for damage feaſant* in his proper land, he may impound them there; quod nota. And per Keble, when a [131] man

man diſtrains his tenant at will for rent, and makes a pound in the ſame land, this making of a pound there is a diſcharge of the leſſee, quod non negatur. Br. Diſtreſs, pl. 30. (bis) cites 21 H. 7. 39.

The plaintiff declared of a diſtreſs taken in a hundred in ſuch a county, and that he drove it ſix miles out of the county; and becauſe a hundred may be in divers counties, and the ſtatute is, that the driving ought not to be more than three miles out of the hundred; and that it might be that the driving was ſix miles from the place where the diſtreſs was taken in another county, and yet not three miles from the hundred where the taking was, for that cauſe it was not adjudged againſt the party; and that was after verdict in arreſt of judgment. Godb. 11. pl. 15. Mich. 24 Eliz. C. B. Anon.

7. 1 & 2 *P. & M. cap.* 12. *ſ.* 1. *Diſtreſſes ſhall not be driven out of the hundred, &c. unleſs to a pound-overt in the ſame ſhire, and within three miles of the place where taken, and ſhall not be impounded in ſeveral places, whereby the owner ſhall be conſtrained to ſue ſeveral replevins, in pain that every perſon offending ſhall forfeit to the party aggrieved* 5 *l. and treble damages; and* 5 *l. for taking more than* 4 *d. for impounding one diſtreſs.*

Diſtreſs was taken in the hundred of Offlay in Staffordſhire, and the city of Litchfield was ſometime within this hundred, and by letters patent, of 1 Mariæ, the city was made a county of itſelf, and he which took the diſtreſs impounded them within a pound in the county of the city of Litchfield; now whether he has incurred the penalty of the ſtatute, or not, was the queſtion. And becauſe the court had not a ſtatute-book there to ſee the preamble, therefore they would give no reſolution. Anderſon ſaid the meaning of the ſtatute was, becauſe the bailiff of the hundred might make deliverance; alſo I think it is within the compaſs of the ſtatute, becauſe the city was a county ſevered before this ſtatute made. Goldſb. 100. pl. 5. Mich. 30 & 31 Eliz. Beardſley v. Pilkington.

It was ſaid by the ſerjeants at bar, that the party may drive the diſtreſs as far as he will within the ſame hundred, but not above three miles out of the hundred. Gouldſb. 101. pl. 5. Mich. 30 & 31 Eliz. Beardſley v. Pilkington.

If a diſtreſs be of three cattle, and they are drove above three miles from the place where taken, and each beaſt has a diſtinct owner, the diſtrainer ſhall forfeit three times 5 l. per Holt Ch. J. 1 Salk. 32. in pl. 2. Paſch. 5 W. & M. in B. R. obiter.

Noy, 52. S. C. and the Court gave 5 l. againſt every offender; but after upon error brought it was held to be erroneous, but the Court gave a day for precedents. —— Cro. E. 480. pl. 12. S. C. adjudged accordingly in C. B. and judgment reverſed in B. R. —— Mo. 453. pl. 620. S. C. and judgment reverſed. —— D. 177. b. Marg. pl. 33. cites S. C. accordingly. —— But by Fenner, if the plaintiff had brought his action againſt them ſeverally, every one ſhould have paid 5 l. Noy, 62. in caſe of Patridge v. Emſon, and ſeems to be S. C. But the reporter ſays quære.

8. P. brought an action of debt againſt N. upon the ſtatute of 1 & 2 P. & M. cap. 12. for taking of a diſtreſs in one county, and driving it into another; and the caſe was, that *three men diſtrained a flock of ſheep, and them impounded in ſeveral places*, and if every of them ſhall forfeit 100 s. ſeverally, or but all together 100 s. The Court was divided, for the words of the ſtatute are, that every perſon ſo offending ſhall forfeit to the party grieved for every ſuch offence 100 s. and treble damages; but Walmſley thought that every one ſhould forfeit 100 s. and he put a difference between perſon and party, for many perſons may make but one party. Gouldſb. 145. pl. 62. Hill. 43 Eliz. Patridge v. Naylor.

9. At common law a man might have driven the diſtreſs into what county he would, which was miſchievous for two cauſes; 1ſt, Becauſe the tenant was bound to give the beaſts (being impounded in an open pound) ſuſtenance, and being carried into another county, by common intendment he could have no knowledge where they were. Another cauſe was, he could not know where to have a replevin, but the party was before this ſtatute

driven to his action upon his caſe; and albeit this ſtatute be in the negative, yet if the *tenancy is in one county, and the manor in another* county, the lord may drive the diſtreſs which he takes in the tenancy to his manor in the other county, for that the tenant is out of both the ſaid miſchiefs; for the tenant by doing of [132] ſuit and ſervice to the manor, by common intendment may know what is done there, and therefore may give his beaſts ſuſtenance; and to know where to have his replevin, the bailiff of the manor uſually drives the cattle diſtrained to the pound of the manor. And this * act extends as well to goods as to beaſts. 2 Inſt. 106.

* Stat. of Marlb. 52. H. 3. cap. 4. S. P. cited per Walmſley J. 2 Brownl. 260. —— Pl. C. 9. b. cites it as held accordingly, 30 E. 3. in the Abbeſs of Wilton's caſe. —— Ibid. in the Marg. is a nota, viz. Vide the caſe in termino H. 30 E. 3. foi. 5. in treſpaſs upon the ſtatute abridged by Fitzh. in tit. Diſtreſs, 16. but nota that it is adjudged contrary to what is vouched here.

10. *By preſcription*, if a manor is in one county, and is held of a manor in another county, the lord may drive a diſtreſs out of the county where it is taken; Arg. Palm. 544. Trin. 4 Car.

Diſtreſs was *in* the county of *Wiltſhire, in a place which is within the honour of Walling ford*, which caſtle and court is *within the county of Berks*, and drove them to the caſtle, and there deliverance was made, and at the ſuit of the defendant the plaint was removed by accedas ad curiam, directed to the ſheriff of Oxford into Bank, and there counted of the taking in Wiltſhire, and this was held well by the Court. D. 168. b. 169. a. pl. 20. Trin. 1 Eliz. Anon.

11. If *lands in Middleſex and Hampſhire* are *demiſed by one demiſe, reſerving one intire rent*, the *diſtreſs taken in Middleſex cannot be chaſed into Hampſhire*, becauſe the counties are not adjoining; per Holt Ch. J. Ld. Raym. Rep. 55. Trin. 7 W. 3. in caſe of Walter v. Rumbal.

12. Where *land lies in ſeveral counties*, and *one diſtreſs is taken for an intire rent of ſome cattle in one county, and ſome in the other*, the *landlord may* drive them all together, and *impound them in either county*, (notwithſtanding the ſtatute of Marlbridge, that a diſtreſs ſhall not be driven out of the county,) and the officer of either county is within the meaning of the late act of parliament of 2 W. & M. Reſolved. Comb. 336. Trin. 7 W. 3. B. R. Walter v. Rumbal.

4 Mod. 395. S. C. per Cur. though the diſtreſs was *taken in two hundreds*, they being *contiguous, it is but one intire diſtreſs*, eſpecially being taken at one and the ſame time, and for one intire rent, and it ought to be put into one pound. —— Ld. Raym. Rep. 55. S. C. held accordingly, and that the chaſing of the diſtreſs over is a continuance of the taking the diſtreſs, and the party, ſince it was for one intire cauſe, cannot ſever the diſtreſs, but muſt chaſe them all together, and impound them in one pound, by the ſtat. 1 & 2 P. & M. cap. 12. —— 12 Mod. 77. S. C. & S. P. held accordingly.

(F) For an *Amercement*.

[*In what Caſes.*]

[1. FOR amercements *in a court leet* for *offences done out of court*, a diſtreſs is incident of common right. Co. 8. Griesly, 41. Doctor and Student, 74. M. 12 Ja. B. per Curiam.]

S. C. cited 11 Rep. 45. a. — Diſtreſs is *incident* to an amercement in a law-day, by all the juſtices in C. B. Quod nota bene. Br. Diſtreſs, pl. 44. cites 9 H. 7. 22.

8 Rep. 41. a. b. in Grieſley's caſe, S. P. a fortiori, quod licitum eſt pro minore, licitum eſt pro majore.

[2. *So* for amercements in a court-leet for offences *done in court*, a diſtreſs lies of common right. 10 H. 6. 7. 7 E. 2. and 8 E. 2. Avowry, 211, 212. upon default of appearance.]

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[3. So for *fines* in a court, a diſtreſs is incident of common right. 39 E. 3. 35. admitted.]

Brownl. 36. S. P.

[4. *But* the lord *cannot* diſtrain for an amercement *in a court baron* without a preſcription. Doctor and Student, 47. Co. 11. Godfrey, 45. Kelloway, 20 H. 7. 66.]

[5. If the *lord of a fair* hath uſed to have certain *toll* for every ſale *of cattle*, and upon a ſale the toll is not paid, the lord may ſeiſe any of the cattle ſo ſold, and retain them till ſatisfaction. Mich. 13 Jac. B. between Agard and Liſle.]

[6. *And* in ſuch fair, if a man *buys one* beaſt *of one* man, *and another of another* man, and ſo many of ſeveral men, and refuſes to pay *toll* for any of them, the lord may ſeiſe any of the cattle ſo bought by him for all his toll. M. 13 Jac. B. per Hobert.]

Br. Retorn de Avers, pl. 11. cites S. C.

7. Replevin. Where the *lord of a leet diſtrains for amercement affeered in a leet* for non-appearance at the leet, the *tenant is bound to take notice for what matter he diſtrains;* per Finch. but Wich. contra, and that it is ſufficient for the tenant to ſay, that in caſe the defendant would have notified to him what was amerced, that he would have paid it. And per Finch. if the *tenant offers the amercement*, and the *lord refuſes it*, and after the *lord diſtrains*, and the *tenant offers it again*, and the *lord carries away the diſtreſs*, he does tort, and yet once it was offered; for he *ought to offer it at the time of the taking*, &c. and then the lord ſhall not have return. And per Wich. if the tenant comes after the lord has diſtrained, and offers the rent, and the lord refuſes, he ſhall not have return. And ſo ſee that *the diſtreſs is only a pledge for the duty, which* duty *when it is offered, the lord ought to deliver the pledge*, and after iſſue was taken upon the notice gratis. Br. Diſtreſs, pl. 8. cites 45 E. 3. 9.

Br. Treſpaſs, pl. 59. cites S. C. and ſays, quære of this pleading at this day.

8. In *treſpaſs*, the *defendant juſtified for* diſtreſs for amercement, *in which A. the owner was amerced*, and the *iſſue* was taken *if the property at the time of the taking was in the plaintiff or in A. who was amerced.* Br. Iſſues joines, pl. 46. cites 47 E. 3. 13.

Br. Amercement, pl. 15. cites S. C. —For ſuit real, no diſtreſs can be taken, but for amerciaments for default of ſuit. 2 Inſt. 120.

9. It was held that a man *cannot diſtrain for amercement for rent-ſervice*, but for *amercement for ſuit real* as at the leet, a man may diſtrain; note the diverſity, and it was for 2 d. Br. Diſtreſs, pl. 15. cites 8 H. 4. 16.

10. For amercement in a leet *no beaſts* ſhall be diſtrained *but the proper beaſts of the offender.* Br. Diſtreſs, pl. 89. cites 12 H. 7. 15.

11. *But* if *a man holds of a leet to be cryer tempore curiæ*, &c. there *he may diſtrain any beaſts* which are *upon the land, held* per Fineux, quod

quod nota, and by the beſt opinion of the Court; et concord' of the diſtreſs in leet. 47 E. 3. 13. Br. Diſtreſs, pl. 89. cites 12 H. 7. 15.

12. It was agreed that a man *may preſcribe for amercement in a leet*, to diſtrain and ſell the diſtreſs, becauſe it is curia regis, and the party derives his intereſt from the king, quod nota. Br. Diſtreſs, pl. 31. cites 21 H. 7. 40.

Br. Diſtreſs, pl. 91. cites S. C. that lord may diſtrain *for breaking of a bye-law* in a leet by cuſtom. Br Diſtreſs, pl. 91. cites 21 H. 7. 40. ——— See 6 Rep. 25. a. Ruddock's caſe. ——— Cro. E. 648. Raſing v. Ruddock. S. C. ——— 11 Rep. 44. Godfrey's caſe.

13. A man may diſtrain and avow, &c. *for rent due from a copy-holder* to a lord of a manor; for this is a duty to the lord at the common law; and therefore an avowry may well be for it. Cro. Eliz. 524. pl. 51. Mich. 38 & 39 Eliz. B. R. Laughter v. Humfries.

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14. So he may for an *amercement of an inhabitant* impoſed *in a court-leet*, for *refuſing to take upon him the office of a conſtable*. 8 Rep. 38. and 41. Trin. 30 Eliz. C. B. Greiſley's caſe.

Sav. 93, 94. pl. 173. S. C. adjudged.

15. A common perſon lord of a manor cannot diſtrain for amercements in a *court baron*, as for ſurcharge of common, &c. *without preſcription*. But the queen by her prerogative may. Cro. E. 748. pl. 1. Paſch. 42 Eliz. B. R. Rowlſton v. Alman.

16. *Diſtreſs* taken *for not doing ſuit* at the leet *may be ſold*, and taken in any land within the leet of the beaſts of him that made default. Jenk. 219. pl. 67.

17. Upon an avowry for an amerciament in a court *no damages* are to be recovered, though found for the avowant. Jenk. 272. pl. 89.

7 *H.* 8. nor 21 *H.* 3. 19. gives any *coſts or damages* in this caſe. Cro. E. 258. but adjornatur. Haſelip v. Chaplin. ——— S. P. adjudged Cro. E. * 300. Porter v. Grey. ——— Upon producing divers precedents of damages and coſts given ſince the ſtatute, the Court inclined to allow them. Cro. E. 330. Haſelop v. Chaplin.

* S. C. cited Cro. J. 28.

18. A *reputed manor* will maintain an avowry for an amercement in a court-leet, though indeed he had no manor in truth. Brownl. 170. Reynolds v. Oakley.

19. A *diſtreſs* is incident of right to a court-*leet*, but in a court-baron preſcription muſt be laid to diſtrain. Brownl. 36.

20. Upon a preſentment of a *nuſance* in a court-leet, and a pain aſſeſſed to remove it by ſuch a time, it was reſolved by all that the lord may *diſtrain*, or have action of † *debt* for ſuch pain or amercement. Cro. J. 382. pl. 10. Mich. 13 Jac. B. R. Pratt v. Stearn.

† Action of debt was brought by a lord againſt his copyhold tenant for a pain aſſeſſed by the homage *for an incroachment on the waſte*. The Court ſeemed to incline againſt the action. See Carth. 183. Cudmore v. Honywood.

21. A *cuſtom was laid for ſuch a townſhip to ſend one to be ſworn conſtable at ſuch a leet*, which not being done a fine was ſet, and diſtreſs taken for it. Exception was taken, becauſe *no cuſtom was alleged to warrant the diſtreſs*; for though of common right a diſtreſs may be taken for a fine in a court-leet, that is, where it is impoſed for ſuch things as are of common right incident to its

Raym. 204. Pierſon v. Riddley. S. C. Twiſden J. ſaid that when a duty is raiſed by cuſtom, a diſtreſs for

that duty muſt be maintained by the like cuſtom. Sed adjornatur. ——2 Keb. 701. 739. 745. S. C. adjornatur.

juriſdiction, as for contempts or the like; yet where cuſtom only enables them to ſet a fine, it cannot be diſtrained for without cuſtom alſo, and cites 11 Co. GODFREY'S CASE. And to this opinion did the Court incline; ſed adjornatur. Vent. 105. Mich. 22 Car. 2. B. R. Pierſon v. Ridge.

S. P. or he muſt *ſet out ſome eſtreate* of the Court 1 Salk. 108. S. C. ——

22. If the bailiff *diſtrains* for an amercement for a nuſance upon preſentment in a leet, he muſt *juſtify by warrant of a ſteward.* Show. 61. Mich. 1 W. & M. Matthews v. Cary.

A diſtreſs *per mandatum* of the lord of the manor is not good; for a bailiff cannot diſtrain by that means, nor otherwiſe than by virtue of a *precept* directed to him *by the ſteward of the court.* Carth. 75. Mich. 1 W. & M. in B. R. Mathews v. Carew. ——Show. 61. S. C. & S. P. accordingly. ——But in an avowry he need not ſhew any authority or precept, but then he muſt aver the offence to have been committed. Carth. 74. S. C. ——Show. 61, 62. S. C. & S. P. accordingly. ——3 Mod. 137. S. C. reſolved that he ought to ſet forth the warrant of the ſteward, without which he cannot juſtify to diſtrain for an amercement. But in a replevin where the defendant made cognizance in the right of the lord, it might be well enough. ——S. P. per Popham accordingly; but per Gawdy contra. —— Cro. E. 698. in caſe of Steverton v. Scroggs. ——S. P. per Popham, but the other juſtices conceived otherwiſe, but afterwards judgment was according to the opinion of Popham. Cro. E. 748. pl. 1. Paſch. 42 Eliz. B. R. Rowleſton v. Alman.

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1 Salk. 175. pl. 1. S. C. adjudged for the plaintiff. ——If abſent, the party ought to be ſummoned, and a time and place appointed under a penalty when and where he ſhall come, and before whom to take the oath. 5 Mod. 127. S. C. and the pleadings.

23. In *replevin*, the defendant made *conuſance as bailiff* to R. F. and ſaid that the place where is within S. and that S. is within the manor of, &c. and *ſhews a cuſtom for the jury to elect* one of the reſiants to ſerve the office of *conſtable* for a year, and ſaid that they elected ſuch a one to be conſtable for the year enſuing, and to take his oath under a penalty of 40 s. and at the next court it was preſented that he did not take the oath, and for this 40s. a diſtreſs was taken, &c. And the plaintiff demurred to this avowry, that here is a duty laid to be by cuſtom, and it is not like to a fine or amercement, and therefore the party ought likewiſe *to enable himſelf by cuſtom to diſtrain* for it, otherwiſe no diſtreſs is incident of common right; for the defect of a cuſtom to diſtrain, and for want of alleging of notice, the Court held the avowry to be ill; for this is a duty by the cuſtom, and therefore the remedy in ſuch a ſpecial matter ought to be by cuſtom likewiſe. Skin. 635. pl. 4. Hill. 7 W. 3. B. R. Fletcher v. Ingram.

Comb. 350. S. C. adjudged niſi, &c. ——12 Mod. 87. S. C. the alleging that notitiam habuit is too general. Judgment for the plaintiff. —— Ld. Raym. Rep. 69. 71. S. C. & S. P. and for that reaſon, and becauſe the defendant did not allege a cuſtom for taking the diſtreſs, it was adjudged for the plaintiff.

(F. 2) Pleadings in Replevins and Avowries for Amerciaments.

Br. Leet, pl. 10. cites 2 H. 4. 15. —Br. Preſcription, pl. 13. cites S. C.

1. CUSTOM cannot be that a man abiding within the leet ſhall be *excuſed* of the leet, *by their coming before the conſtable and portreeve.* Br. Cuſtoms, pl. 11. cites 2 H. 4. 16.

2. The

2. The lord intitled himſelf to a leet and a certain ſum pro certo letæ by means of his hundred; it is a *good plea* by him, *that he is ſeiſed of the hundred without ſhewing the deed*; per Periam and Rhodes J. But if the hundred itſelf had been in queſtion, then he ought to ſhew a deed; but here the defendant intitling himſelf to a leet, and a leet-fee by reaſon of the hundred, it is ſufficient for him to ſay that he is ſeiſed of the hundred, &c. although it be by diſſeiſin; for if he has poſſeſſion, be it jure vel injuria, he ſhall have all things incident thereunto; for the poſſeſſion of the hundred draws to him the leet, and the leet the leet-fee. 2 Le. 74. pl. 98. Trin. 28 Eliz. C. B. Lawſon v. Hare. 3 Le. 178. pl 231. S.C. in totidem verbis.

3. In avowry on a diſtreſs for an amerciament in a leet on a vill as *for not making tumbrel and ſtocks*, it *muſt be alleged that the pain is not paid* to the lord, or *elſe it might be paid by another of the vill before*. Mo. 573, 574. pl. 789. Trin. 40 Eliz. Scroggs v. Stevenſon. Cro. E. 698. pl. 11. Steverton v. Scroggs. S. C.

4. In replevin, the defendant *avowed, for that he had a leet for all the inhabitants and reſiants within his manor, and that the plaintiff being an inhabitant, was ſummoned to appear* at the leet *on a certain day, and for making default he was amerced, for which he diſtrained*; the plaintiff *replied, that the place where he dwelt was parcel of a monaſtery, and land held in frankalmoigne diſcharged of all ſecular ſervices; then* he *pleads the ſtatute* 31 *H.* 8. *and the king's grant to his anceſtors adeo plene, libere & integre, as the abbot held it* before the diſſolution, and conveyed the land to himſelf by deſcent, &c. The avowant demurred; and adjudged for the [136] plaintiff; for the abbot was diſcharged ratione ordinis ſui, as all churchmen, women, and noblemen, &c. were; and this immunity churchmen had at common law before the ſtatute of Marlbridge, in reſpect of their perſons, and therefore it ſhall not go to the patentee of the king; but all other perſons above 12 years old muſt do ſuit, and it is called ſuit real, alias regal, for though the lord has the benefit of the court, yet it is the king's court, and the ſervice there done is ſervice to the king. 2 Roll. Rep. 56. Mich. 16 Jac. B. R. Dacre v. Nixon.

5. In *treſpaſs*, the defendant pleads a ſpecial juſtification for an amercement upon a *preſentment* by the jury *for a nuſance* at the court-leet of the archbiſhop of Canterbury; adjudged for the plaintiff, for the defendant ought to *ſhew the bounds and limits* of the leet, *and over what perſons* the leet has juriſdiction, as to ſay de reſidentibus, and inhabitantibus infra manerium de Lambeth, &c. for the leet may extend into one manor, or within four or five manors; or there may be ſeveral leets within one manor, and therefore he ought to plead the bounds of his leet certainly. Skin. 392, 393. pl. 29. Mich. 5 W. & M. in B. R. George v. Lawley.

6. The avowry of the bailiff of a manor *for taking the beaſts as a diſtreſs for breach of a bye-law by the plaintiff, was held ill, becauſe he did not plead a precept of the ſteward* for taking the diſtreſs, or levying the pain; for he can no more do it ex officio, than a ſheriff could 4 Mod. 377. S. C. adjudged for the plaintiff. —S.P. held accordingly.

and alſo because he did not plead an extract of the could execute a judgment of B. R. without a writ. Skinn. 587. Mich. 7 W. 3. B. R. Lamb v. Mills.

Court, which the bailiff ought to have for his warrant. Mo. 573, 574. pl. 789. Trin. 40 Eliz. Scroggs v. Stevenſon. —— All the juſtices held, that the bailiff cannot without ſpecial authority from the ſteward diſtrain for an amercement in a leet. Mo. 607. pl. 839. Stevenſon v. Scroggs. S.C.

Skinn. 35. pl. 4. S. C. & S. P. accordingly. Comb. 350. S.C. & S.P. by Holt Ch. J. and judgment accordingly. —— 5 Mod. 127. 130. S. C. —— Ld. Raym. Rep. 69. 71. S. C. & S. P. accordingly, by the opinion of the whole Court.

7. There can be *no diſtreſs for a penalty* by cuſtom in a leet, as to forfeit 40 s. by the cuſtom if one refuſes to be ſworn conſtable if elected, *without alleging a cuſtom for it.* 1 Salk. 175. Hill. 8 W. 3. B. R. Fletcher v. Ingram.

(G) *For what* Thing *againſt common Right* a Diſtreſs may be taken.

S. C. cited by Hale Ch. J. Freem. Rep. 103. in the caſe of BRUMFIELD v. LEA, that though they did not allege a cuſtom to diſtrain, yet it was held good enough, becauſe the party had no other remedy.

[1. IF there be a *cuſtom in the town* of Tewkſbury, that the bailiffs and principal burgeſſes of the town have uſed time, &c. *to rate* and tax *every inhabitant* within the town, *for the reparation of any bridge* within the town; if a *tax* be *made according to the cuſtom*, a diſtreſs may be taken for this rate of the goods of any inhabitant ſo taxed, though upon the making of the tax it is not ordained that a diſtreſs ſhall be taken for it, inaſmuch as here no perſon can have an action of debt for this tax, inaſmuch as the corporation is not to have it, and then if a diſtreſs ſhould not be for it, there ſhould be no remedy for it. Paſch. 11 Car. B. R. SMETHESDEN AND ASHTON, reſolved per totam Curiam, after a verdict for the avowant, in which the diſtreſs was made by * warrant under the ſeal of the bailiffs, burgeſſes, and commonalty, which was the name of the corporation, and yet reſolved good, becauſe the bailiffs could not have made a warrant by other ſeal.]

* [137]

[2. If a *rent-charge* be granted, and that if it be arrear, that the grantee ſhall have a *penal ſum*; if the penalty be forfeited the grantee may diſtrain for it. 11 H. 4. 85. Quære of this.]

3. The *uſage* of the town of Dale was, *that when the church was ruinous*, the *inhabitants aſſembled* themſelves *and taxed every one to a certain ſum, and if any taxed, &c. did not pay, they uſed to diſtrain ſuch perſon.* This by the cuſtom is allowable, and the diſtreſs taken lawful, notwithſtanding there is a ſtatute which ſays, that nulli liceat ex quacunque cauſa facere diſtrictiones extra feodum ſuum, niſi a domino rege & miniſtris ſuis auctoritatem habent; for the ſtatute does not take away ſuch cuſtom. Arg. And. 71. in pl. 144. cites 44 E. 3.

1 Roll. Rep. 33. 35. 75, 76, 77. S.C. adjudged.

4. If by cuſtom time out of mind there has been paid at a leet certain money called *certum letæ*, the lord without a ſpecial cuſtom enabling him, cannot diſtrain for it, becauſe being againſt common right, and for the private benefit of the lord, as he muſt preſcribe in the principal, ſo he muſt preſcribe in the diſtreſs. 11 Rep. 44. b. Mich. 12 Jac. Godfrey's caſe.

5. A

5. A *rent-charge* was granted *for years with a nomine pœnæ, and clauſe of diſtreſs* if not paid at the day, and the rent is behind, and the years incur, he cannot diſtrain for the nomine pœnæ, for that depends upon the rent, and the diſtreſs is gone as to both of them; per Cur. Win. 7. Paſch. 19 Jac. Tutter v. Fryer.

6. If there be a *cuſtom* within a manor, *that every free tenant of the manor, upon every alienation* of their tenancy, *ſhall pay ſo much by way of relief as their yearly rents amount to*, this is not properly a relief, but a fine for the alienation due by cuſtom, and therefore cannot be diſtrained for unleſs by cuſtom; otherwiſe if due by tenure; and it being alleged that the tenant held by 5 s. rent, & per relevium quando acciderit ſecundum conſuetudinem manerii, it was held by three judges againſt Doderidge, that it ſhould be *intended a relief due by tenure;* for though it was firſt averred, that ſuch relief was due by cuſtom of the manor, yet it is after expreſsly alleged, that the tenant held by relief quando acciderit; agreed per totam Curiam. Jo. 132. Trin. 2 Car. Hungerford v. Havyland. Lat. 37. 95. 130. S. C.— 3 Bulſt. 323. S. C.

7. Certum letæ cannot be *diſtrained for*, unleſs there is a cuſtom to warrant it. Jo. 133. Trin. 2 Car. B. R. per Cur. cites 11 Rep. 44. b. Mich. 12 Jac. Bulloyne and Godfrey's caſe. Roll. Rep. 35. S. C. Coke Ch. J. ſaid that certum letæ is againſt common right, therefore he doubted if it might be diſtrained for without a preſcription; and the Court ſeemed to incline to the ſame intent. ——Ibid. 76, 77. S. P. accordingly.

8. Grantee of a rent-charge *levies a fine* to the uſe of himſelf and wife in tail, yet he may diſtrain for rent arrear before the time levied. 2 Jo. 2. Witherhead v. Harriſon.

(H) *What Thing* may be diſtrained. [138]

[1. A Diſtreſs for rent or, &c. ought to be of a *thing of which there is a valuable property in ſome perſon*, and for dogs, deer, coneys, and ſuch like which are *feræ naturæ*, they cannot be diſtrained. Co. Litt. 47.]

[2. *Furnaces* or cauldrons *fixed* to the freehold, or the *doors* or *windows* of an houſe or ſuch like cannot be diſtrained. Co. Litt. 47. b.]

[3. A man can*not cut the corn growing* and take it as a diſtreſs. 18 E. 3. 4.]

[4. Such things *of which no replevin lies becauſe they cannot again be known* from other things cannot be diſtrained for ſervices, as *money out of a bag*. 22 E. 4. 50. b.] Freem. Rep. 202. pl. 204. Mich. 1675. S. P. obiter. 2 Mod. 61. S. P. obiter in S. C.

[5. Or *ſheafs out of a cart*. Contra, 22 E. 4. 50. b.] 2 Inſt. 82. S. P.—— Freem. Rep. 202. pl. 204. S. P. per tot. Cur. Mich. 1675. Wilſon v. Ducket.——2 Mod. 61. S. C. adjudged.

[6. Or *ſhocks of corn*. 11 H. 7. 14. * 21 H. 7. 39. b. Curia.] * Fitzh. Avowry, pl. 263. cites S. C. and Trin. 14 H. 7.——Br. Diſtreſs, pl. 30. cites S. C.——Jo. 197. Mich.

Mich. 4 Car. B. R. S. P. admitted in the caſe of Cowper v. Pollard.——2 Mod. 61. Mich. 27 Car. 2. C. B. Wilſon v. Ducket. S. P. per tot. Cur.——Freem. Rep. 202. pl. 204. S. C. and S. P. per Cur.

Fol. 667.

[7. Another reaſon is given that *ſhocks* cannot be diſtrained, for that by the carriage there would be damage by ſhedding. 22 E. 4. 150. 2 H. 4. 15. Co. Litt. 47.]

2 Mod. 61. S. P. in caſe of Wilſon v. Ducket.

[8. *Grain or barley* cannot be diſtrained. 18 E. 3. 4. 20 H. 7. 8. b.]

[9. Nor *after it is ground.* 18 E. 3. 4.]

[10. *But* ſuch *things of which a replevin lies*, and which can be known again, may be diſtrained. 22 E. 4. 50. b.]

2 Inſt. 82. S. P.—— [11. *As* a *cart of grain.* 22 E. 4. 50. b.]

Jo. 197. Mich. 4 Car. B. R. the S. P. per Cur. in caſe of Cooper v. Pollard.——2 Mod. 61. S. P. per Cur. Mich. 1675. in caſe of Wilſon v. Ducket.——Freem. Rep. 202. pl. 204. S. C. & S. P. per Cur.

* Br. Diſtreſs, pl. 11. cites S. C.——Fitzh. Diſtreſs, pl. 9.——See pl. 37.

[12. Curia, Co. Litt. 47. a cart *of corn.* * 2 H. 4. 15.]

[13. *Or* a *horſe laden with* a load of *ſheafs.* 21 E. 4. 50. b.]

[14. Or *money* in a ſealed bag. 22 E. 4. 50. b.]

[15. A man cannot diſtrain *corn in the ear*, or *hay* for ſervices. 3 E. 2. Avowry, 189.]

[16. A man may diſtrain *other goods beſides cattle.* 18 E. 3. 4.]

[139] Jo. 197. S. C. adjudged.—and ſo of hay in cocks, but if it be in a cart it may. Adjudged by four juſtices. Ibid.

[17. A man cannot diſtrain *hay in a barn* for ſervices, becauſe this cannot be known again to have deliverance in a replevin. Mich. 4 Car. B. R. between COOPER AND POLLARD, adjudged upon a demurrer; which intratur Trin. 4 Car. Rot. 457.]

[18. If a man leaſes rendering rent, when the tithes are ſevered from the nine parts, he cannot diſtrain the *tithes* for the rent. 11 H. 4. 40. quære. But Brooke Diſtreſs, 81. it is ſaid he ſhall not, becauſe it is the thing leaſed.

Though this is generally true, yet it muſt be intended where there are goods or other beaſts enough to be diſtrained; Arg. 5 Mod. 361. —— If a miller has two *mill-ſtones*, the one in the mill, and the other near it, the ſpare ſtone may be diſtrained. Mo. 214, 215. Arg. cites 18 H. 8.

[19. No man can be diſtrained by the *utenſils of his trade.* Co. Litt. 47.

[20. *As* the *axe of a carpenter* cannot be diſtrained for rent. Co. Litt. 47.]

[21. *Nor* the *books of a ſcholar.* Co. Litt. 47.]

[22. If a horſe be laden with a burden of ſheafs, the *horſe only*, *or* the *ſheafs only*, may be diſtrained for ſervices (R. admitting the ſheafs only may be diſtrained). 22 E. 4. 50. b.]

[23. The *materials for making cloth in a weaver's ſhop* cannot be diſtrained. Co. Litt. 47.]

[24. Equi-

[24. Equitarura hoc eſt *equus palfridus* or an horſe that a man keeps for journies cannot be diſtrained. Regiſtrum Originale, 100. b. but it does not appear for what the diſtreſs was.] If a man rides upon a horſe, this ſhall not be diſtrained,

but if he has another horſe upon which he ſometimes rides alſo, the ſpare horſe may be diſtrained. Arg. Mo. 214. ——S. P. per Cur. obiter Cro. E. 550.——A ſaddle horſe is not diſtrainable if there are other goods ſufficient or covenable. 2 Inſt. 133.

[25. An horſe *upon which another rides* cannot be diſtrained. Co. Litt. 47.]

[26. An *horſe in a ſmith's ſhop* cannot be diſtrained for the rent iſſuing out of the ſhop; becauſe this is for the maintenance of trade or of the common-wealth. Co. Litt. 47. For he is there by authority of law.] 3 Bulſt. 270. S. P. Arg. —S. P. by Holt Ch. J. but he ſaid that there is

no ſuch reſtriction where it is for a perſonal duty. Ld. Raym. Rep. 386. Mich. 10 W. 3.

[27. *So* an horſe cannot be diſtrained *in an inn*. Co. Litt. 47.] Br. Diſtreſs, pl. 97. (99)

cites 10 H. 7. 21. S. P.——Ibid. pl. 42. cites 7 H. 10. [1] S. P.——Br. Treſpaſs, pl. 281. cites 2 H. 7. 1. S. P.——3 Bulſt. 270. Arg. S. P.

[28. So *ſacks of corn or meal* cannot be diſtrained *in a mill*. Co. Litt. 47.] Br. Treſpaſs, pl. 281. cites 7 H. 7. 1. S. P.——Ibid. pl. 42. cites S. C. [but miſprinted for 7 H. 7. f. 10.] S. P.

[29. *So* ſacks of corn or meal cannot be diſtrained *in a market*. Co. Litt. 47.]

[30. So *cloth or garments* cannot be diſtrained *in a taylor's ſhop*. Co. Litt. 47. * 10 H. 7. 21.] * Br. Diſtreſs, pl. 97. (99.) cites

S. C.——Ibid. pl. 42. cites 7 H. 7. 10. [1] S. P.——Br. Treſpaſs, pl. 281. cites 7 H. 7. 1. S. P.

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[31. *Averia carucæ* cannot be diſtrained. Co. Litt. 47.] The, are not privileged where there is no other diſtreſs. Arg. 1 Salk. 249. cites 2 Inſt. 133.——By the common law the plough or any thing belonging to it was not diſtrainable ſo long as any other diſtreſs might be taken. 2 Inſt. 133.——Co. Litt. 47. a b. S. P.——5 Mod. 361. Arg. S. P.

[32. *Things diſtrained damage-feaſant* cannot be diſtrained for rent; becauſe they are *in cuſtody of law*. Co. Litt. 47.] Things which are in cuſtodia legis

cannot be taken; as a diſtreſs in a pound overt cannot be taken out of the pound upon another diſtreſs. Godb. 316. Arg. cites D. 67. Stringfellow's caſe.

33. 51 *H.* 3. *ſtat.* 4. *Neither draught-cattle nor ſheep ſhall be diſtrained (except for damage-feaſant) ſo long as other goods may be found to ſatisfy the debt; diſtreſſes ſhall be reaſonable; the ſheriff ſhall anſwer all debts received; and where the ſheriff charged himſelf, the debtor ſhall be acquitted.* In treſpaſs on the ſtatute for diſtraining per averia carucæ ſuæ contra formam ſtatuti, he ought to ſurmiſe in his count that he had other beaſts; for if there are no other beaſts, he may diſtrain the beaſts of the plough. Br. Action ſur le Eſtatute, pl. 45. cites 4 H. 7. 8.

In treſpaſs on the ſtatute, the plaintiff declared of taking contra formam ſtatuti generally without alleging that he had otherwiſe reaſonable diſtreſs, for which cauſe exception was taken, ſed non allocatur; for this muſt come on the part of the defendant, viz. that no other reaſonable diſtreſs could be found, and this is iſſuable; and judgment with coſts was given for the plaintiff. D. 312. a. pl. 86. Trin. 12 Eliz.

Ibid.

Ibid. cites Mich. 18 E. 2. where it was held that this action lies for the tenant againſt the lord, though the tenant had come to agreement with the lord for the rent for which the diſtreſs de averiis carucæ was taken; and cites Paſch. 17 H. 6. Rot. 93.

34. A man may diſtrain *ſheep* if he cannot find other diſtreſs, though he might have found other diſtreſs before. Br. Diſtreſs, pl. 63. cites 29 E. 3. 16. and Fitzh. tit. Treſpaſs, 250.

35. A man *ſeiſed of four acres* of land *has iſſue a ſon and a daughter by one venter, and two daughters by another venter, and granted 100 s. out of his land to his ſon in fee;* the *ſon dies without iſſue in the life of his father;* the *father dies*, the *land deſcends to the three daughters;* the *eldeſt daughter* cannot diſtrain for the two parts of the rent till partition be made. Br. Extinguiſhment, pl. 31. cites 34 Aſſ. 15.

S. C. cited Cro. E. 550.

36. A man cannot diſtrain the *horſe upon which a man rides*, quod nota bene. Br. Diſtreſs, pl. 60. cites 6 R. 2. and Fitzh. tit. Reſcous, 11.

37. Note, That a *waggon full of corn* may be diſtrained, contra of *grain in truſſes;* per Hank. and Thirn. quod nemo negavit. And note, that a general receiver has no authority to re-deliver diſtreſs without command of his maſter. Br. Diſtreſs, pl. 11. cites 2 H. 2. 15.

Br. Diſtreſs, pl. 80. cites S. C.

38. In debt upon *a leaſe of tithes levied by diſtreſs* is no plea, per Skrene, becauſe there is no land in which he can diſtrain, and he cannot diſtrain by the tithes ſevered; for this is the thing leaſed, contra Till. Br. Dette, pl. 234. cites 11 H. 4. 40.

39. A man may diſtrain *the beaſts of his tertenant* for rent-ſervice, or for rent reſerved upon a leaſe, &c. *immediately* when they are put into the land, *but not* the beaſts *of a ſtranger before they are levant and couchant.* Br. Diſtreſs, pl. 65. cites Lib. Fundamentum Legum.

40. *A garment at a taylor's, or a horſe baiting in an inn or hoſtery*, ſhall not be diſtrained; for they are there by authority. And the ſame law elſewhere of *ſacks of grain at a mill to grind*, or *cloth at a dyer's*. And per Bryan, the ſame law of a *horſe with a farrier to be ſhod;* but if he *takes off the ſaddle and lays it upon the ground*, the lord may diſtrain the ſaddle, and yet not the horſe. Br. Diſtreſs, pl. 56. cites 22 E. 4. 49.

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Br. Diſtreſs, pl. 88. cites S. C. —— * S. P. per Brian and Cateſby, but Suliard contra, no more than money. Br. Diſtreſs, pl. 88. cites S. C.

41. Treſpaſs of taking of *two waggons of corn;* the defendant juſtified as diſtreſs for rent arrear upon the ſeigniory, and ſhewed certainly, there *he ought as well to juſtify the taking the waggons as the corn*, and otherwiſe it is ill; for per Suliard clearly, a man cannot diſtrain ſheafs, nor grain in ſhocks, for the damage of ſhedding in carriage, and a man cannot diſtrain *money unleſs it were in a bag ſealed*, for one penny cannot be known from another, and then replevin cannot be thereof made. Per Cateſby, our books are ſo of ſheafs unleſs they were in waggons; but I think that a man * may diſtrain by ſheafs; and Brian to the ſame intent; for writ of reſcous lies thereof; tamen *quære*. Fr. Diſtreſs, pl. 58. cites 22 E. 4. 50.

42. *As*

42. *As* where a man *leaſes his ſheep*, or *bails his goods in pledge*, there they ſhall not be taken and put in execution, nor taken for outlawry, nor for diſtreſs, nor ſuch like, *till the leaſe be determined, or the money paid* for the pledge. Br. Diſtreſs, pl. 74. cites 22 E. 4. 11.

43. A man cannot diſtrain *grain in ſhock* for rent arrear, becauſe he cannot have replevin nor return thereof, for it is not certain to have thereof conuſance; but otherwiſe it is for damage feaſant; per all the juſtices. Br. Diſtreſs, pl. 100. cites 11 H. 7. 14.

44. A *furnace fixed to the land*, and *not to the walls*, nor *fatts fixed in the land, pale, eſtanks, windows, doors, gates, evidence of land, poſt fixed in the land, table dormant*, &c. ſhall not be diſtrained, for they are not chattels which go to the executors, but the heir ſhall have them; per Cur. quære if *glaſs*; for it is ſaid per Pollard, and not denied, but that the executor ſhall have it, and not the heir. Br. Diſtreſs, pl. 29. cites 21 H. 7. 26. Br. Chattels, pl. 7. cites S. C.

45. In treſpaſs of taking a *mill-ſtone*; the defendant juſtified for diſtraining it for ſuit, &c. The *plaintiff ſaid, that it was fixed to a great piece of timber, cum clavibus & aſſeribus*. Per Brudnell this is no plea, but he *ſhall ſay that he had a horſe-mill in the houſe, and annexed to the houſe where*, &c. and *that the mill-ſtone was parcel of the mill*; by which he ſaid ſo; by which the *defendant ſaid, that it was ſevered, and was in picking*; and yet it was held that it ſhall not be diſtrained; for yet it is parcel of the mill; for a mill is for the commonwealth; but if another mill-ſtone, which is none of them which are for grinding, be in the houſe, this may be diſtrained. Quære of the *anvil of a ſmith*, it ſeems that this ſhall not be diſtrained, if it be that upon which the ſmith uſed to work, notwithſtanding that it be taken out of the ſtock. Br. Diſtreſs, pl. 23. cites 14 H. 8. 25.

46. *So of doors and windows*. Br. Diſtreſs, pl. 23. cites 14 H. 8. 25.

47. It is a moot caſe, if *a man diſtrains for a juſt cauſe, and impounds the beaſts*, and after the *lord of the ſoil comes and diſtrains them for rent again*, if his diſtreſs be lawful, and it ſeems that it is not, inaſmuch as they were diſtrained before, and were *in cuſtodia legis*. Br. Diſtreſs, pl. 74. cites 4 E. 6.

48. *Stuff ſent to a taylor, fuller, ſheerman, weaver, miller*, &c. ſhall not be diſtrained; for thoſe artificers are for the commonweal. And the ſame law elſewhere of *a horſe in a common inn*. But ſuch artificers may retain the ſtuff for their wages for their labour. And the hoſtler of the inn may retain the horſe for his victuals, viz. for the horſe-meat not paid. And *victuals* nor *corn in ſheafs* cannot be diſtrained; contra *of corn in a waggon*. Br. Diſtreſs, pl. 70. cites lib. Raſtel.

49. If a *knight of the order of the garter has ſeveral garters*, all but one may be diſtrained; Arg. Mo. 214. Mich. 27 & 28 Eliz.

50. An horſe which carries corn to market, and is put into a friend's houſe for the time, he is not diſtrainable; per Beamond and Owen, which Walmſley denied. And where an *horſe carries* [142]

corn

corn to a mill, and is tied at the mill door during the grinding of the corn, he ſhall not be diſtrained; to which Walmſley agreed; becauſe it is a common place, and for the public weal; but he ſaid that they be not alike. Cro. E. 550. pl. 25. Hill. 39 Eliz. C. B. in caſe of Read v. Burley.

51. A covenable diſtreſs is not of *armour*, or *veſſel*, or *apparel*, or *jewels*, ſo long as there are other ſufficient or covenable; nor of *ſheep, ſaddle-horſes, beaſts of the plough, poultry, or fiſh.* 2 Inſt. 133. cites Mirror, cap. 2. ſ. 16.

52. *Goods under an attachment* cannot be diſtrained. Vent. 221. Trin. 24 Car. 2. B. R. Monk's caſe.

Upon this act, if corn be diſtrained in the field, the party may carry it away, or elſe by its lying on the ground it may ſpoil,

53. 2 *W. & M. ſtat.* 1. *cap.* 5. *ſ.* 3. *It ſhall be lawful to diſtrain for rent arrear, as aforeſaid, any ſheaves or cocks of corn, or corn looſe in the ſtraw, or hay in any barn, or upon any hovel, ſtack, or rick, or otherwiſe; and to lock up and detain the ſame where it ſhall be found, till it be replevied; and in default thereof, within the time aforeſaid, to ſell the ſame after appraiſement as aforeſaid; ſo as it be not removed to the damage of the owner, but kept where it ſhall be found till it be replevied or ſold.*

and every taking and removing of the corn out of the place where it was, is a taking and carrying away in law; per Holt and Powell. For per Holt, the act of parliament is only that it be not removed to the damage of the owner, and as long as it is not at the damage of the owner, it may be carried out of the field; but by Holt, if corn be diſtrained in a rick, I doubt whether it can be carried away. Mich. 8 Ann. B. R. Le Grice v. Manning.

54. 11 *Geo.* 2. *cap.* 19. *ſ.* 8. *Enables landlords, their ſtewards, bailiffs, receivers, or other perſons impowered, to diſtrain any* cattle or ſtock *of their tenants* feeding or depaſturing upon any common *appendant or appurtenant, or any ways belonging to all or any part of the premiſes demiſed or holden; and alſo to take and ſeize all ſorts of corn and graſs, hops, roots, fruits, pulſe, or other product whatſoever, which ſhall be growing on any part of the eſtates ſo demiſed or holden, as a diſtreſs for the arrears of rent; and the ſame to cut, gather, make, cure, carry, and lay up, when ripe, in the barns or other proper place on the premiſes ſo demiſed or holden; and in caſe there ſhall be no barn or proper place on the premiſes ſo demiſed or holden, then in any other barn or proper place which ſuch leſſor or landlord, leſſors or landlords ſhall hire or otherwiſe procure for that purpoſe, and as near as may be to the premiſes, and in convenient time to appraiſe, ſell, or otherwiſe diſpoſe of the ſame, towards ſatisfaction of the rent for which ſuch diſtreſs ſhall have been taken, and of the charges of ſuch diſtreſs, appraiſement, and ſale, in the ſame manner as other goods and chattels may be ſeiſed, diſtrained, and diſpoſed of, and the appraiſement thereof to be taken when cut, gathered, cured, and made, and not before.*

S. 9. *Tenants to have notice of the place where the diſtreſs is lodged. And diſtreſs of corn, &c. to ceaſe if rent be paid before it be cut.*

(H. 2) The Goods of whom may be diſtrained.

1. LESSEE is ouſted by a ſtranger, the goods of *the diſſeiſor* may be diſtrained for the rent. Cro. J. 300. pl. 5. Paſch. 10 Jac. B. R. Humphry v. Damion.

2. A. *driving cattle to London to ſell,* by agreement with the maſter of an inn puts them into a ground at ſo much a ſcore for a night; the *landlord* ſeeing them aſked whoſe they were, but *conſented* to their ſtaying there, and afterwards the ſame evening diſtrained them for rent due to him by the maſter of the inn; and adjudged for the landlord in the caſe of Fowkes v. Joice. 3 Lev. 260. Trin. 1 W. & M. in C. B.

2 Vent. 50. S. C.—— 2 Vern. R. 129. S. C. Relief decreed upon the fraud, and the landlord to anſwer the value of the ſheep, and to pay coſts both in equity and at law; per Commiſſioners, and they ſeemed to think that the grounds lying to the inn and uſed therewith, ought to have the ſame privilege as the inn, and paſſengers cattle not to be diſtrainable there.——On the landlord's coming and ſeeing the ſheep, he pretended to be angry, upon which the owner offered to take out the ſheep, at which time they were not diſtrainable for the rent, having not been *levant and couchant* upon the lands; ſo that the Court looked on the conſent as a fraud to get them to be left all night, by which they became liable to the diſtreſs; and the plaintiff had his coſts both at law and in equity. Ch. Prec. 7. S. C.

3. A *rent-charge* was arrear for 20 years, and *cattle eſcaped out of the next ground* and were diſtrained. Ld. Nottingham relieved againſt it; cited 2 Vern. 131. Hill. 1690, as the caſe of Brodon v. Pierce. S. C. cited Ch. Prec. 8.

4. Where a *ſtranger's beaſts eſcape* into the land, they may be diſtrained for rent, though they have *not* been *levant or couchant*, provided that they are *treſpaſſors*. *But* if the tenant of the land is in default in *not repairing his fences*, whereby the beaſts came into the land, the leſſor cannot diſtrain ſuch beaſts, though they have been levant and couchant, unleſs he have given *notice to the owner*, and he ſuffer them to remain there afterwards. But *the lord of the fee*, or *grantee of a rent-charge*, in this caſe may diſtrain ſuch beaſts, after they have been levant and couchant, without giving notice. 2 Lutw. 1573. 1577. Hill. 7 W. 3. Kimp v. Cruwes.

5. The goods of an *ambaſſador* are *privileged by* 7 *Ann.* 12. and 10 Mod. 4. Trin. 8 Ann. B. R. Arg. and cites Grotius to the ſame purpoſe.

(I) The *Goods of whom* may be diſtrained.

Fol. 668.

[*And in what Place.*]

[1. IF the *cattle of a ſtranger eſcape into the lands holden*, and the *owner* knows *it, and ſuffers them to continue* there after *for a day or more*, the lord may diſtrain them for his ſervices. 27 E. 3. 80.]

But if in this caſe the cattle eſcape, and the owner freſhly follows to take them, it is otherwiſe. 2 Inſt. 296.——S. P. admitted per Cur. Palm. 43. Mich. 17 Jac. B. R. Lacy's caſe, and held that there was no difference between leſſor and leſſee, and the caſe of lord and tenant.——S. C. cited by Powell J. 2 Lutw. 1580. Hill. 7 W. 3.

[2. [So]

And ſo he may, though they are not levant and couchant. See (O) pl. 1.

[2. [*So*] if the cattle of a ſtranger eſcape into the lands held, *though the owner does not know them to be there, yet if* they are *levant and couchant* there, the lord may diſtrain them for his ſervices. Contra, 27 E. 3. 80.]

In caſe of an ancient ſeignory, the lord may diſtrain cattle for ſervices, which came in by eſcape, though they were not levant and couchant, although it be in default of the fences, which the tenant of the land ought to maintain, becauſe the lord has nothing to do with the repairing of the fences. But in caſe of rent reſerved upon a leaſe for years, the leſſor cannot diſtrain ſuch cattle until they be levant and couchant; for if the leſſor had had the land in his own hands, he ought to have repaired the fences; and when he puts in a leſſee, he ought by covenant, &c. to oblige him to repair. And therefore in that caſe if the law would allow the leſſor to diſtrain the cattle of a ſtranger which come in by eſcape, before that they be levant and couchant, it would be in effect to allow a man to take advantage of his own wrong; therefore the opinion of Coke cannot be maintained ſo generally, no book warranting it, unleſs 10 H. 7. 21. b. Therefore it muſt be intended if the cattle come in by default of the owner of the cattle, then they may be diſtrained before they be levant and couchant. 7 H. 7. 1. 15 H. 7. 17. But if in default of the tenant of the land, there they cannot be diſtrained until they have been levant and couchant, that is to ſay for rent upon leaſes for years. 15 H. 7. 17. And in ſuch caſe the leſſor ſhall not take the cattle before that he has given notice to the owner that they are upon the land liable to his diſtreſs. And if the diſtrainor chaſe cattle in a place liable to his diſtreſs, and gives notice to the owner of the cattle, and he does not come to take them away, they are now become diſtrainable. But in caſe of diſtreſs by the ancient ſeignory aforeſaid, the owner may prevent the diſtreſs by making freſh purſuit; cites 15 H. 7. 2 Roll. Rep. 124. Gill v. Gawen; per Powell J. But by Treby Ch. J. where the cattle eſcape accidentally, there they are not diſtrainable until they have been levant and couchant; but if they eſcape by default of their owner, they are diſtrainable the firſt minute. Ld. Raym. 168, 169. Hill. 8 & 9 W. 3. C. B. Kemp v. Crewes.

[3. The cattle of a ſtranger that eſcapes into the land may be diſtrained *for ſervices.*]

[4. *But* the cattle of a ſtranger that comes into the land by eſcape can*not* be diſtrained *for a rent-charge.* 18 E. 2. Avowry, 219.]

[5. *But* the cattle of a ſtranger may be diſtrained *for rents and ſervices*, though they eſcape into the land of the tenant, *if they do a treſpaſs to the tenant.* 22 E. 4. 49. b. Contra, 27 E. 3. 80.]

[6. *But* the cattle of a ſtranger cannot be diſtrained by the lord if they eſcape into the land of the tenant, *if they do no treſpaſs to the tenant.* 22 E. 4. 49. b.]

[7. *As if* the *tenant ought to incloſe againſt the highway by preſcription*, and in driving my cattle by the way, *by default of the incloſure* they eſcape into the land of the tenant, the lord cannot diſtrain them. 20 E. 4. 49. b.]

[8. *So* if he ought *to incloſe* by preſcription *againſt my land*, and my cattle eſcape, &c. 22 E. 4. 49. b.]

[9. In theſe caſes, after the eſcape, if my cattle *continue* in the land *levant and couchant for four*, or ſix, or more *days*, or for half a year, yet if I have *no notice* thereof, the lord cannot diſtrain them. 22 E. 4. 49. b.]

[10. *But* otherwiſe it is if I have *notice*, and ſuffer them to continue there after. 22 E. 4. 49. b. 50.]

Fitzh. Diſtreſs, pl. 8. cites S. C.

[11. My goods cannot be diſtrained *in a market or fair*, for the prejudice to the public. 7 H. 7. 2.]

——Goods *brought to market*, and expoſed to ſale, ſhall not be diſtrained, becauſe it is pro bono publico. Noy, 19. 15 Jac. Traſſel v. Morris.

Br. Diſtreſs, pl. 42. cites 7 H. 7.

[12. So my gown *in a taylor's ſhop* cannot be diſtrained by the lord of the ſhop for ſervices, *nor* my *horſe in an inn.* 10 H. 7. 21. b.

* 7 H. 7. 2. *Nor* my *horſe in the ſhop of a ſmith who is to ſhoe him,* for the laws give me a liberty to put him there. 22 E. 4. 39. b.] 10. S. P. * Br. Treſpaſs, pl. 281.

cites 7 H. 7. 1. S. C.——Br. Diſtreſs, pl. 42. cites 7 H. 7. 10. [1.] S. P.——Fitzh. Diſtreſs, pl. 8. cites S. C.

[13. And in theſe caſes the lord cannot diſtrain theſe goods, *though they continue there as long as I pleaſe;* for they may retain them till ſatisfaction. 22 E. 4. 39. b.] [145]

[14. If I put my horſe to a ſmith's to be ſhod, *although* he be there *three or four days* before he is ſhod, yet the lord cannot diſtrain him. 22 E. 4. 50.]

[15. *But* if I come with my horſe to be ſhod, and there put the ſaddle under the right ſide of the horſe, the *lord may diſtrain the ſaddle.* 22 E. 4. 50.]

[16. If a man *rides to any place, and* there he *is took ſick,* upon which he *remains there two or three days,* yet *his horſe cannot be diſtrained for rent.* 15 E. 2. Avowry, 216.]

[17. [*So*] if a man *put his horſe into a common herbage per* 8 *jours,* &c. † in beverie ſon chival & lui remove, yet this horſe cannot be diſtrained for rent there. 15 E. 2. Avowry, 216. adjudged.] † Quære the meaning of the French words, unleſs it be (and waters his horſe, and puts him in again).

[18. If the *diſtreſs* is to be taken *for any cauſe touching the ſoil,* the *cattle of a ſtranger* may be diſtrained, being upon the land, *for rent,* &c. 41 E. 3. 26. b.] Fol. 669. Br. Diſtreſs, pl. 3. cites S. C. & S. P. as where it is for damage-feaſant, or for rent-ſervice.

[19. If an *heriot-ſervice,* due after the death of a tenant, be *eſſoigned,* the lord may diſtrain the *cattle of any ſtranger manuring upon the land.* 27 Aſſ. 24. adjudged.] Br. Hariots, pl. 6. cites S. C.—— Fitzh. Avowry, pl. 177. cites S. C.——Ow. 146. Anderſon ſaid, that he agreed the caſe of Dyer, that the cattle of a ſtranger cannot be taken for a heriot.

[20. The *ſame law* if a diſtreſs be to be taken *for a cauſe touching the perſon, as* for an *amercement in frank-pledge,* the cattle of a ſtranger may be diſtrained being upon the land. 41 E. 3. 26. b. Vide contra, 47 E. 3. 23.]

[21. The cattle of a ſtranger cannot be *ſold for debt of the king.* 41 E. 3. 26. b.]

[22. *But* they may be *diſtrained if* they are *depaſtured* in the place where, &c. 11 H. 4. 2.] Fitzh. Avowry, 22. cites S. C.

[23. *Cattle* which are *in* certain *land by way of agiſtment* may be diſtrained *for rent.* 18 E. 2. Avowry, 219. admitted by the iſſue.]

[24. If a town be aſſeſſed to 40s. for the *expences of the knights* of the ſhire *in parliament,* this may be levied upon the goods *of one man* in the town *only.* 11 H. 4. 2.] Fitzh. Avowry, pl. 52. cites S. C.—— Br. Diſtreſs, pl. 94. (95.) cites S. C.——Br. Avowry, pl. 42. cites S. C.

Br. Diſtreſs, pl. 68. cites S. C.—— Br. Charge, pl. 39. cites S. C.

[25. If there are *ſeveral jointenants*, and *one grants a rent-charge* out of the land, the grantee may *diſtrain the cattle of the grantor.* 11 H. 6. 23. b. 28. 33.]

Br. Diſtreſs, pl. 68. (69.) cites S. C.

[26. *But* he cannot diſtrain the cattle *of the other jointenants.* 11 H. 6. 23. b. 28 33.]

——Br. Charge, pl. 39. cites S. C.

[146]

Br. Diſtreſs, pl. 68. (69.) cites S. C.

[27. *But* he may diſtrain the cattle *of a ſtranger* that come upon the land. 11 H. 6. Brooke Diſtreſs, 69. Quære.]

and that there is a quære; but Brooke ſays it ſeems that they may be diſtrained.——Br. Charge, pl. 39. cites S. C. and quære, and ſame opinion by Brooke.

Cro. J. 611. pl. 6. Hill. 18 Jac. B. R. Snelgar v. Henſton, S. C. adjudged, that one tenant in common may diſtrain

[28. If there be two *jointenants*, and *one leaſes his part to the other for years, rendering rent*, and they occupy it accordingly, now the leſſor may diſtrain his cattle; for now he ſhall occupy the whole without the diſturbance of the leſſor, and he cannot ouſt him. 11 H. 6. 34. M. 18 Ja. B. R. between Sir Henry Snelgrave and Dalston, adjudged upon a demurrer where the leaſe was made to a ſtranger, who leaſed it to the other jointenant.]

upon the other, where he comes in under the leſſee. —— 2 Roll. Rep. 212. Hudſon v. Snelgar, S. C. Two were tenants in common in fee, and one made a leaſe for 40 years, rendering rent, and the leſſee aſſigned his term to the other tenant in common; and the Court held clearly, that for rent arrear the leſſor may diſtrain the beaſts of his companion; and cited 11 H. 6. 28. accordingly.

Br. Diſtreſs, pl. 68. (69.) cites S. C. and cites 11 H. 6. 33. where it is in a manner

[29. If there be ſeveral *jointenants*, and *one grants a rent-charge, and after leaſes his part to the other jointenants at will*, and they occupy the whole, yet their cattle cannot be diſtrained for the rent; becauſe the *leaſe at will is void*, inaſmuch as a jointenant ought to occupy per my et per tout by the law. 11 H. 6. 28. 34.]

agreed, that where five jointenants are, and two charge the land with rent, and leaſe their part to one of the other three, and the grantee diſtrains him, that this is good; for by the taking of the leaſe of the part of the grantors, he ſhall be in the ſame plight as the grantors themſelves ſhould be; and e contra if he had occupied his firſt part only.

[30. *But admitting the leaſe at will to* them to *be good*, then their cattle may be diſtrained for the rent; becauſe they come to the third part under the charge, and they ſhall be in the ſame plight that the grantor himſelf was. 11 H. 6. 28. a. b.]

[31. If A. *leaſes at will, and after grants a rent* (admitting this does not determine the will, quod quære), the grantee cannot diſtrain the *cattle of the tenant at will*, becauſe he was in before the charge, and therefore the tenant of the freehold cannot charge him before the will determined. 11 H. 6. 28. b.]

[32. If a man be ſeiſed of a *rent-charge by preſcription iſſuing out of the manor of D.* yet it ſeems he cannot diſtrain the *cattle of the copyholders* of the manor, if they have not been uſed to be diſtrained, becauſe they are in by preſcription alſo, and ſo as high as the owner of the rent. M. 12 Ja. B. between Cannon and Turner, dubitatur.]

[33. *But*

[33. *But* in the ſaid caſe it is clear *if the owner of the rent has it by grant*, or otherwiſe, *and not by preſcription*; yet the cattle of the copyholders * cannot be diſtrained for it. M. 12 Ja. B. between CANNON AND TURNER, adjudged.] * Fol. 670.

[34. If a *rent* be granted *out of two parts of certain land*, and after a *leaſe is made of the two parts to A.* and the *other third part alſo comes to A. by another leaſe of him that has the third part*, the cattle of the leſſee may be taken for this rent. Hobart's Reports, 110. between NEWMAN AND MOOR; where but one 3d part came to the leſſee of the two parts.]

35. If a man *puts his beaſts to J. N. to paſture* for 4d. the week, and after *gives notice that he will not paſture them any longer*, and the owner will not retake them, J. N. may diſtrain them for damage-feaſant. Br. Diſtreſs, pl. 93. cites 43 E. 3. 21.

36. In writ of *meſne*, if the *defendant confeſſes the acquittal*, the defendant ſhall be diſtrained if he does not acquit him; per Belknap. Br. Diſtreſs, pl. 20. [147] Br. Fines, pl. 45. cites 38 E. 3. 33. S. C.

37. Where a man *agiſt beaſts* in his land *for a certain ſum*, he cannot diſtrain the beaſts for the agiſtment arrear; but if the owner chaſes them away before payment of the agiſtment, the other may have action of treſpaſs; quære inde; for it ſeems that debt lies. Br. Diſtreſs, pl. 67. cites the Regiſter.

38. *So* it ſeems of *leaſe of tithes*, the *leſſor cannot diſtrain the ſheafs of the tithes*. Br. Diſtreſs, pl. 67. cites the Regiſter.

39. For *fees of knights of the county for the parliament*, a man may diſtrain the beaſts of the vill, or of any of the vill. Br. Diſtreſs, pl. 94. (bis) cites 11 H. 4. 2.

40. A man *put his beaſts into his own cloſe*, and they *eſcaped into the cleſe of another adjoining, and* the *owner freſhly retook them*, this is good matter to ouſt the lord of the diſtreſs of them, but the other ſhall have treſpaſs thereof; quod nota; per Cur. Br. Diſtreſs, pl. 21. cites 21 H. 6. 37.

41. Whether the *ſheriff* may *diſtrain the beaſts of a ſtranger upon the land of one that has loſt iſſues* in Curia regis for non-appearance was the queſtion on a demurrer; Brook ſays, it ſeems to him that he may; becauſe the land is thereof charged. Br. Diſtreſs, pl. 40. cites 5 H. 7. 1.

42. In replevin the defendant *avowed for rent charge; the plaintiff ſaid that the land where*, &c. *was open to the highway for default of incloſure, and he drove his beaſts in the way, and they eſcaped, and he freſhly purſued them, and the defendant took and diſtrained them*; and by all the juſtices, if *a man de ſon tort puts his beaſts into certain lands*, the lord may diſtrain them though they were † [not] levant and couchant upon the land. Quære of the diverſity between this caſe and the caſe of eſcape. And the defendant ſaid by replication, that the beaſts were in the land by two nights after the eſcape; and per Cateſby, he *ought to traverſe the eſcape*; but Brian e contra, and that upon freſh purſuit the party cannot diſtrain; contra where he ſuffers the beaſts to remain after the eſcape, by which (by him) the defendant

† The editions of Brook omit the word (not), but it is in the Year-book.

ought to traverſe the freſh ſuit or the eſcape, quod Choke conceſſit. Br. Diſtreſs, pl. 24. cites 15 H. 7. 17.

43. By Manhood J. there is a *difference when the cattle come upon the lands of another in the default of the owner of the cattle*, as by eſcape or ſtray, *and where in the default of another*; for in the firſt caſe the lord may diſtrain them before they be levant and couchant; but in the latter caſe not; alſo a *rent reſerved upon a leaſe for years, is a new rent, and not like unto an ancient rent due upon an ancient tenure, betwixt the lord and the tenant*; for, for a rent reſerved upon a leaſe for years, or for a rent-charge, a man cannot diſtrain the cattle before they be levant and couchant upon the lands, although they come upon the land by eſcape, eſtray, &c. Dyer ſaid, the lord cannot diſtrain the cattle which eſcape into the land of his tenant, for want of encloſure of his tenant, before they be levant and couchant, and yet the ſeigniory is favoured for the antiquity of it. 2 Le. 7, 8. pl. 8. 7 Eliz. C. B. Anon.

Noy, 68. S. C. accordingly, for they were brought there for another intent, and were in the poſſeſſion of the very owner

44. If a *clothier* having *put his wool to ſpin comes with an horſe to carry it back*, but becauſe there is no beam or weights at the ſpinner's houſe to weigh it, *the clothier and ſpinner, with the leave of a neighbour who had a beam and weights* in his houſe, *bring the horſe thither, and enter the houſe to weigh the yarn*; the lord of houſe whilſt they * are there cannot diſtrain the horſe for ſervices; adjudged. Cro. E. 549. 596. Hill. 39 Eliz. Read v. Burley.

——S. C. cited 3 Lev. 161. by Lutwich J.

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45. There is a *difference between a diſtreſs for ſervices, and* a diſtreſs *for amercements for not doing the ſervices*; for the firſt is by common right maintainable, the ſecond againſt common right by preſcription. And then for ſuch amercements you muſt diſtrain the tenants own beaſts, and not the beaſts of a ſtranger found upon the land; as for ſervices you may, and the reaſon of that, as I conceive, is, for that it is for a *perſonal crime*; per Walmſley J. Noy, 20. in caſe of Pell v. Towers.

46. *Two hundreds*, viz. L. and M. were *adjoining to ſeveral manors*, viz. D. and E. and A. was ſeiſed of D. and B. was ſeiſed of E. In a replevin A. avowed, and *preſcribed that all the tenants of the other manor have uſed to make ſuit to the leet within his hundred, and that the lord of the other manor uſed to appear at the ſaid leet, or to pay 4 s. pro anno futuro, and if not paid, then he preſcribed to diſtrain any inhabitant within the hundred for the ſame*; and for 4 s. not paid he avowed the diſtreſs within the manor of the plaintiff, who was one of the inhabitants. Williams J. cited 47 E. 3. that the cattle of the lord of the manor might be diſtrained in any land within the hundred for ſuit and ſervices. But it was afterwards agreed by all the juſtices, that the cattle of a ſtranger could not be diſtrained. Owen, 146. Paſch. 40 Eliz. C. B. Gooſe v. Potts.

Noy, 20. S. C. but S. P. does not appear.

47. If for an amercement for default of ſuit the lord *preſcribes to diſtrain the goods of his free-tenant*, he *cannot take a diſtreſs of the beaſts*

beaſts of his under-tenant, who is not within the preſcription; adjudged. Cro. E. 791, 792. Mich. 40 Eliz. Pill v. Towers.

48. If *I let land* for years, *reſerving rent, and I command one to put his cattle into the land, I cannot diſtrain them*; for my commandment is a wrong, and an action on the caſe will lie againſt the commander. Brownl. 31. Hill. 6 Jac. Anon.

49. If one ſeiſed in fee *makes a leaſe for life, and* after *grants to me a rent-charge*, if the *grantor's cattle come upon the ground*, I may diſtrain them, although I cannot diſtrain the tenant in poſſeſſion, but the grantor cannot avoid it. Brownl. 32. Paſch. 10 Jac. Anon.

50. The defendant *avowed for rent reſerved* upon a leaſe for life. The plaintiff pleaded in bar, and conveyed to himſelf title to 10 acres adjoining, and that he put in his *beaſts*, and they *eſcaped into the place*, &c. *and he freſhly followed to drive them out, but before he could recover them, the defendant diſtrained them.* The caſe had been ſomewhat better, if the tenant ought to maintain the fence. But no judgment or opinion. Hob. 265. pl. 347. 17 Jac. Reynolds v. Okely.

Brownl. 170. S. C. and ſays the Court held in this caſe, becauſe the beaſts were always in the plaintiff's poſſeſſion, and in his view, the defendant could not diſtrain the cattle of a ſtranger; but if he had permitted the beaſts to have remained there by any ſpace of time, though they had not been levant and couchant, the leſſor might have diſtrained the beaſts of a ſtranger. ——S. C. cited Mod. 63. pl. 6.——S. C. cited 2 Lutw. 1580.

51. *Cattle driving to London to be ſold* for proviſions for the city, and being *lodged in a cloſe by the way*, may be diſtrained for rent, though they are put into the cloſe *by conſent of the landlord*; adjudged per tot. Cur. 3 Lev. 260. Trin. 1 W. & M. in C. B. Fowkes v. Joice.

2 Vent. 50. S. C. ſays it was argued, that nothing appeared in the pleading of a common inn, and ſo the matter did not come in queſtion; neither was it ſet forth that the * cattle were driving to market, but only to London, ad proficuum inde faciend'; and beſides, in the bar to the avowry the licence is the only matter relied upon, which does not conclude the leſſor from taking the diſtreſs. And of that opinion was the Court. And the Court held, that cattle driving to a market, and put into paſture by the way, were not privileged from being diſtrained; for it is by the ſtatute of Marlbridge, that beaſts cannot be diſtrained in the highway; and not by the common law. —— 2 Vern. 129. pl. 128. Hill. 1690. S. C. Relief decreed upon the fraud, and the landlord to anſwer the value of the ſheep, and to pay coſts both in equity and at law; per Commiſſioners, and they ſeemed to think, that the grounds lying to the inn, and uſed therewith, ought to have the ſame privilege as the inn, and paſſengers cattle not be diſtrainable there.

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52. A. is *ſeiſed of a third part of a cloſe in common*, and B. of the other two parts in common with A.—A. *lets his third part*, reſerving a rent. B. puts in his cattle, or a ſtranger by his licence. Such cattle are not diſtrainable for the rent. 2 Vent. 227. 283. Hill. 2 & 3 W. & M. in C. B. Kemp v. Cory.

53. In all caſes *where the land is the debtor*, the *cattle of a ſtranger* are as well liable as thoſe of the owner of the land; as cattle of a ſtranger *levant and couchant* are diſtrainable for arrears of a rent-ſervice. So if a neighbour's cattle eſcape into land, out of which a rent-charge iſſues, and are levant and couchant, (there are good authorities, *though* they are *not levant and couchant*,) they are diſtrainable for the rent-charge, and the owner ſhall not have them again unleſs he pays the arrears; per Holt Ch. J. in

delivering the opinion of the Court. Ld. Raym. Rep. 308. Hill. 9 W. 3. in caſe of Britton v. Cole.

54. Goods in the cuſtody of a carrier are *privileged* from diſtreſs for the carrier's rent. 1 Salk. 249. pl. 5. Hill. 8 Ann. Giſburn v. Hurſt.

(I. 2) Grant of Rent out of one Manor or Place, with Clauſe of Diſtreſs in another Manor or Place.

1. WHERE a rent-charge is *granted out of an ox-gange of land in D. and* that *if the grantor alien* the ox-gange of land, that the *grantee may diſtrain in the manor of B.* and the grantor aliens the ox-gange of land, yet in aſſiſe the *tenant of the ox-gange of land ſhall be named, and the ox-gange ſhall be put in view*, for this remains charged. Br. Charge, pl. 17. cites 1 Aſſ. 10.

2. *Rent is granted out of land in D. and for default of payment to diſtrain C.* there *both* ſhall be charged, and *ſhall be put in view* in aſſiſe; *but if* the lands were *in diverſe counties*, then the firſt land only ſhall be charged, for otherwiſe he cannot have aſſiſe in this caſe; for he cannot have aſſiſe in two counties unleſs the land be *in confinio com'*; quod nota. Br. Aſſiſe, pl. 427. cites 10 E. 3. 18. and Fitzh. Aſſiſe, 157.

[150] (K) In what *Place* a Diſtreſs may be taken de Jure.

By the King.

[1. THE king may diſtrain for *rent-ſervices in all the lands of the tenant*, as well thoſe that are held of others as of the king. * 44 E. 3. 45. Curia. † 9 H. 6. 9. 44 Aſſ. 22. by all the juſtices.]

* Br. Diſtreſs, pl. 6. cites S. C. —— Fitzh. Grant, pl. 47. cites S. C.

† Fitzh. Grant, pl. 6. cites S. C. —— Where it is ſaid that the king may diſtrain out of his fee, that is in the other lands of his tenant, it muſt be underſtood in ſuch other lands as his tenant has in his own actual poſſeſſion, and manured with his own beaſts, and not in the poſſeſſion of his leſſee for life, years, or at will, for their beaſts are not ſubject to ſuch diſtreſs. 2 Inſt. 132.

[2. *So* the king may diſtrain *for a fee farm* in all the lands of the farmer. ‡ 44 E. 3. 45. 8 H. 6. 1. b.]

‡ Br. Diſtreſs, pl. 6. cites S. C. —— Fitzh. Grant, pl. 47. cites S. C.

[3. If a *town* be *aſſeſſed to a certain ſum*, a diſtreſs may be taken *in any part* ſubject to the diſtreſs for the whole duty. 11 H. 4. 35. b.]

[4. If a *corporation* be *amerced in B. R.* this may be levied *upon the vill or land of the vill, or* upon the *goods* which they have *in their natural capacity*. 8 H. 6. 1. a. b.]

[5. If

[5. If a man *holds of the king by rent*, &c. and the arrears incur, and the *tenant leaſes it to another*, the king may diſtrain *in the lands of the under-tenant* for theſe arrearages in any place *out of the land held*. M. 17 Ja. B. between CATFORD AND OSMOND, per Hobart.] Brownl. 17. S. C. but not S. P.

6. In treſpaſs for goods taken for *diſtreſs in the high ſtreet*, the ſtatute was rehearſed in the commencement of the writ, and the concluſion was *contra legem & conſuetudinem Angliæ*, &c. And adjudged good enough and purſuant; for it is made law and cuſtom by the ſtatute. Thel. Dig. 102. lib. 10. cap. 11. ſ. 8. cites Mich. 19 E. 2. Brief, 842.

7. The king may diſtrain for rent or fee-farm *as well in land which is not held in him as in other*, by all the juſtices; for the king may grant rent, fee-farm, &c. to hold of him in which a man cannot diſtrain. Br. Diſtreſs, pl. 87. cites 44 Aſſ. 32.

8. The king may diſtrain in all other lands of his tenant for his *rent-charge*, and may diſtrain for his *ſervices* in all the other lands of the tenant. Contra of his *grantee*. Br. Diſtreſs, pl. 48. cites 13 E. 4. 6.

9. *And* if the *king had had a rent time out of mind*, and *had not uſed to levy it by diſtreſs* by the ſame time, his *patentee cannot diſtrain*. Br. Diſtreſs, pl. 48. cites 13 E. 4. 6.

10. The king may diſtrain for his debt, and may make levy of the debt which the debtor owes to him, by levy *of the tenants of the debtor*, and take the rent of them, which ſhall be a good bar for them againſt the debtor who is their lord; quod nota. Br. Diſtreſs, pl. 28. cites 21 H. 7. 12. Br. Barre, pl. 49. cites S. C.

11. The king cannot diſtrain *for the debt of the baron* upon the *dower of the feme, nor in her inheritance, nor in the joint purchaſe which ſhe has* with her baron; *but if* the baron was *indebted to the king before the coverture*, there the king may diſtrain in the dower of the feme; note the diverſity. Br. Diſtreſs, pl. 71. cites F. N. B. [151]

12. *C. was indebted to the king, and* was *ſeiſed of a third part of certain lands in N.* and *R. was ſeiſed of the other two parts as tenant in common*, and the *beaſts of N. and R. paſtured promiſcuouſly* on the land. Upon proceſs to levy the king's debt, the *ſheriff took R.'s cattle*, and ſold them; but held that ſuch taking was not good, though otherwiſe it would be if the cattle had been levant and couchant on the land of the king's debtor; and if my cattle are levant and couchant on the land of the king's debtor, the king may diſtrain them damage-feaſant, but not for the debt; per the Ch. Baron, and two of the barons, but Snig ſeemed to doubt. Lane, 96, 97. Hill. 8 Jac. in Scacc. Clare's caſe.

13. Although the king may diſtrain in any of the lands of the tenant, yet it muſt be admitted, that if the *tenant aliens any part of his lands, or* if he deviſes, nay if he *leaſes to a tenant at a rent, although but at will*, the *king cannot diſtrain upon thoſe lands, being no part of the lands originally charged with the rent;* and ſo it is upon a recovery by elegit, and therefore even the crown is precarious in this matter; the tenant may at any time determine

that right of diſtraining by aliening, by deviſing or ſetting his land. *It is only liable whilſt it is in his own hands;* Arg. 2 Vern. 714, 715. Hill. 1715. in caſe of Attorney General v. Coventry (Mayor, &c.).

(L) For an *Amercement.*

[*In what Place the Diſtreſs may be taken.*]

[1. FOR an amercement *in the ſheriff's tourn* for ſtopping a way, the ſheriff may take a diſtreſs through the whole county. * 2 H. 4. 24. b. 8 R. 2. Avowry, 194.]

* Br. Diſtreſs, pl. 13. cites S. C. —Br. Leet, pl. 28. and pl. 41. cites S. C. —— Br. Amercements, pl. 13. cites S. C. —— Br. Court-baron, pl. 13. cites S. C. —— Fitzh. Diſtreſs, pl. 10. cites S. C.

[2. *So* where an amercement is *within a hundred* the lord of the hundred may diſtrain *through the whole hundred,* as well out of the land as upon the land; for the amercement does not extend to the land [only] nor iſſue out of it. † 2 H. 4. 24. b. ‡ 11 H. 4. 89. b. For the juriſdiction of the hundred is intire through the whole hundred. 13 H. 4. 9. b. 8 R. 2. Avowry, 194]

† Br. Diſtreſs, pl. 13. cites S. C. —Br. Leet, pl. 28. and pl. 41. cites S. C. —Br. Amercements, pl. 13. cites S. C. —— Br. Court-baron, pl. 13. cites S. C. —— Fitzh. Diſtreſs, pl. 10. cites S. C.

‡ Br. Diſtreſs, pl. 18. cites S. C. —— Fitzh. Avowry, pl. 57. cites S. C.

[3. The lord may take a diſtreſs for an amercement *in a leet in his own land which is within the hundred,* if he can find the cattle of him that is amerced; for the *amercement charges only the perſon* and *not the land.* 47 E. 3. 13.]

Fitzh. Diſtreſs, pl. 15. S. C.

[4. So a diſtreſs may be taken for it in the high ſtreet. 47 E. 3. 13.]

Fitzh. Diſtreſs, pl. 15. cites S. C.

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[5. *But* if a man be amerced in a leet a diſtreſs *cannot be taken* for it *of the goods of the party* amerced *in the lands which is in the hands of the king, though* it be *within the limits of the hundred;* for during this time it is out of the juriſdiction of the leet. 47 E. 3. 13.]

Br. Diſtreſs, pl. 10. cites S. C. —— Fitzh. Diſtreſs, pl. 15. cites S. C. —— Br. Leet, pl. 8. cites 47 E. 3. 12. S P. —— Br. Reſeiſer, &c. pl. 5. cites 47 E. 3. 5. S. P. admitted.

Fol. 671.

(M) By a *common Perſon. In the Houſe.*

[*Or what other Place.*]

[1. A Diſtreſs *for rent* may be taken in a houſe, *if the doors be open,* elſe not; 46 E. 3. 26. b.]

In ſuch caſe the lord may enter into the houſe and diſtrain for rent or ſervice; per Cur. 5 Rep. 92. a. cites 38 H. 6. 26. a. and 33 E. 3. Avowry, 256. and he may diſtrain in the houſe, though lands are alſo held of him in which he may diſtrain, cites 29 Aſſiſe, pl. 49.

[2. [*And*]

[2. [*And*] among the petitions of parliament of the 18 E. 1. fo. 7. it is ſaid that he ſhall diſtrain for rent *per oſtia et feneſtras* prout a diſtreſs for rent may be taken in a houſe. 29 Aſſ. 49. *Moris eſt.*] See pl. 7. infra.

[3. A man cannot diſtrain for a *rent-ſervice* but *in the land out of which* it iſſues. 8 H. 4. 18. b. 9 H. 6. 9.]

[4. *As* he cannot diſtrain *in other land though* it be *within his fee.* 8 H. 4. 14. b.]

[5. A diſtreſs *out of his fee for ſervices* is not lawful. 17 E. 3. 43.]

[6. A diſtreſs *in a way within his fee* was lawful at common law. 17 E. 3. 43.]

[7. A man may diſtrain for the *rent* of an houſe *per oſtia et feneſtras;* among the petitions of parliament of 18 E. 1. folio 7. it is ſaid that he may diſtrain per oſtia et feneſtras *prout moris eſt;* it ſeems as if this was intended that he might go to the houſe, and take a diſtreſs, or take it out of the windows.] See pl. 2.

[8. If a man *leaſes an advowſon* for life, rendering rent, he cannot diſtrain for this *in the glebe.* 11 H. 6. 5.]

[9. If a man *leaſes a manor to which an advowſon is appendant* rendering rent, he cannot diſtrain for the rent *in the glebe,* becauſe the leſſor hath nothing to do therewith. 11 H. 6. 5.]

[10. If a *rent-ſervice* iſſues *out of land* which is *in ſeveral counties,* a diſtreſs for the whole may be taken in one county. 18 E. 3. 32. b.]

[11. If a *rent-charge* iſſues *out of land* lying *in ſeveral counties,* a diſtreſs for the whole may be taken in one county. 18 E. 3. 32. b.]

[12. *So* if a rent charge iſſues *out of* the *land* which is *in the hands of ſeveral men,* a diſtreſs may be taken for the whole rent *upon the poſſeſſion of one;* for all the rent iſſues out of every part. 39 Aſſ. 4. adjudged.]

[13. 52 *H.* 3. *cap.* 2. *None ſhall diſtrain any to come to his court, which is not of his fee, or upon whom he has no juriſdiction, by reaſon of his hundred or bailiwick, nor ſhall take diſtreſſes without his fee or in* * *place where he has no juriſdiction. And he that offends ſhall be puniſhed in like manner, according to the treſpaſs.*] This is intended of ſuit ſervice, in reſpect of a ſeignory, and not of ſuit real in reſpect of reſiance. 2dly, Or that he has juriſdiction by hundred, wapentake, or bailiwick. 3dly, That he ſhall not take diſtreſſes out of his fee or place where he has a bailiwick or juriſdiction. 2 Inſt. 104.

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13. Stat. Marlb. cap. 2. is a declaration of the common law, ſaving for the penalty hereby inflicted; and therefore if A. diſtrain B. and in a replevy A. avow as lord for rent or ſervice, B. pleads hors de ſon fee, and it is found for B.; A. ſhall not in this replevy be puniſhed by ranſom, &c. according to this act, but he muſt have an action upon the ſtatute et ſic de ſimilibus. 2 Inſt. 104, 105.

14. 52 *H.* 3. *cap.* 15. † *It ſhall be lawful to no man* This *miſchief before this ſtatute was,* that whereas the king by his prerogative might diſtrain for his rents in any other lands of his tenant, being in his own actual poſſeſſion, though they were out of his fee and ſeigniory, divers lords took upon them alſo to diſtrain out of their fee, which was wrong and oppreſſion. And whereas all

all the king's ſubjects ought to have free paſſage in via regia & communi ſtrata, as well to fairs and markets, as about their other affairs, the lords uſed to diſtrain in the highways; both which miſchiefs this ſtatute does remedy. 2 Inſt. 131.

† This is *to be underſtood* of diſtreſſes *by reaſon of a ſeigniory*, and not for diſtreſſes *for rent-charges*, &c. *or by reaſon of a leet*. 2 Inſt. 131.

This branch *is but in affirmance of the common law*, for regularly no ſubject can diſtrain out of his fee and ſeigniory, and therefore if the lord do diſtrain out of his fee, the tenant may either have an action of treſpaſs at the common law, or an action upon this ſtatute, but in ſome ſpecial caſe the lord by the common law may diſtrain out of his fee and ſeigniory; as if the lord come to diſtrain, and the tenant or any other ſeeing the lord come to diſtrain them, drive them to a place out of the fee of the lord, yet in this caſe the lord may diſtrain them out of his fee, becauſe the *lord had a view of them within his own fee*, by reaſon whereof the lord ſhall be adjudged in a kind of poſſeſſion of them; but if the beaſts go out of the tenancy of themſelves without enchaſement before the lord can diſtrain them, there the lord cannot diſtrain them, though he had the view of them within his fee and ſeigniory. 2 Inſt. 131.

A *heriot cuſtom* the lord may ſeiſe in the highway, for that is no diſtreſs but a ſeiſure; but he cannot diſtrain for a *heriot ſervice* there. 2 Inſt. 131.

To take diſtreſſes out of his fee;

In this branch, *non liceat ſhall be taken not ſimpliciter* to make it utterly unlawful, as to take advantage thereof in bar to an avowry, *but ſecundum quid*, that is to this purpoſe, that if the lord diſtrain in the high ſtreet, or in the common way, the tenant may have an action againſt the lord upon this ſtatute; and the reaſon hereof is, that whenſoever any thing is prohibited by a ſtatute, the party ſhall have his * action upon the ſtatute, and the offender ſhall be for his contempt fined and impriſoned; and ſo it is declared by act of parliament, as hath been always obſerved. Now if the tenant ſhould plead it in bar of the avowry, the king ſhould loſe his fine; for in that nature of ſuit he cannot be fined, and therefore the tenant is to take his remedy by action upon the ſtatute, wherein the king ſhall have his fine, &c. 2 Inſt. 131, 132.

Nor in the highway, nor in the common ſtreet, but only to the king or his officers, having ſpecial authority.

* S. P. cited per Cur. 3 Lev. 48. Mich. 33 Car. 2. C. B. in caſe of Woodcroft v. Tompſon.

This ſtatute does not extend only to diſtreſſes between lord and tenant, but alſo to all other diſtreſſes whatſoever, as well at the king's ſuit, as at the ſuit of the ſubject, ſo there be other goods ſufficient; alſo to all manner of executions, as well at the ſuit of the king as of the ſubject, with the like caution as is aforeſaid. 2 Inſt. 133.

In writ upon this ſtatute he need not put the price of the chattel taken. Thel. Dig. 109. lib. 10. cap. 19. ſ. 1. cites Mich. 19 E. 2. Brief, 842.

15. In treſpaſs quare vi & armis *ſanctuar'* fregit, &c. et averia cepit, the bailiff juſtified for diſtreſs *for iſſues for the king*, and *could not find beaſts nor chattels of the plaintiff in any other place*, and well. Br. Diſtreſs, pl. 34. cites 27 Aſſ. 66.

16. The party cannot diſtrain *in one county and drive it into another*, by reaſon of the ſtatute of Marlbridge, cap. 4. but ſhall [154] make ranſom, and this for rent. But it is doubted there if a man may do it *for a fee, or* an *honour, or* for *ſuit, or caſtle-guard*. Quære for *homage* if he diſtrains, and chaſes into another county. Br. Diſtreſs, pl. 36. cites 30 Aſſ. 38.

17. A man cannot diſtrain *in a ſanctuary*. Per Skipwith. Br. Diſtreſs, pl. 63. cites 29 H. 3. 16.

Br. Diſtreſs, pl. 1. cites S. C.

18. Of common right a man cannot diſtrain for rent but *in the land out of which the rent is iſſuing*; but if the tenant grants to me, that if I am not paid the rent, that I ſhall diſtrain in other land, this is good per tot. Cur. and there this is no new rent. Br. Rents, pl. 1. cites 9 H. 6. 9.

19. *And* per Cand. if a man *grants* to me, *that if I am not annually paid* 10*s. rent at Michaelmas, that I ſhall diſtrain in his land*

in

in D. this is a good grant of the rent, and it is a new rent. Contra in the caſe above. Br. Rents, pl. 1. cites 9 H. 6. 9.

20. Note for law, that he who diſtrains beaſts may put them *in a cloſe houſe if he will give them food*, for the diſtreſs in pound overt is only to the intent that the owner may give them food. Br. Diſtreſs, pl. 66. cites 33 H. 8.

21. The ſtat. Marlb. cap. 15. did not *intend but for diſtreſſes for rent or ſervices*, and not for thoſe things whereof no diſtreſs can be but in the highway; as toll-thorough due by cuſtom. Per Cur. Cro. E. 710. pl. 34. Mich. 41 & 42 Eliz. C. B. in caſe of Smith v. Shepherd.

22. A *heriot-cuſtom* the lord may ſeiſe in the highway, for this is no diſtreſs but a ſeiſure; but he cannot diſtrain for a heriot-*ſervice* there. 2 Inſt. 132.

(N) In what *Places* it may be taken for a *collateral Cauſe.*

[Freſh Suit.]

[1. WHEN the *lord is in view of the cattle*, if the *tenant* to avoid the diſtreſs *chaſes them into a place not within his diſtreſs*, yet the lord may take them freſhly; for he ſhall not have advantage of his own wrong. 44 E. 3. 20. b.]

Co. Litt. 161. a. S.P. ——And ſo it is if any other perſon does it. Ibid.

——If a man chaſes them out the lord may diſtrain them. Br. Diſtreſs, pl. 98. cites 11 H. 4. 7. ——S. P. for when they are in his view they ſhall be adjudged in law in his poſſeſſion; the reaſon ſeems to be becauſe they are tranſitory. Br. Treſpaſs, pl. 296. cites 2 E. 4. 6.

[2. *But if* the tenant, after the lord has the view, chaſes the cattle for other lawful cauſe out of his fee, and *not on purpoſe to avoid the diſtreſs*, the lord cannot take them. 44 E. 3. 21.]

Co. Litt. 161. a. S.P. ——So if the lord had no view of them within his fee; or if the cattle after the view go out of the fee, the lord cannot diſtrain them out of his fee. Ibid. ——If they go out without chaſing, the lord cannot diſtrain them. Br. Diſtreſs, pl. 98. cites 11 H. 4. 7.

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3. If a man comes to diſtrain for *damage-feaſant* or for * *ſervices*, and the diſtreſs goes into other land by chaſing, he may *take them in the other land.* And per Jenney, if beaſts taken for diſtreſs eſcape, he who diſtrains may *retake them when he will.* Br. Diſtreſs, pl. 49. cites 13 E. 4. 8.

* Co. Litt. 161. a. S.P. the lord may freſhly purſue and diſtrain the cattle, and the tenant cannot make reſcous, though the place wherein the diſtreſs is taken is out of his fee; for now in judgment of law the diſtreſs is taken within his fee; and ſo ſhall the writ of reſcous ſuppoſe.

4. If a man comes to diſtrain for *rent or ſervice* and *ſees the beaſts in the land*, held, &c. and the *tenant chaſes them out*, the lord may purſue and take them, but contra for † *damage-feaſant* clearly. Per Brian Ch. J. Br. Diſtreſs, pl. 50. cites 16 E. 4. 10.

† If a man comes to diſtrain for damage-feaſant and ſees the beaſts in his ſoil, and the owner chaſes them out of purpoſe before the diſtreſs taken, the owner of the ſoil cannot diſtrain them, and if he does, the owner of the cattle may reſcue them, for the beaſts muſt be damage-feaſant at the time of the diſtreſs, and ſo note a diverſity. Co. Litt. 161. a.

5. *And*

5. *And* per Brian Ch. J. where a man *comes to diſtrain for the 15th granted to the king by parliament*, and ſees the beaſts, and the other chaſes them out of the vill, the *collector cannot diſtrain them in another vill*, quod nota. Br. Diſtreſs, pl. 50. cites 16 E. 4. 10.

S.P. though he chaſes them into the land of another.

6. If a *man comes to diſtrain*, and the *party chaſes the diſtreſs out of the land*, the other may *freſhly purſue*, and take the beaſts for diſtreſs. Br. Avowry, pl. 13. cites 34 H. 6. 18.

Br. Nuſance, pl. 14. cites 9 E. 4. 35.——If a man chaſes them out, the lord may diſtrain them. Br. Diſtreſs, pl. 98. cites 11 H. 4. 7.——Br. Diſtreſs, pl. 90. cites 44 E. 3. 20.

See ſtat. 8 Ann. cap. 14. ſ. 2. at tit. Rents (W. b).

7. If *beaſts eſcape* into my land the *lord may diſtrain them*; contra *if he retakes them before that the lord diſtrains them*, and *though* they were *levant and couchant by* 40 *days*, if the owner takes them before the lord, there the lord ſhall not diſtrain them, but if he finds them there, if they were there but an hour the lord may diſtrain them. Br. Diſtreſs, pl. 97. cites 10 H. 7. 21.

(O) [Where the Cattle *eſcape*, &c. into the Land liable.] Pl. 1 to 8.

See pl. 2. contra.— See (I) pl. 2.

[1. IF the *cattle of a ſtranger eſcape into the land holden* they may be diſtrained *though* they are *not levant and couchant*. Co. Litt. 47.]

* Fol. 672.

[2. If the *cattle of a ſtranger eſcape into* the lands holden, &c. they * cannot be diſtrained. 48 E. 3. 34. 2 H. 4. 16. b. contra 7 H. 7. 1. b. Curia.]

[3. *But* the cattle *of the tenant himſelf* may be diſtrained if they eſcape there. 48 E. 3. 34.]

[4. *So* if there be *arrearages*, and after the *tenant aliens*, and after the *cattle of the alienee eſcape there*, yet they may be diſtrained; for this is not any eſcape. 2 H. 4. 16. b.]

[5. If a *ſtranger* keeps or *cauſes his cattle to be kept in a place where*, &c. they may be diſtrained; for this is not any eſcape. 2 H. 4. 16. b.]

[156] [6. *So* if a ſtranger *hath notice that his cattle hath uſually*, or are accuſtomed to be *in the place where*, &c. they may be diſtrained; for this is not an eſcape. 2 H. 4. 16. b.]

[7. The *grantee of a rent-charge* cannot diſtrain the *cattle of a ſtranger which* come there by *eſcape*, and are freſhly purſued by the owner, demurrer. Trin. 17 Ja. B. between REYNOLD AND CAKELEY.]

[(O. 2) At what *Time* it may be taken, Pl. 8. to the End of the Roll, Pl. 16.]

3 Rep. 64. b. S. P. per Cur. and

[8. If a man *leaſes for years* rendering rent, and the rent is behind, and after the *term expires* the leſſor cannot afterwards diſtrain

train for the ſaid rent. (It ſeems to be intended that he held over.) 14 H. 4. 31.] cites 14 Aſſ. 11. accordant.

——Keilw. 96. pl. 5. Mich. 22 H. 7. Anon. S. P. All the court of C. B. held clearly, that the leſſor may diſtrain for the rent, notwithſtanding the term is paſt; and that if the leſſor will he may diſtrain the beaſts for damage-feaſant, but ſays Hankford and Hill held contra. 14 H. 4. 31. Ideo quære, and ſays, ſee 11 H. 7. fol. 12. Treſpaſs.——Where rent is reſerved upon a leaſe for years at Eaſter and Michaelmas, for one year ending at Michaelmas, there he cannot diſtrain after Michaelmas; for the *term is expired*. Br. Diſtreſs, pl. 73. cites Doctor and Student, lib. 2.

[9. For *rent due the laſt day of the term*, the leſſor cannot diſtrain; becauſe the term is ended before the rent is due; for the leſſee hath the whole day to pay it. Co. Litt. 47.]

[10. If a man leaſes land for years rendering rent, and after the *leſſee holds over the term*, the *leſſor cannot diſtrain* upon the land, *for the rent incurred during the term*, becauſe the leaſe was ended before, and the leſſee not in privity of the leaſe. 14 H. 4. 31. per Hill and Hankford. Mich. 15 Jac. B. R. between HARRISON AND METCALF, per Curiam, this being moved in arreſt of judgment, and the poſtea ſtayed accordingly. Contra 23 H. 7. 96. Per Curiam Kelleway.] Cro. J. 442. pl. 15. S. C. and becauſe it appeared that the eſtate, out of which the rent was granted, was determined long before the diſtreſs taken, ſo that the defendant had no title to avow, judgment was given for the plaintiff.

[11. If a *man* be *ſeiſed in fee* or for life *of a rent charge*, and after the arrearages incurred he *grants over the rent to another*, he *himſelf cannot afterwards diſtrain for the arrearages incurred before the grant*, becauſe now the arrearages are divided from the freehold of the rent, and ſo the diſtreſs gone. Co. 4. Ognell, 50. b. per Curiam.] S. C. cited by Vaughan Ch. J. Vaugh. 40, 41.

[12. The *ſame* law is *of a rent-ſervice*. Co. 4. OGNELL, 50. b. per Curiam.]

[13. If *leſſee for* 20 *years makes a leaſe for* 10 years reſerving rent, and *arrearages incur*, and after *leſſee for* 20 *years dies*, by which the reverſion and arrearages deſcend to his executors, the executors, and *executors of executors*, *may diſtrain for the arrearages incurred in the life of the teſtator*, becauſe theſe arrearages were never ſevered from the reverſion, but theſe executors have the reverſion, and rent is annexed thereto, and in the ſame plight as the teſtator himſelf had it, in as much as they repreſent the perſon of the teſtator, and it is not like a reverſion which deſcends to the heir, and the arrearages go to the executors. Trin. 3 Car. between WADE AND MARSH, adjudged in a replevin.] Lat. 211. S. C. reſolved per Cur.—— See the ſtat. 32 H. 8. cap. 37. at tit. Rents (S. b). [157]

[14. An *attachment by cattle in* an action of *treſpaſs* ought not to be made *in the night*. Hill. 37 Eliz. per Curiam.]

[15. *So* a *diſtreſs for rent-ſervice*, or rent-*charge*, cannot be in the night. Co. Litt. 142.] For the tenant is to be attendant upon the land all the day to pay his rent; but he is not compellable to attend in the night. 9 Rep. 66. a. Paſch. 9 Jac. in Mackally's caſe.——7 Rep. 7. a. Trin. 29 Eliz. C. B. in Milborn's caſe. S. P. cites 12 E. 3. tit. Diſtreſs, 17. and 11 H. 7. 5. a. accordingly.——S. C. cited 4 Le. 218. pl. 352.——Br. Diſtreſs, pl. 99. cites 11 H. 7. 5.——Brownl. 176. S. P. as to rent-charge, in caſe of Read v. How.

[16. *But*

9 Rep. 66. a. S. P. in Mackally's caſe.——

[16. *But* a man may diſtrain cattle *damage-feaſant* in the night, for otherwiſe perhaps the cattle will be gone before he can take them. Co. Litt. 142.]

7 Rep. 7. a. in Milborn's caſe, S. P. and cites 10 E. 3. 21. accordingly.——Br. Diſtreſs, pl. 99. cites 11 H. 7. 5. S. P.

17. If a man leaſes for years rendering rent, and the rent is arrear, and the *term expires*, he cannot diſtrain, but ſhall have action of debt; quod nota bene. Br. Diſtreſs, pl. 19. cites 14 H. 4. 31.

18. In *per quæ ſervitia*, if a man *grants a ſeigniory for term of life*, the *remainder over by fine*, and the *tenant attorns to the grantee for life, ſaving his acquittal*, and the *grantee grants the acquittal*, and after dies, he in remainder cannot diſtrain till he has granted the acquittal likewiſe; by all the juſtices, in a note. Br. Confeſſion, pl. 54. cites 18 E. 4. 7.

19. If a man *grants a reverſion depending upon a term, rendering rent*, he cannot diſtrain till the particular eſtate be determined, and then he may diſtrain for all the arrears, but by ſome he may diſtrain immediately if the beaſts of the grantee come upon the land; quære; for per Moyle, he has nothing to do till the term be expired. Br. Diſtreſs, pl. 47. cites 10 E. 4. 4.

20. *So* upon a leaſe *for term de auter vie*, and *ceſtuy que vie dies*; for in thoſe caſes the reverſion is determined. Br. Diſtreſs, pl. 73. cites Doct. & Stud. lib. 2.

21. If the *tenant offers the fealty*, and the *lord refuſes*, there he cannot diſtrain after before *a new requeſt*, and this *to the perſon*, and not upon the land. Br. Tender, pl. 24. cites 21 E. 4. 17.

22. *So* of *homage*; the reaſon is, in as much as it ſhall be done by the tenant *in proper perſon*, and not by deputy. Ibid.

23. If the *lord diſtrains for rent* arrear at a certain day his tenant's cattle, and he ſues a replevin, &c. and the lord avows for the rent, &c. and the *tenant pleads hors de ſon fee*; if the *lord (pendant that plea) diſtrains for rent behind at another day after*, the tenant ſhall have a writ of recaption, becauſe the lord's title ſhall be tried by the firſt plea. But otherwiſe it is if the tenant in the firſt replevy pleads *riens arrear, or levied by diſtreſs*, then (pendant that plea) the lord may diſtrain for the rent behind at a day after, becauſe that the ſeigniory is there confeſſed, and the tenant ſhall not have a recaption. F. N. B. 71. (M).

*[158] Lev. 43. Palmer v. Stanage, S. C. held accordingly by all the Court, præter Mallet, and judgment for the conuſant, niſi, &c.

24. In replevin the caſe was, the defendant *avowed for a rent-charge due* in the year 1660, *and afterwards he diſtrained and avowed for other part of the rent-charge due a year before*, viz. anno 1659, and this diſtreſs was taken of the cattle of another perſon who was then tenant of the lands; and upon demurrer the queſtion was, whether he was eſtopped to avow for the arrears of the rent-charge before the * year 1660? and adjudged that he was not; but that if he had given an *acquittance to the laſt day of payment* he could not claim the rent due before, becauſe that was his voluntary act and deed, and ſhall be received to claim againſt it;

but in an avowry for rent he may avow for all, or part, at his pleaſure, and the firſt avowry ſhall not bar him from avowing for rent before, Sid. 44. pl. 1. Mich. 13 Car. 2. B. R. Palmer v. Stabick. ——Raym. 21. Palmer v. Stavick. S. C. adjudged for the defendant. The reaſon that Mallet went upon was, becauſe an avowry is a thing upon record, and more than an acquittance. ——Keb. 95. pl. 84. Palmer v. Strotwick. S. C. adjornatur. ——Ibid. 113. pl. 15. S. C. adjudged accordingly. —— S. P. by Powell J. Comb. 59. Trin. 3 Jac. B. R. in caſe of Fountain v. Gnales. And he ſaid, that there is a diverſity as to an acquittance, that where the acquittance for the laſt quarter is under the plaintiff's hand and ſeal, and where it is under his hand only, for in the firſt caſe it is an eſtoppel, but in the latter it is only evidence.

25. A *leaſe* was made *for one year, and ſo from year to year, quamdiu ambabus partibus placuerit*, rendering 12 l. a year rent ſo long as the leſſee ſhould occupy the premiſes. The leſſor diſtrained for a year and a half due after the making the leaſe. Exception was taken that he could not diſtrain for the rent after the year was determined, ſince it was but a leaſe at will; ſed non allocatur; for it was a good leaſe for two years, and after that at will. Ld. Raym. Rep. 170. Hill. 8 & 9 W. 3. Bellaſis v. Burbricke. 1 Salk. 209. S. C. but S. P. does not appear. ——Lutw. 213, 214. S. C. & S. P. adjudged accordingly. ——3 Salk. 136. S. C. ſays the reporter tells us, that the law is contrary. ——S. P. and that the leſſee entered, and was in poſſeſſion for two years and an half, and the rent being in arrear the leſſor diſtrained; and adjudged that he could not by law, becauſe by this agreement there was an eſtate for two years created, and no more; the other was a growing intereſt, or eſtate at will, which being a diſtinct eſtate from the firſt, cannot be ſubject to the arrears of the firſt. 3 Salk. 135. pl. 1. 9 W. 3. C. B. Stanfit v. Hicks. —— Ld. Raym. Rep. 280. Stanfill v. Hicks. S. C. adjudged per tot. Cur. that the diſtreſs was unlawful; for the intereſts are different, and therefore the ſecond eſtate cannot be anſwerable for the debts of the former eſtate, which was before determined.

26. 11 *Geo.* 2. *cap.* 19. *ſ.* 1. *Enables the landlord or any perſon by him impowered, in caſe of rent arrear, to diſtrain goods fraudulently carried off the premiſes by tenant for life, lives, years, at will, or at ſufferance, within* 30 days *after ſuch carrying off, and to ſell, or otherwiſe diſpoſe of the ſame, as if diſtrained upon the premiſes, unleſs ſold before bona fide, and for a valuable conſideration, to any perſon not privy to the fraud.*

S. 2. *Provided that no landlord ſhall ſeize goods ſold bona fide, and for a valuable conſideration, to any perſon not privy to ſuch fraud.*

(O. 3) At what Time for Rent after their being taken in Execution.

1. CASE by an executor againſt W. bailiff of the liberty of the dutchy of Lancaſter in Norfolk, and declared that *D. C.* on 6 June 1712, *took an eſtate of teſtatrix from Mich. for one year, and ſo from year to year as long as both parties ſhould pleaſe*, at 70 l. *A year's rent being due 6 Octob.* 1713, *W. cepit bona & catalla D. C. in & ſuper, &c. terr' exiſten' ad valentiam* 200 *l.* The executor poſt captionem & ante amotionem bonorum & catallorum, &c. and the teſtatrix in vita ſua dedit W. notitiam de reddit' prædict' ſic debit', and ſhe then demanded of W. the ſaid rent out of the ſaid goods and chattels, which he refuſed to pay,

pay, but carried off, and removed the ſame from the premiſes contra formam ſtatuti in eo caſu edit' & provis'. Upon not guilty there was verdict, and judgment for the plaintiff in C. B. and judgment affirmed in B. R. Hill. 6 Geo. per Powis, Eyre, and Forteſcue. Reſolved, 1ſt, The action may be maintained by the executor or adminiſtrator, there being a right veſted by the *ſtatute* 8 *Ann. cap.* 17. in theſe goods. The act *is a general prohibition, that no goods, &c. lying or being upon any meſſuage, &c. ſhall be liable to be taken by virtue of an execution*, &c. on any pretence whatſoever, *unleſs the party at whoſe ſuit*, &c. *ſhall before the removal, &c. pay to, &c. all ſuch ſums, &c. as ſhall be due for rent, provided the ſaid arrears do not amount to more than one year's rent, or if more, on payment of one year's rent*, &c. *and the ſheriff, &c. is required to levy and pay to the plaintiff, as well the money ſo paid for rent as the execution money.* And the duty of the officer is when he has notice to keep the goods till payment, but if he removes he tranſgreſſes the act, and he is liable to an action by the party who is injured and aggrieved; the ſheriff has power to levy the money, as well for the landlord as for the plaintiff in execution. Where the injury is to the perſon, all fails by the death of the party; but when it is to the eſtate, in any manner whatſoever, the action ſurvives if the eſtate ſurvives. Theſe goods are not to be removed, but to remain as a pledge, and it is a ſort of poſſeſſion in the landlord, and this act of the officer not only injures this poſſeſſion, but the intereſt and property of the landlord. It is ſtronger than an action for not ſetting out of tithes, becauſe there is only a demand for a particular tenth part, but no particular property; for till ſeverance he had no right but to an undivided tenth part. A year's rent is ſecured againſt all events. 2dly, That the action was well founded, and the officer well charged; for the notice was to him of what was due, and then it was incumbent upon him not to have removed the goods till ſatisfaction had been made. Notice to the plaintiff in execution was no notice to the ſheriff; but if it were to him, and not to the ſheriff, ſhould the ſheriff be liable? As to what is reaſonable notice, it is not appointed by the act. Eyre J. ſaid, that without notice he could not tranſgreſs the act, but if he has notice the action is reaſonable. But per Forteſcue, when the law does not determine it, the party muſt take notice, eſpecially here, when the act ſays, he ſhall not remove, &c. When there is a condition in a will, the party muſt take notice in law and equity, but here was notice according to the equity of the thing, and the right perſon had notice. Where no perſon is directed to give notice, it is at his peril. Hill. 6 Geo. B.R. Wyndham v. Palgrave.

Fol. 673.

(P) *Pound.* [What it is, and] how he ſhall *demean himſelf* towards the Diſtreſs.

See tit. Treſpaſs (G. a), per totum.

[1. *A Pound overt is* a pinfold made for ſuch purpoſes, or the cloſe of him that diſtrains, or the cloſe of a ſtranger, with his conſent where the diſtreſs is taken. Co. Litt. 47.]

[2. A *pound-covert*, or cloſe, *is* when the diſtreſs is impounded in an houſe. Co. Litt. 47.]

* [3. He that diſtrains any *thing that hath life*, ought to *impound it in a lawful pound, within three miles, in the ſame county.* Co. Litt. 47. b.]

[4. *But* if a man diſtrains *dead goods*, as utenſils of an houſe, or ſuch like, *which may take damage by wet or weather*, and the like, he ought to impound them in an houſe, or other *pound-covert, within three miles, in the ſame county;* for if he impounds them in a pound-overt, he ought to anſwer for them. Co. Litt. 47. b.]

[5. If a man diſtrains *cattle* and puts them *in a pound-overt*, the *owner ought to keep them at his peril.* Co. Litt. 47. b. for it is lawful for him to come there for this purpoſe.]

[6. *But* if he puts the cattle *in a pound-covert*, or cloſe, *there he ought to keep them at his peril, and* yet he ſhall *not have any ſatisfaction for it.* Co. Litt. 47. b.]

[7. If a man takes a diſtreſs, and puts it into a pound-overt, and the horſe which he diſtrains *leaps three times over* the pound, which is as high as it is uſed to be, and therefore he takes the horſe and *ties him with a rope to a poſt in the ſame pound*, and after he *ſtrangles himſelf*, yet this will not excuſe him, but he may be puniſhed in an action of treſpaſs. 27 Aſſ. 64. adjudged.] Br. Treſpaſs, pl. 250. cites S. C.—— Br. Diſtreſs, pl. 86. cites S. C.

[8. If a man takes a *cow* for a diſtreſs, he *cannot milk her;* for though the cow be the better for it, yet he ought not to do good to the owner without his conſent, and perhaps the owner would have come before any damage by this came to the cow, and if it periſh by this, yet he that took the diſtreſs may diſtrain again, and ſo he is at no damage. H. 4 Jac. B. R. between BAGSHAW AND GALLIARD, per Curiam.] Yelv. 96. S. C. but S. P. does not appear. ——Cro. J. 147. pl. 6. Bagſhaw v. Coward, S. C. but S. P. does not fully appear; but it is ſaid that a diſtreſs may not be uſed, becauſe he hath it by law only as a gage.——Noy, 119. S. C. & S. P. reſolved, and Noy cited S. P. reſolved in one Prideaux's caſe, becauſe it is a puniſhment to the owner, and in cuſtodia legis.——It was argued per Cur. that if a man takes a diſtreſs, he cannot work it; for it is only the act of the law that gives him power to the diſtreſs; for he has no property in it, nor poſſeſſion in jure. Ow. 124. Mich. 7 Jac. C. B. in caſe of More v. Conham.——See tit. Eſtray (E), pl. 2. S. C.

10. Writ of beaſts taken in one county, and carried into another county, upon the ſtatute of Marlebridge, cap. 4. and Weſtm. 1. cap. 16. was maintained without making mention of the ſtatute in the writ. Thel. Dig. 118. lib. 10. cap. 28. ſ. 4. cites 30 Aſſ. 38.

11. *Diſtreſs* taken for *damage feaſant cannot be converted to his own uſe*, but ſhall be uſed as a diſtreſs. Br. Diſtreſs, pl. 81. cites 28 H. 6. 5.

12. If a man takes *quick-chattels* as diſtreſs, he ought to put them *in pound overt*, ſo that the owner may give them ſuſtenance; *but* of *chattel dead* a man may put it *where he pleaſes*, but if they are *corrupted in his default*, he ſhall anſwer for them. Br. Diſtreſs, pl. 25. cites 9 E. 4. 2. per Choke J.

13. Treſpaſs of taking ſheep, and detaining them till he paid 54s. for deliverance of them, the defendant juſtified for diſtreſs

for relief, and that he took the 54 s. for their eating, abſque hoc that he took it for the deliverance, and by the juſtices it is no plea; for if he did *give them victuals, he cannot compel the party to pay for it;* for the diſtrainor is not compellable by the law to give them ſuſtenance. And if they *agree after the diſtreſs upon this ſum*, yet *it is no excuſe*, but that it is for the deliverance. *But if they agree at the time of the diſtreſs taken*, that he ſhall give to them
[161] victuals, and that he ſhall have 20 s. for it, this is a good bargain. Br. Diſtreſs, pl. 52. cites 21 E. 4. 53.

14. If a beaſt be put into a place in which there are *ſharp ſpikes, by which the beaſt is ſtuck*, though it be a public pound, the diſtrainer ſhall anſwer for it, for it is his pound; Arg. 12 Mod. 660. in caſe of Vaſper v. Edwards, cites Doct. and Stud. c. 27.

15. A pound-overt is *every place where the owner of the diſtreſs may come and give them food, and be no treſpaſſor* for their being there. Br. Diſtreſs, pl. 72. cites Doct. and Stud. lib. 2.

16. Beaſts taken damage-feaſant *drove into another country* and ſold there is an abuſer. And. 65. pl. 139. Mich. 23 & 24 Eliz. Pleadal v. Knap.

17. If the *lord takes a diſtreſs for an amercement in a leet*, he may either ſell it or put it into the pound at his pleaſure. 8 Rep. 51. b. Trin. 30 Eliz. C. B. Grieſley's caſe.

3 Le. 235, 236. pl. 323. Anon. S.P. 18. Beaſts taken *in withernam* may be worked. Le. 220. pl. 302. Mich. 32 & 33 Eliz. C. B. Chamberlain's caſe.

——Becauſe they are *delivered to him in lieu of his own.* Arg. 12 Mod. 660. Hill. 13 W. 3.

19. If there be a *cuſtom* within a town, *that if a butcher kills any beaſts* within the town, *and ſells the fleſh within the market, he ſhall pay* 2 *d. for every hide, and that the bailiff may diſtrain the hide for the* 2 *d.* if denied; admitting the cuſtom good, and the diſtreſs of an hide well taken, yet the *bailiff cannot tan the hide* to prevent its being rotten, for the cuſtom to diſtrain the hide does not enable them to *tan it*, for the property is quaſi altered thereby, the marks by which it might be known being taken away from the owner ſo as he cannot have it again; adjudged. Cro. E. 783. Mich. 42 Eliz. Duncomb v. Reeve and others.

20. But by Popham, in ſome caſes a man may meddle with and uſe a diſtreſs where it is for the benefit of the owner; as if one *diſtrains armour* he may cauſe it to be *ſcoured to avoid ruſt;* or if one diſtrains *raw cloth*, he may cauſe it *to be fulled.* Ibid.

And if *they die*, he ſhall be ſaid a treſpaſſor ab initio. 21. If a man puts *cattle in a pound-covert* or cloſe, there he ought to keep them at his peril, and yet he ſhall not have any ſatisfaction for it. Co. Litt. 47. b.

Het. 76. Hill. 3 Car. C B. Perkins v. Butterfield.——51 *Hen.* 3. *enacts that the owner ſhall not pay for keeping the cattle, but may feed them himſelf.*

22. Where one diſtrains *dead goods*, or things inanimate, he muſt put them in a *pound-covert within three miles* of the place, &c. and *in the ſame county;* for if he put them in another open pound, and they be ſtolen, or receive damage, the perſon diſtraining will be anſwerable for them. Co. Litt. 47. b.

23. A

23. A diſtreſs of *live cattle* may be *kept in any open place* in the landlord's own grounds, or in the grounds of another by his conſent, as well as in the common pounds, if he give *notice* to the owner of the cattle *where they are*; but if he gives no notice, and the cattle die for want of food, the landlord muſt make ſatisfaction for them. Co. Litt. 47. b.

24. *Cattle* taken as a diſtreſs cannot be *worked*; for it is only the act of the law that gives power to the diſtreſs; for the diſtrainor has no property in the diſtreſs, nor poſſeſſion in jure; cites 21 H. 7. replevin. A man has *return irreplevisable*, he cannot work them; for the judgment is to remit them to the pound there to remain. Ow. 124. Mich. 7 Jac. C. B. in caſe of Moor v. Conham, cites S. C.

Cro. J. 148. S. P. but a *cow may be milked*, becauſe for the owner's benefit.—— If one has beaſts delivered to him *in withernam*, he may work them; becauſe he has them in lieu of his own beaſts, and it is reaſonable that he ſhall have their labour and uſe for their paſture. D. 280. a. Marg. pl. 14. cites it as agreed for law by the juſtices. Hill. 33 Eliz. C. B.

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25. In treſpaſs for *taking two horſes from his cart loaden with corn*, the defendant juſtified as a diſtreſs for *rent-ſervice iſſuing out of the land where*, &c. The Court were of opinion, after ſeveral debates, that the diſtreſs was well taken. Sid. 440. pl. 9. Hill. 21 Car. 2. B. R. Webb v. Bell.

Vent. 36. Welſh v. Bell. S. C. and ſays it appeared alſo in the declaration that there was a ſervant in the cart, and therefore it was inſiſted that the cart and horſes were privileged; et adjornatur. ——Raym. 218. S. C. but S. P. does not appear. ——2 Lev. 73. S. C. but not S. P——Freem. Rep. 106. S. C. but not S. P.

26. Defendant diſtrained a *trunk*, and being informed that there were things of value in it he cauſed it to be *corded* to prevent damage; and for that he was adjudged a treſpaſſor ab initio; cited per Twiſden to have been ſo adjudged before Roll Ch. J. Vent. 37. Trin. 21 Car. 2. B. R.

27. If *turves lie upon a common damage-feaſant*, though for this a commoner may diſtrain them, yet he cannot burn them. 2 Jo. 193. Paſch. 34 Car. 2. Bromhall v. Norton.

28. One *cannot break open the outer door* to diſtrain for rent; per Ch. J. But per Pollexfen, if the outer door be open one may break open the inner door. Comb. 17. Paſch. 2 Jac. 2. B. R.

Wood. Inſt. 191.

29. If a *landlord* come into a houſe and *ſeiſes* upon ſome *goods as a diſtreſs* in name of all the goods in the houſe, that will be a good ſeiſure of all; but he *muſt remove them in convenient time at common law; and now ſince the late ſtatute of* * *W. & M. immediately, except it be hay or corn*; and here for that the ſeiſure was on Monday, though of barrels of beer not eaſily removeable, if at all without damage, and no removal till Wedneſday, when the defendant took them by virtue of a replevin, in which the leſſee and not the diſtrainant was made defendant, and beſides the plaintiff quitted poſſeſſion of them the two intervening nights, and had not the poſſeſſion at the time of the taking by virtue of the replevin, without which there could be no reſcous, the plaintiff was nonſuited; in this caſe it appeared alſo, that the *diſtrainant drew beer out of one of the barrels*; which per Holt Ch. J.

* See (H).

made him a treſpaſſor ab initio as to that barrel only. 6 Mod. 215. Trin. 3 Ann. B. R. in caſe of Dod v. Monger.

30. If *lands in diſtant counties are demiſed by one demiſe, reſerving one intire rent*, the diſtreſs taken in the one county cannot be driven into the other; per Holt Ch. J. but otherwiſe if the counties and hundreds are contiguous; per Cur. Ld. Raym. Rep. 55. Trin. 7 W. 3. in caſe of Walter v. Rumbal.

31. A. diſtrained an *hog* damage-feaſant; per Holt, he may put him in a *pound-covert*. 1 Salk. 248. pl. 3. Paſch. 12 W. 3. B. R. Vaſper v. Eddowes.

32. A *common* pound *is the pound of the diſtrainor* for the time, and if he will uſe it he muſt take care to keep it ſo, and if it be in a broken condition, or an improper pound for the thing to be impounded, as a pig, &c. and the diſtreſs eſcapes, the diſtrainor ſhall not take advantage of his own neglect ſo as to bring treſpaſs afterwards. 12 Mod. 664. Hill. 13 W. 3. Vaſpor v. Edwards.

33. Common pounds *are* either *by cuſtom, tenure*, or *agreement*, among the inhabitants of a vill or manor, and not by common law; per Holt Ch. J. 12 Mod. 664. in S. C.

S. P. Arg. Ld. Raym. Rep. 720. cites 27 Aſſ. 64.

34. A diſtreſs *may not be tied*, for that would be a miſuſer, and amount to a converſion; per Gould J. 12 Mod. 661. Hill. 13 W. 3. Vaſpor v. Edwards.

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35. Diſtrainer cannot *tan raw hides* though it be for their preſervation, cites Cro. E. 783. Nor *milk cows* to preſerve their milk, or ſave them from hurt, cites 1 Roll. Abr. 673. though it be allowed, Cro. J. 148. that kine may be milked to prevent their being ſpoiled; per Powis J. who ſaid that he took Roll. Abr. to be law. 12 Mod. 662. Hill. 13 W. 3. in caſe of Vaſpor v. Edwards.

36. If the *plaintiff ſuffers the diſtreſs to eſcape by his own conſent*, this is a diſcharge of the treſpaſs, but then it muſt be ſhewn in the bar; per Gould J. 11 Mod. 21. pl. 1. Hill. 1 Ann. B. R. in caſe of Jaſper v. Eadowes.

37. If a landlord diſtrains for rent, and *keeps the goods on the premiſes longer than a reaſonable time*, which the law allows him to remove them in, *he is a treſpaſſor ab initio*, cited by Forteſcue J. 2 Ld. Raym. Rep. 1427. as a caſe between CARTWRIGHT AND COMBER at niſi prius, tried before the Earl of Macclesfield when he was Ch. J. of B. R.

38. No juſtification can be good for *deſtroying* a thing diſtrained; for all diſtreſſes ought to be ſafely kept. 8 Mod. 330. Mich. 11 Geo. Sparks v. Keeble.

Although the party might enter into the houſe and diſtrain the goods, yet *in a reaſonable time he ought to remove them,*

39. In *treſpaſs* for entering his land defendant *pleads an entry and diſtreſs for rent*. Plaintiff *replied, that defendant continued upon the land 6 days*, and had eight bailiffs there. On demurrer judgment was for the plaintiff; for the Court ſaid, that by the common law a perſon that diſtrains was *obliged to carry off the diſtreſs immediately, and put it into a pound-covert, or a pound-overt, and not detain it on the land*, and that the preſent caſe is not within the ſtatute 2 W. & M. cap. 5. And Reynolds J. ſaid, that the very reaſon

reaſon why ſhocks of corn could not be diſtrained at common law, was, becauſe they could not be carried off without damage to the tenant, which implies, that a carrying off the diſtreſs is neceſſary. Barnard. Rep. in B. R. 3, 4. Mich. 13 Geo. Griffin v. Scott.

and put them either in a pound-overt or cloſe; but at common law no diſtreſs could be impounded on the premiſes, and for that reaſon ſheaves or ſhocks of corn were not diſtrainable for rent, becauſe nothing could be diſtrained but what might be returned in as good a condition as it was in when the diſtreſs was taken, but after a removal ſheaves of corn could not be reſtored in the ſame condition, cites Co. Litt. 47. a. and therefore the ſtatute 2 *W. & M. ſeſſ.* 1. *cap.* 5. *gives the leſſor power to diſtrain ſheaves of corn, &c. and to lock up and detain the ſame upon the place where it was found*; but that is only in the particular caſes mentioned in that act; per Cur. 2 Ld. Raym. Rep. 1426. Mich. 13 Geo. in caſe of Griffin v. Scott & al'.

40. 11 *Geo.* 2. *cap.* 19. *ſ.* 10. *Perſons lawfully diſtraining for any kind of rent, may impound the ſame, of whatever kind, in ſuch place, or on ſuch part of the premiſes, as ſhall be moſt convenient for ſecuring the ſame, and to appraiſe, ſell, and diſpoſe of the ſame upon the premiſes, as in like caſe may be done off from the premiſes by the* 2 *W. & M. or the* 4 *Geo.* 2. *And any perſons may come and go to and from ſuch place, or part of the ſaid premiſes, where any diſtreſs for rent ſhall be impounded, and ſecured as aforeſaid in order to view, appraiſe, and buy, and alſo in order to carry off and remove the ſame on account of the purchaſor thereof, and that if any pound-breach, or reſcous ſhall be made of any goods and chattels, or ſtock diſtrained for rent and impounded, or otherwiſe ſecured by virtue of this act, the perſon or perſons aggrieved thereby ſhall have the like remedy, as in caſes of pound-breach or reſcous is given and provided by the ſaid ſtatute.*

(P. 2) What ſhall be ſaid a Reſcous of the Diſtreſs. [164]

1. WHERE *a lord comes to diſtrain and ſees the beaſts*, and the *tenant perceiving it, chaſes the diſtreſs out*, &c. the lord ſhall not have writ of reſcous; for he never had poſſeſſion of the beaſts; per all the juſtices. Br. Reſcous, pl. 13. cites 21 H. 7. 40.

S. P. but he may purſue and take them, which ſee in Nat. Brev. in the writ of reſcous. Br. Reſcous, pl. 24. cites 14 H. 4. and 44 E. 3. ——— If the *lord diſtrains* cattle *out of his fee* in lands not held of him, the tenant may make reſcous, unleſs in ſome ſpecial caſes, as if the lord come to diſtrain his cattle which he *ſees* then *within his fee, and the tenant or any other*, to prevent the lord to diſtrain, *drive the cattle out* of the fee of the lord into ſome other place out of his fee, yet *may the lord freſhly follow* and diſtrain the cattle, and the tenant cannot make reſcous, albeit the place where the diſtreſs is taken is out of his fee. For now in judgment of law the diſtreſs is taken within his fee, and ſo ſhall the writ of reſcous ſuppoſe. Co. Litt. 161. a.

2. Reſcous *is* when the lord in the land held of him *diſtrains* for his rent arrear, if the *diſtreſs is reſcued* from him. Litt. ſ. 237.

3. So if the *lord comes on the land to diſtrain*, and the *tenant* or another will not ſuffer him. Litt. ſ. 237.

4. Reſcous is *a taking away and ſetting at liberty againſt law a diſtreſs taken*, or a perſon arreſted by the proceſs or courſe of law. And all is one as to the point of the *diſſeiſin* to reſcue the diſtreſs *after it is taken, and beforehand to reſiſt* and withſtand the

Reſcous *is not but where he has poſſeſſion of* the cattle, or

the thing of which the reſcous is taking of it; but yet it is no reſcue till it be diſtrained. Co. Litt. 160. b.

ſuppoſed to be made; for if one comes to arreſt a man, or to diſtrain, and he is diſturbed to do it, he ſhall not have a writ of reſcous, but an action on the caſe. F. N. B. 102. (F).

5. If the *tenant reſcues the diſtreſs, and after is diſſeiſed* of the tenancy, *yet the aſſiſe lies againſt him* for the diſſeiſin done of the rent by the reſcous. Co. Litt. 160. b.

6. When a man has a diſtreſs, and the *beaſts*, as he is driving them to the pound, *go into the houſe of the owner*, if he that diſtrained them demands them of the owner, and he delivers them not, it is a reſcous *in law*. Co. Litt. 161. b.

(Q) *Reſcous* of a Diſtreſs. *Who may* make it.

[And what Remedy the Diſtrainer has where the Diſtreſs was with Cauſe. Roll, pl. 6.]

If a lord diſtrains his tenant's cattle, and a ſtranger's cattle, for rent or ſervice behind,

[1. IF a man *diſtrains* my cattle *without a cauſe*, yet a *ſtranger cannot* of his own head reſcue them from him; for he hath good cauſe to have them againſt him. 39 E. 3. 35. b.]

[2. If a man *diſtrains my cattle* together *with the cattle of J. S. without cauſe*, *J. S. or I may juſtify* the reſcue of all. 39 E. 3. 35. b. per Thorp.]

when there is not any rent or ſervice behind, the ſtranger may reſcue his own cattle, but not the tenant's as it ſeems. And that as it ſeems by the ſtatute of Marlbridge, cap. 3. which wills, non ideo puniatur dominus per redemptionem, yet the opinion of Thorpe, M. 31 E. 3. is contrary; * for he ſays, the ſtranger may reſcue as well the tenant's cattle as his own; † quære. F. N. B. 102. (E) and in marg. cites S. C.——† Ibid. in the new notes there (b) ſays, and note 4 E. 6. Diſtreſs, 74. contra. See 6 E. 4. 11. 5 E. 4. 10, 11. 19 H. 7. 48 E. 3. 33. 3 H. 4. 22. 22 H. 6. 37. contra 29 E. 3. 35. 4 Co. 11. b. Bevill's caſe.

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S. P. per Cur. Ld. Raym. 105. Mich. 8 W. 3. in caſe of Cotſworth v. Betiſon.——1 Salk. 247. pl. 2. S. C. & S. P. in a note there.

[3. If a diſtreſs be taken *of goods* without a cauſe, the *owner may* reſcue them. Co Litt. 47. b.]

And. 31. pl. 75. Mich. 36 H. 8. S. P. in C. B.——Bendl. 30. pl. 48. S. P. accordingly by the juſtices of C. B. and ſeems to be S. C.——S. P. per Cur. Ld. Raym. Rep. 105. Mich. 8 W. 3. in caſe of Cotſworth v. Betiſon.——1 Salk. 247. pl. 2. S. C. & S. P.

[4. *But* if a diſtreſs be taken without a cauſe and put into the pound, the *owner cannot break the pound*, and take them out; becauſe they are in the *cuſtody of the law*. Co. Litt. 47. b.]

Fol. 674.

[5. If a man *takes cattle damage-feaſant*, and puts them into a pound, and the *owner that hath common there makes freſh ſuit and finds the doors unlocked*, he may *juſtify* the taking out the cattle in a parco fracto. Co. Litt. 47. b.]

[6. *But if* the owner *breaks the pound*, and takes out his goods, he that diſtrained them may have his *action de parco fracto*, and

and may alſo *take again the goods diſtrained* where he finds them, *and impound them again.* Co. Litt. 47. [b].]

7. Reſcous *by guardian of the land an heir of W. B. for diſtreſs for amercement*, and the defendant made reſcous, and there it was agreed, that if a man *diſtrains tortiouſly*, the *owner* of the beaſts *may make reſcous.* Br. Reſcous, pl. 12. cites 39 E. 3. 35.

8. *But* it was agreed, Paſch. 4 E. 6. that *if* a man diſtrains *tortiouſly and puts them in pound*, that the *owner cannot break the pound* and take them out; for they are in cuſtody of the law. Ibid.

9. If a man *diſtrains tortiouſly*, the owner of the beaſts may make reſcous. Br. Diſtreſs, pl. 26. cites 39 E. 3. 35. *But* P. * 4 E. 6. it was agreed that *if he* diſtrains tortiouſly and *impounds them*, the owner cannot take them out; for they are in cuſtody of the law. Br. Diſtreſs, pl. 26.

Br. Reſcous, pl. 12. cites S. Caſes.— * Br. Diſtreſs, pl. 74. cites S. C. & S. P. by the juſtices for law.

10. If the *lord diſtrains without cauſe*, yet the *tenant cannot make reſcous*, per Mombray. Br. Reſcous, pl. 25. cites 40 E. 3. 32.

11. If a man *diſtrains my beaſts which come into his land by eſcape*, I may reſcue them, but if I keep or put them there, or if I have notice that they uſe to go there, this is no eſcape. Br. Reſcous, pl. 5. cites 2 H. 4. 16.

S. P. Br. Diſtreſs, pl. 12.

12. In caſe of a diſtreſs *for 2d. a ſcore of ſheep of any ſtranger paſſing per & trans the ſaid vill*, and if it was denied on requeſt that they uſed to diſtrain, it was inſiſted that a man cannot *preſcribe to diſtrain for it via regia*, for that it is againſt the ſtat. of Marlbridge, cap. 15. and cited 17 E. 3. 1. 43 E. 3. 40. 11 R. 2. Avowry, 87. 17 E. 3. 43. that where a lord diſtrained in an highway, the tenant might have treſpaſs or make reſcous; and that againſt a ſtatute one cannot preſcribe, and cites 9 H. 6. 56. and Dyer, 232 and 273. But this exception was not allowed; for it was held that *this ſtatute did not intend but for diſtreſſes for rents and ſervices*, and not for thoſe things whereof no diſtreſs can be but in the highway. Cro. E. 710. pl. 34. Mich. 41 & 42 Eliz. C. B. Smith v. Shepherd.

Mo. 574. pl. 93. S.C. adjudged that that preſcription is not good nor reaſonable to take toll for paſſage in via regia, and the inheritance of every man in paſſage in viis regiis is precedent to all preſcriptions. But if the party ſhews cauſe for the toll, as if he is † bound to repair the bridge or cauſey, &c. then it may be reaſonable cauſe for the commencement of the toll and preſcription; but for toll traverſe it is clear that a man may preſcribe.——See tit. Toll (A), per totum.

† [166]

13. The rent muſt be behind, or elſe the tenant may make reſcous; for if *no rent* be *behind* when the diſtreſs is taken, how can the reſcous amount to a diſſeiſin of the rent, when none is due? Co. Litt. 160. b.

Where a man diſtrains the *tenant cannot make reſcous though no rent be arrear*, quod nota bene. Br. Reſcous, pl. 16. cites 9 H. 7. 2.

14. And *ſo* it is *if the tenant reſiſts* the lord to diſtrain when there is no rent behind, this can be no diſſeiſin of the rent for the cauſe aboveſaid, and this (as it appears by Littleton) holds as well in the caſe of a rent-ſervice between lord and tenant, as in caſe of

a rent-charge, &c. And ſo I heard Sir Chriſtopher Wray ſay that he had adjudged it. Co. Litt. 160. b.

15. And *that which the tenant may do* when there is no rent behind, *may a ſtranger do*, if his beaſts are diſtrained. Co. Litt. 160. b.

16. If the tenant *tender the rent to the lord when he is to take the diſtreſs*, if notwithſtanding the lord will diſtrain, the tenant may make reſcue. Ut ſupra.

If the rent of the lord be behind, and the lord *diſtrains* the cattle of the tenant *in the highway* within his fee, the tenant may make reſcous; for that it is defended by law to diſtrain in the highway. Ut ſupra.

17. And by the ſame reaſon, if the lord will diſtrain *averia carucæ, where there is a ſufficient* diſtreſs to be taken *beſides*; or if the lord will diſtrain *any thing that is not diſtrainable*, either by the common law, or by any ſtatute, the tenant may make reſcous. Co. Litt. 160. b. 161. a.

18. If the *lord coming to diſtrain had no view* of the cattle within his fee, though the *tenant drives them off purpoſely*, or if the *cattle themſelves after the view go out of the fee*, or if the *tenant after the view removes them for any other cauſe* than to prevent the lord of his diſtreſs, then cannot the lord diſtrain them out of his fee, and if he does the tenant may make reſcous. Co. Litt. 161. a.

1 Salk. 247. pl. 2. Mich. 8 W. 3. C. B. Cotſworth v. Pettiſen, S. P. accordingly.

19. Where *goods* are *diſtrained without cauſe*, the owner may reſcue them *before they are impounded*, but he cannot afterwards break the pound and take them out, becauſe they are then in the cuſtody of the law. Co. Litt. 47. b.

——Ld. Raym. Rep. 104, 105. S. C. & S. P. held accordingly.

20. If the lord diſtrains *his tenant's cattle, and a ſtranger's cattle*, for rent or ſervice behind, *where there is not any rent or ſervice behind*, the *ſtranger may reſcue his own cattle*, but not the tenant's, as it ſeems. And that, as it ſeems by the ſtatute of Marlbridge, cap. 3. which willeth, non ideo puniatur dominus per redemptionem; yet the opinion of Thorp, M. 31 E. 3. is contrary; for he ſays, the ſtranger may reſcue as well the tenant's cattle as his own. Quære. F. N. B. 102 (E).

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(Q. 2) Reſcous. Writ and Pleadings.

1. IN writ of reſcous made of goods and merchandizes reſcued, for which toll ought to be paid, the writ was, that the chattels were *taken at C. for the toll*, and would have detained them according to the law, &c. and that the *defendants reſcued the ſame chattels without ſaying where* the reſcous was made, and yet held good; for it ſhall be intended at the place where the taking was. Thel. Dig. 99. lib. 10. cap. 9. ſ. 6. cites Mich. 30 E. 3. 20.

2. So in *treſpaſs for* taking an *eſtray*. Thel. Dig. 99. lib. 10. cap. 9. ſ. 6. cites Brief, 333.

3. Reſcous,

3. Reſcous, becauſe the *plaintiff diſtrained in his fee in B. in land held of him*, and the *defendant made reſcous*, and the *defendant ſaid, that he held two acres there of the plaintiff, and three acres there of N. and the plaintiff would have diſtrained in the three acres which are out of his fee, and the defendant made the reſcous.* The *plaintiff ſaid, that he came to the two acres to have diſtrained, and ſaw the beaſts there, and the defendant perceiving it chaſed them into the three acres, which are out of his fee, and the plaintiff came there freſhly and would have diſtrained, and the defendant made reſcous vi & armis.* Cand. demanded *judgment of the writ*, which is, that he diſtrained within his fee, and now he confeſſes that it is out of his fee, and in this caſe he ought to have writ accordingly; but Thorp [awarded him to] anſwer; for *there is no other form of writ in this caſe;* and alſo when he came to the two acres to diſtrain, and you perceiving it chaſed them into other land, it is lawful for him to purſue and diſtrain there, and this taking refers to the firſt place; by which the *plaintiff ſaid, that he was harrowing in the two acres, and when he had finiſhed it went to the three acres to perform his overaigne*, prout, &c. *abſque hoc that he chaſed for this cauſe*, and the others e contra, and ſo the cauſe in iſſue. Br. Reſcous, pl. 3. cites 44 E. 3. 20.

Br. General Brief, pl. 4. cites S. C. —Br. Iſſues Joines, pl. 45. cites S. C. — Thel. Dig. 86. pl. 9. cap. 7. ſ. 12. cites S. C.

4. Where a man *avows for rent, and after diſtrains and avows for homage*, and the *plaintiff ſues recaption, and after in the avowry diſclaims to hold of the defendant*, by this he has not abated his recaption; and ſo ſee that a man may have recaption *againſt him who has not tenure if he diſtrains twice for one and the ſame cauſe;* but if he diſtrains for rent of one day, and after, pending the ſame replevin, diſtrains for rent of another day, recaption does not lie. Br. Recaption, pl. 4. cites 47 E. 3. 22.

5. *And* alſo it ſeems there, that where a man *diſtrains for one cauſe, and after for another pretended cauſe which is not true*, yet recaption does not lie, and the iſſue was, if he took the ſecond diſtreſs for the firſt cauſe or not? Ibid.

6. In reſcous of diſtreſs it was awarded a good plea, *that he had a great waſte adjoining to his manor, and he put his beaſts there, and they eſcaped into the place where*, &c. *and the plaintiff took them, and he made reſcous;* nota. Br. Diſtreſs, pl. 12. cites 2 H. 4. 16.

Br. Reſcous, pl. 12. cites S. C. and S. P.

7. *But* it was ſaid, that if a *man keeps his beaſts in the place*, or *has notice that they uſually came to this place*, this is not an eſcape; quod nota. Br. Diſtreſs, pl. 12. cites 2 H. 4. 16.

Br. Reſcous, pl. 12. cites S. C. and S. P.

* 8. Writ of reſcous upon *diſtreſs taken for rent arrear;* it was ſaid, that † *riens arrear*, and ‡ *ne unques ſeiſie*, are good pleas in writ of reſcous, quod non negatur, tamen quære inde. Br. Reſcous, pl. 6. cites 2 H. 4. 22.

† Br. Reſcous, pl. 18. cites 5 E. 4. 8. and 7 E. 4. 19, 20. contra that it is no plea; for he may aid himſelf in replevin and ſuffer the diſtreſs, per Choke; quære inde. —— S. P. Br. Reſcous, pl. 20. cites 6 E. 4. 11. —— ‡ *Ne unques ſeiſie after the limitation* is no plea, per Yelverton; contra in avowry. Br. Reſcous, pl. 29. cites 6 E. 4. 11.

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9. In reſcous the plaintiff was compelled to *ſhew for what rent he diſtrained, and for what term being in arrear* and otherwiſe ill, by which he ſhewed the tenure, and for 20 d. arrear ſuch a feaſt he

he diſtrained, and the defendant made reſcous; the defendant took exception becauſe he *did not allege ſeiſin*, et non allocatur. Br. Reſcous, pl. 7. cites 8 H. 4. 2.

10. By which he *ſaid that where A. B. granted to the plaintiff the ſeigniory, the tenant did not attorn, by which he made reſcous*, et non allocatur *without ſhewing that he is tertenant or other authority*. Ibid.

11. *And* therefore he *ſaid that he as ſervant to the tertenant, and by his command*, made the reſcous. Ibid.

12. In reſcous the *defendant to the vi & armis pleaded not guilty*, and *to the reſcous* ſaid that the plaintiff's *ſervant took the defendant's ſheep in his ſeveral in C. and he made reſcous, abſque hoc that he took them in A. priſt*, &c. et adjornatur. Br. Reſcous, pl. 9. cites 7 H. 6. 1.

13. In reſcous the plaintiff *counted that R. was ſeiſed of two houſes and held them of him by fealty and two ſhillings rent payable at Eaſter annually, of which ſervices he was ſeiſed by the hands of the ſaid R.* as by the hands *of his very tenant*, and for the 2s. rent arrear ſuch a feaſt he diſtrained, and the defendant made reſcous; the defendant *pleaded unques ſeiſie per my les mains, priſt*, and the others e contra; per Newton this is no plea *in this action*, for here *the tenure is only traverſable and no other thing*. Br. Reſcous, pl. 10. cites 22 H. 6. 27.

14. And from hence it follows that *riens arrear* is no plea in this action, by which Priſot imparled, and the like Paſchæ hoc anno. Ibid.

15. Reſcous that he *diſtrained T. in D. for ſervices*, &c. *and he made reſcous*, it is *no plea that the plaintiff diſtrained in S. abſque hoc that he diſtrained in D.* for he *ought to juſtify the reſcous*, per tot. Cur. by which Pole *ſaid he diſtrained in four acres in S. which was the franktenement of the defendant, by which he made reſcous, abſque hoc that he diſtrained in D.* but after he *ſaid that he was ſeiſed in fee of the four acres in S. and the property of the beaſts were in him, and the plaintiff diſtrained, by which he made reſcous, abſque hoc that the plaintiff diſtrained in D. priſt*, and the others e contra. Br. Reſcous, pl. 11. cites 22 H. 6. 54.

Br. Aſſiſe, pl. 27. cites 33 H. 6. 20. S. C.

16. Reſcous may be and yet *not vi & armis*. Br. Reſcous, pl. 2. cites 33 H. 6.

17. In reſcous *hors de ſon fee* is a good plea, per Cur. Br. Iſſues Joines, pl. 26. cites 38 H. 6. 26.

Thel. Dig. 238. lib. 16. cap. 10. ſ. 59. cites Trin. 9 H. 7. 4. S. P. and that it was adjudged 39 H. 6. 7.

18. Reſcous becauſe he *diſtrained for rent-arrear for three days*, and the *defendant made reſcous*, and *it appeared that the third day was not come at the time of the taking*, by which the defendant demanded *judgment of the count*, and that the writ abate, and per Cur. the count is good; for *if he had any cauſe to diſtrain the defendant cannot make reſcous*, and the matter is only to the action for the third day. Br. Reſcous, pl. 14. cites 39 H. 6. 7.

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19. In reſcous it is no plea *that he held by other ſervices*, or the like, for if he holds of him it is not lawful for him to make reſcous. Br. Reſcous, pl. 18. cites 5 E. 4. 8. and 7 E. 4. 19, 20.

20. *Rien*

20. *Rien arrear* is no plea in reſcous, but he may ſuffer the diſtreſs, and aid himſelf in replevin. Br. Eſtoppel, pl. 162. cites 5 E. 4. 7, 8. and 7 E. 4. 19, 20.

21. Reſcous, *and alleged tenure and ſeiſin by the hands of his tenant as his very tenant, and that he diſtrained, and the tenant made reſcous*; the defendant ſaid that *ne unques ſeiſie per my les mains after the limitation of aſſiſe*, and the beſt opinion was that it is no plea; for if he has ſeigniory there he may diſtrain, ſo *traverſe the tenure and not the ſeiſin*, for *no limitation is given in reſcous, but in replevin, and aſſiſe, and writ of right*. Br. Reſcous, pl. 17. cites 5 E. 4. * 52. Br. Seiſin, pl. 29. cites 5 E. 4. 62. S. C. * It ſhould be 62.

22. In reſcous the defendant pleaded *hors de ſon fee*, and per Cur. this is no plea in this action nor in treſpaſs; but he *ſhall ſay that it is held of a ſtranger, and ſo hors de ſon fee*, and then a good plea, and ſo he did. Br. Reſcous, pl. 19. cites 6 E. 4. 4. In reſcous, if the *plaintiff ſuppoſes that he diſtrained within his fee, and the other made reſcous*, there *hors de ſon fee is a good plea*, per Cur. Brooke ſays, *quære if he may reply for rent-charge*; for *it ſeems that there is no other form of writ*. Br. Reſcous, pl. 22. cites 38 E. 3.

23. And per Choke and Danby Ch. J. the ſame year, fol. 87. where the *tenant holds by* 2*d.* and the *lord incroaches* 4*d.* the *tenant may aid it by reſcous and ſpecial pleading, and ſhall not be drove to ne injuſte vexes, or contra formam feoffamenti*. Ibid.

24. *So* in *aſſiſe*. Ibid.

25. *Contra in avowry*. Ibid.

26. In reſcous, the defendant pleaded *always ſeiſed after the limitation*, and the *plaintiff would have demurred*, and the *defendant durſt not* demur, the reaſon ſeems to be, that a man may diſtrain that never was ſeiſed, quære. Br. Reſcous, pl. 23. cites 5 E. 4. 6.

27. If a *man ſends his ſervant to diſtrain* for rent, or ſervice, or damage-feaſant, and reſcous be made upon the ſervant, the maſter ſhall have the writ of reſcous and not the ſervant, for the wrong is done to him who ought to have the rent or ſervice, or is damnified, &c. F. N. B. 101. (F).

28. If a *collector* or ſub-collector *diſtrains for fifteenths*, and reſcous be made, he ſhall have a writ of reſcous, &c. F. N. B. 101. (F).

29. If the *king's bailiff diſtrains for rent*, and reſcous be made, the bailiff ſhall have the writ of reſcous, and not the king. F. N. B. 102. (B).

30. If the *ſheriff ſend to the bailiff of the liberty to levy fines* and amercements *for the king*, and the bailiff diſtrains certain cattle, and the reſcous is made. Now the *lord of the liberty* ſhall have a writ of reſcous *of the reſcous* done to the bailiff, *and for the battery and aſſault* made upon him, *and for the loſs of his ſervice*, and all in one writ. F. N. B. 102. (B).

31. In reſcous, &c. the plaintiff *declared that he had diſtrained* 40 *ſheep of the defendant's, and* 80 *of R. S.'s, damage-feaſant, and that the defendant took, chaſed, and reſcued all of them*; the *defendant juſtified the putting his* 40 *ſheep* in the place where, as for *common, and* 2 Roll. Rep. 163. S. C. Haughton J. ſaid that in treſpaſs the defendant

might juſtify the chaſing the ſheep of R. S. to ſever them from his own, but as to driving them away he could not do ſo by any means, quod Doderidge conceſſit, but ſaid that if defendant had put the ſheep of R. S. into the common again, it had been good, judgment for the plaintiff. —— Palm. 172. Genings v. Plaiſto, S. C. adjudged for the plaintiff. But Doderidge ſaid that defendant might have aided himſelf in pleading, if he ſaid after, that he had ſevered the 40 ſheep, and had reſtored the 80 to the plaintiff.

and that the plaintiff de injuria ſua propria chaſed them, and that the defendant would have taken them from him, but *they ran among ſt the other* 80 *ſheep of R. S* and flocked with them, *and becauſe he could not ſever them, he chaſed them*, &c. quæ eſt eadem reſcuſſio. Upon a demurrer the plaintiff had judgment, for though the defendant had ſome colour to reſcue his own ſheep, he had none to reſcue the ſheep of a ſtranger who appeared not to have any right of common. He ſhould have ſaid, * that he chaſed them all to ſuch a place to ſever them. Cro. J. 568. pl. 6. Paſch. 18 Jac. B. R. Jennings v. Playſtoe.

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32. It was agreed in a caſe by Hobart, that where a man brought an action de parco fracto, and declared upon the breach of a pound, and alſo of the taking out of beaſts; and the defendant as to the taking out of the beaſts, *pleaded not guilty*, and as to breaking of the pound he ſaid, *that he was lord of the ſoil upon which the pound ſtood, and that he brake off the lock and put a lock of his own;* and Hobart ſaid in this caſe, that he ought to plead the general iſſue, for in verity this is not any breach of the pound, except the beaſts come out of it; and Jones J. was of opinion, that if he put out the beaſts this action would not lie, becauſe the freehold was in him, but he ought to have a *ſpecial action upon the caſe*. Win. 80, 81. Paſch. 22 Jac. C. B. Anon.

(Q. 3) Pound-breach. What is. And how puniſhed.

1. WHERE one *breaks the pound and takes the diſtreſs*, yet he who diſtrained may retake them and put them in again, notwithſtanding that he may have parco fracto; quod non negatur. Br. Avowry, pl. 13. cites 34 H. 6. 18.

2. The *diſtrainor* may have *parco fracto* for the breach of the pound, and *not the lord*. Arg. 12 Mod. 660. cites Dr. and Stud. c. 27.

3. A. brought parco fracto, and declared upon the breach of a pound, and alſo of the taking out of beaſts; as to the taking out of beaſts the defendant pleaded not guilty, and as to the breaking the pound he ſaid, he was *lord of the ſoil* on which the pound ſtood, and that he broke the lock and put a *lock* of his own. Per Hobert, he ought to plead the general iſſue, for in truth this is not any breach of the pound except the beaſts come out. And per Jones J. if he put the beaſts out he may not have this action, becauſe the freehold was in him, but he ought to have a ſpecial action on the caſe. Winch. 80. Paſch. 22 Jac. C. B. Anon.

4. If the *door of the pound be open*, it is no pound-breach to take the diſtreſs out of it; per Powell J. 2 Lutw. 1262. Trin. 7 W. 3. Alwayes v. Broom.

5. 2 *W. & M. ſtat.* 1. *cap.* 5. *ſ.* 4. *Upon any pound-breach or reſcous of goods diſtrained for rent, the perſon grieved ſhall in a ſpecial action upon the caſe recover treble damages and coſts againſt the offenders, or againſt the owner of the goods if they come to his uſe.* This is only meant treble damages and ſingle coſts; and he may ſue either the owner or the actual offender in all caſes, and the owner if the goods come to his uſe or poſſeſſion, but if he recovers againſt the offender, he ſhall not ſue the owner afterwards. Sir Barth. Shower's Obſervations, ut ſupra, fol. 162, 163.

6. If the owner breaks the pound and lets the diſtreſs go, the diſtrainor may have a parco fracto, *or may retake the diſtreſs;* per Gould J. 12 Mod. 661. Hill. 13 W. 3. Vaſpor v. Edwards.

(Q. 4) Eſcape. What Remedy lies. [171]

1. IF a man *diſtrains beaſts*, and *they go back to the owner of their own accord*, he who diſtrains *cannot retake them by reaſon of the firſt diſtreſs unleſs he comes freſhly;* for there is negligence in the diſtrainor; per Danby J. Br. Diſtreſs, pl. 25. cites 9 E. 4. 2.

2. Where the perſon diſtraining puts the diſtreſs in a *broken pound, or ſuch as cannot keep the thing impounded*, and the diſtreſs eſcapes, he cannot maintain an action for the ſame treſpaſs, and its being a common pound varies not the caſe. 12 Mod. 658. 663, 664. Hill. 13 W. 3. Vaſpor v. Edwards. Ld. Raym. Rep. 719. S. C. adjudged.

3. If *diſtreſs* taken damage-feaſant *eſcapes*, the diſtrainor cannot bring *treſpaſs* unleſs he *ſhews that the eſcape was without his default*, and ſaying that it was without his conſent and will is not ſufficient. 12 Mod. 658. Hill. 13 W. 3. Vaſpor v. Edwards.

4. *But* if they *eſcape without his default*, he has other remedy; becauſe he cannot otherwiſe ſecure them than by impounding; for he cannot tie them; per Powis J. 12 Mod. 662. in caſe of Vaſper v. Edwards, cites 27 Aſſ. pl. 64.

5. *So* if they are *ſtole out of the pound*-overt he is not anſwerable for them, nor remedileſs unleſs the things ſtolen were not proper to be put into a pound-overt; per Powis J. 12 Mod. 662. cites Co. Litt. 47. b.

(Q. 5) Death of Beaſts in the Pound; at whoſe Loſs it ſhall be.

1. IF the *beaſts die in pound after offer of ſufficient amends*, this is at the peril of the owner if they are in pound-overt; *but if they are not in pound-overt*, this is at the peril of the diſtrainor. But *if the writ of the king comes to deliver them*, and the *diſtrainor reſiſts it*, there *if they die*, this is at the peril of the diſtrainor, and the owner ſhall recover his damage by action upon the ſtatute for diſobeying the writ. Br. Diſtreſs, pl. 72. cites Doct. and Stud. lib. 2.

2. If

* If the diſtreſs was for rent; per Powis J. 12 Mod. 663. in S.C.

2. If *cattle diſtrained* be put in pound-overt, the owner at his peril muſt feed them, and if they *die* the diſtrainor ſhall bring his *action, or* * *diſtrain again;* per Powis J. 12 Mod. 662. cites D. 280. Co. Lit. 47. Dr. and Stud. 102. and ſaid, that the reaſon is becauſe he has loſt his pledge without any fault in him.

[172] (Q. 6) Actions and Pleadings.

1. WRIT of treſpaſs for diſtreſs *taken in the high ſtreet*, contrary to the ſtatute of Marlebridge, was *without ſaying contra pacem*, and yet adjudged good. Thel. Dig. 114. lib. 10. cap. 24. ſ. 1. cites Mich. 19 E. 2. Brief, 842.

2. [So] writ of diſtreſs taken in the high ſtreet, contrary to the ſtatute of Marlebridge, was *without ad grave damnum*, and yet held good. Thel. Dig. 115. lib. 10. cap. 25. ſ. 1. cites Mich. 19 E. 2. Brief, 842.

3. It ſeems by the argument of a recaption, that where a man diſtrains, he *ſhall ſhew for what cauſe he diſtrains*, or at leaſt if he ſhews cauſe *this is material as to the recaption*, though he avows for other cauſe. Br. Diſtreſs, pl. 61. cites 28 E. 3. 92. and Fitzh. tit. Recaption, 6.

4. It was granted per Cur. that of *rent*, if the *tenant tenders upon the land*, the other cannot diſtrain. Br. Diſtreſs, pl. 36. cites 30 Aſſ. 38.

5. If a man *takes beaſts for one thing*, yet when he comes into court of record he *may make avowry for what thing he pleaſes;* per Cur. 3 Rep. 26. cites it as adjudged Mich. 34 E. 1. tit. Avowry, 232.

6. Of *taking in the high ſtreet* a man ſhall *not have replevin, but writ upon the ſtatute.* Thel. Dig. 117. lib. 10. cap. 27. ſ. 8. cites Trin. 11 R. 2. Avowry, 87.

7. But *otherwiſe* it is *of oxen of his plough, or ſheep*, taken againſt the ſtatute. Thel. Dig. 117. lib. 10. cap. 27. ſ. 8. cites Trin. 11 R. 2. Avowry, 87. Quære.

8. If the *rent of three terms be arrear*, and the *lord diſtrains for the rent of the firſt term*, and the *tenant ſues replevin*, and the *lord avows*, and *tenant pleads hors de ſon fee, or* other ſuch *thing which brings the ſeigniory in debate*, there the lord cannot diſtrain for the rents of the other terms till the ſeigniory be tried; per Rickhill for law, quod conceditur per all the juſtices. Br. Diſtreſs, pl. 14. cites 7 H. 4. 4.

9. In *treſpaſs between lord and tenant upon diſtreſs*, the *tenure* is only traverſable. Br. Traverſe per, &c. pl. 360. cites 10 H. 6. 24.

10. *Contra in avowry*, note the diverſity. Br. Ibid.

11. In treſpaſs the *defendant ſaid that he leaſed to the plaintiff for 10 years, rendering annually 20 s. at two feaſts*, &c. and for 10 s. arrear he diſtrained, and the plaintiff was not permitted to ſay that de ſon tort demeſne without ſuch cauſe; but *ſhall ſay that de ſon tort demeſne abſque hoc that he leaſed, or* abſque hoc *that any rent was arrear.* Br. De ſon tort, &c. pl. 29. cites 10 H. 6. 3.

12. Treſpaſs of three horſes taken; Suliard ſaid, actio non; for J. S. was ſeiſed of the cloſe where, &c. and held of him by fealty and 10 s., &c. and for the *rent arrear* he came and found the horſes levant and couchant, by which he took them, and within his fee; the defendant ſaid that they *eſcaped in default of incloſure* of the tertenant, who ought to incloſe it, *as he was chaſing them in the highway*. Suliard ſaid they were levant and couchant there by ſix days after the eſcape. Per Brian he may well diſtrain them. Per Choke, when the beaſts of a ſtranger enter in default of incloſure of the tenant of the franktenement, there if the owner has notice of them and does not take them away, the lord may diſtrain them. Per Cateſby J. where the beaſts enter in default of incloſure, the owner of the land cannot diſtrain them damage-feaſant, though they are there by half an year, and therefore the lord cannot diſtrain. But where the tenant of the [173] land is not bound to incloſe it, there if beaſts enter the lord may diſtrain. But ſee Brian Ch. J. above made the beſt reaſon, as it ſeems. Br. Diſtreſs, pl. 56. cites 22 E. 4. 49.

13. If diſtreſs be *ſtole or ſet at large by a ſtranger* he ſhall not be anſwerable for it; but even in that caſe if *replevin* be brought, and an *elongatur* returned, as it muſt be, there ſhall be a *withernam*, and the diſtrainor liable till he *ſhew that matter*, which being no default of his, will excuſe him. Per Holt Ch. J. 12 Mod. 660. Hill. 13 W. 3. Vaſpor v. Edwards.

16. If diſtreſs be *ſtole* out of pound, and *elongat'* be returned, the diſtrainor *to prevent a withernam may ſhew* that they were ſtolen. Per Powis J. 12 Mod. 662. in caſe of Vaſpor v. Edwards, cites 32 H. 6. 27. b. Br. Ret. Brev. 135. Nat. B. 74. and ſome books ſay the ſheriff may return it.

(R) What ſhall be ſaid *exceſſive*, and what not.

[1. IF 40 *ſheep* are taken *for* 2 *d.* and 16 *oxen for* 9 *d.* this is exceſſive. 41 E. 3. 26.]

[2. If *two oxen for four pair of gloves, ten ſheep for one pair, and ten for another*, it is an exceſſive diſtreſs. 29 E. 3. 24. adjudged.]

[3. *But* if a man takes *five horſes joined in a cart for* 3 *d.* rent, this is not exceſſive for the intierty. 8 H. 4. 15.] Cheynie ſaid it was exceſſive ad quod non fuit reſponſum. * But Brooke ſays that it is not becauſe they were joined in one plough, and *could not be ſevered*. Br. Diſtreſs, pl. 15. cites 8 H. 4. 16.

A man cannot *ſever* a diſtreſs, and therefore in ſome caſes a diſtreſs of great value, as a *cart and horſes*, may be taken for a ſmall matter, becauſe not ſeverable; admitted Arg. 2 Vent. 183. Trin. 2 W. & M. in C. B. in caſe of Clark v. Tucker.

[4. No diſtreſs *for homage* ſhall be ſaid exceſſive for the high eſteem thereof in the law. 42 E. 3. 26. Co. 4. Bevill, 8. b.] He who diſtrains *for homage*, may take as many of the beaſts as he can find upon the land; for, for homage the *diſtreſs ſhall not be ſaid exceſſive*. Per Belk. quære; for Finch. was contra, but it was not adjudged, therefore quære. Br. Diſtreſs, pl. 4. cites 42 E. 3. 26. ——Though the lord diſtrains the tenant ſo that he is not able to manure his land, ibid. ——In aſſiſe it was ſaid for law, that if the tenant holds of his lord by *homage*, the diſtreſs cannot be exceſſive,

[5. The *ſame* law of *fealty*. Co. 4. Bevill, 8. b. 29 E. 3. 24.]

exceſſive, nor for *ſuit of court* nor *fealty*, but it was ſaid that the law is not very clear for ſuit nor fealty. Br. Diſtreſs, pl. 35. cites 28 Aſſ. 50.

Br. Diſtreſs, pl. 79. cites 11 H. 4. 2. S. P.—— Diſtreſs ſhall

[6. A diſtreſs of more than the value ſhall not be ſaid exceſſive *for the expences of knights of parliament*, becauſe the king is in a manner party. 13 H. 4. Fitzh. Avowry, 239.]

not be ſaid exceſſive where the *king is party*, as for fees of knights of the county for the parliament, and no miſchief; for by payment of it they ſhall re-have the beaſts. Br. Prerogative, pl. 98. cites 11 E. 4. 2.——S. P. 2 Inſt. 107. but Lord Coke adds, that the ſtatute of Marlbridge is general and extends to all.

7. No diſtreſs can be exceſſive for *homage*, *fealty*, or *ſuit*, and aſſiſe lies not for too often diſtraining or for exceſſive diſtraining for thoſe duties. F. N. B. 178. (I) in the new notes there (b.) cites 28 Aſſ. 50. and 42 Ed. 3. 26.

[174] 8. If a man diſtrains a *load of grain and four horſes for* 2 *s.* this is exceſſive diſtreſs; contra if they are *annexed to the waggon*; for then it is a thing intire, which cannot be ſevered. Br. Diſtreſs, pl. 88. cites 20 E. 4. 3.

9. *And* it was in a manner agreed, that a *fold of ſheep in the field* may be diſtrained for 2 s. and ſhall not be ſaid exceſſive; for the diſtrainor cannot ſever them. Br. Diſtreſs, pl. 88. cites 20 E. 4. 3.

(R. 2) Cauſeleſs and exceſſive Diſtreſs. Remedy for it.

If the lord diſtrain *two or three oxen for* 12 d. or the like

1. 52 *H.* 3. *cap.* 4. *THE diſtreſſes ſhall be reaſonable, and not too great; and he that takes great and unreaſonable diſtreſſes ſhall be grievouſly amerced for the exceſs.*

ſmall ſum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the 12 d. &c. of his own ſhewing, he ſhall make fine, &c. or the party may have his action upon the ſtatute. 2 Inſt. 107.

If the lord diſtrain *an ox or horſe for a penny*, if there were *no other diſtreſs upon the land* holden, the diſtreſs is not exceſſive; but if there were a ſheep or ſwine, &c. then the taking of the ox or horſe is exceſſive, becauſe he might have taken a beaſt of leſs value. 2 Inſt. 197.

Mod. 71. pl. 25. The King v. Legingham, S.C. & S.P. by Twiſden, ſed adjornatur.—— Ibid. 288.

2. An information was brought againſt a lord of a manor for taking unreaſonable diſtreſſes upon ſeveral tenants of his manor; but judgment was ſtayed; for the taking unreaſonable diſtreſſes is *puniſhable by action on the ſtatute of Marlebridge, and not by information.* Lev. 299. Mich. 22 Car. 2. B. R. The King v. Leſingham.

pl. 34. Trin. 29 Car. 2. B. R. The King v. Ledgingham, S. C. held that it will not lie.—— Raym. 205. S. C. and by Twiſden information lies not for diſtreſſes, becauſe they are private offences; and ſo judgment againſt the defendant was ſtaid.—— Vent. 104. S. C. & S. P. held accordingly; for exceſſive diſtreſſes were not puniſhable until the ſtatute of Marlb. cap. 4. which ſays, that he who ſo diſtrains ſhall be amerced, whereas upon an information he muſt of neceſſity be fined; and cites 2 Inſt. 107.

3. Avowry for 2 d. and for 9 d. and that he took *two ſheep for the* 2 *d.* and 15 *oxen for the* 9*d.* and therefore he was amerced to

20 s.

20 s. for the exceſſive diſtreſs; quod nota. Br. Diſtreſs, pl. 2. cites 41 E. 3. 26.

4. 2 *W. & M. ſtat.* 1. *cap.* 5. *ſ.* 5. *If any diſtreſs or ſale ſhall be made for rent where no rent is due, the owner of the goods, his executor, &c. may by action of treſpaſs, or upon the caſe, recover double the value of the goods diſtrained with coſts.*

5. *Treſpaſs* does not lie for entering and taking an exceſſive diſtreſs; and ſo a judgment in C. B. was reverſed. Gibb. 85. Trin. 2 & 3 Geo. 2. B. R. Lyne v. Moody.

(R. 3) Remedy by Aſſiſe of Souvent Diſtreſs. [175]

1 IN aſſiſe, the *defendant ſaid that the plaintiff himſelf is ſeiſed*, &c. to which the *plaintiff ſaid, that the defendant claimed ſeigniory in his land, and had diſtrained him by beaſts of his plough, and by ſouvent diſtreſs*, ſo that he could take no advantage of the land; the *defendant ſaid, that the land was held of him in jure uxoris by homage, fealty, and eſcuage, and ſuit of court and rent*, and for the fealty and ſuit he diſtrained. Br. Aſſiſe, pl. 274. cites 27 Aſſ. 51.

2. *And* it was ſaid there by ſome, that aſſiſe *does not lie by ſouvent diſtreſs, but where the lord diſtrains;* for *if another diſtrains he may make reſcous;* and it was held, that it is a *good plea* for the plaintiff, in caſe of ſouvent diſtreſs, *to ſay that he does not hold of him*, but then the aſſiſe of ſouvent diſtreſs does not lie, by ſome. Ibid.

3. *And* it was ſaid, where *lord meſne and tenant are*, and the *lord diſtrains for the ſervices of the meſne*, the *tenant may ſay that viens arrear* in the aſſiſe; contra in replevin; quære of the ſouvent diſtreſs; for the plaintiff dared not demur. And hence it ſeems that he thought that the aſſiſe did not lie of ſouvent diſtreſs but where the lord of whom, &c. diſtrains. Ibid.

4. *For ſuit* the ſouvent diſtreſs is maintainable, for this cannot be extended to any value, quære of *fealty;* for by ſome the ſame law of fealty, but rent is valuable in certain. Br. Diſtreſs, pl. 33. cites 27 Aſſ. 51.

In aſſiſe, the *tenant ſaid, that the plaintiff himſelf is ſeiſed of the frank-tenement*; judgment of the writ; the *plaintiff ſaid, that the defendant had diſtrained him by ſouvent diſtreſs*, ſo that he could not plough his land, and prayed the aſſiſe; to which the *defendant ſaid, that the plaintiff held of him by homage fealty, and ſuit of court*, for which ſervices he had diſtrained; judgment of aſſiſe; for, *for homage the diſtreſs cannot be ſaid exceſſive.* And the plaintiff ſaid that he held of J. who held over of the defendant by 12 d. and as to this riens arrear, and prayed the aſſiſe, and the aſſiſe awarded, and by the opinion of ſome of the juſtices, *aſſiſe does not lie for ſouvent diſtreſs where the lord diſtrains for homage fealty or ſuit.* Br. Aſſiſe, pl. 291. cites 28 Aſſ. 50. ——— 4 Rep. 8. a. Mich. 17 & 18 Eliz. C. B. Bevil's caſe, S. P. held accordingly, and cited S. C. and 11 H. 4. 2. a. 42 E. 3. 46. a. and Br. Diſtreſs, 80.

5. If the lord, or other man who has a rent iſſuing out of the lands, do *often diſtrain for the rent or ſervice where none is behind*, the tenant may have aſſiſe for this diſtreſs by the common law; and that aſſiſe lies between the lord and the tenant, or between the lord paramount and the tenant paravail, as appears 27 Aſſ. 51.

But it ſeems reaſonable, that the tenant have the aſſiſe of ſouvent foits diſtrained againſt him who claims a *rent-charge* out of the land; tamen quære. F. N. B. 178. (I).

6. Aſſiſe of ſouvent diſtreſs *lay at common law*, in which the *writ ſhall be general, and the count ſpecial*, that the lord ſouvent foits diſtrained, &c. and *judgment* ſhall not be that the demandant recuperet ſeiſinam, for he has that, but *quod teneat abſque multiplici diſtrictione*. 8 Rep. 50. a. b. Mich. 6 Jac. C. B.

[176] (R. 4) Several Diſtreſſes for the ſame Thing. Lawful in what Caſes.

The word (not) is omitted in the editions of Brooke, and therefore miſprinted.

1. WHERE the *lord* comes to diſtrain, and *takes an ox, which is not ſufficient for the rent arrear*, and then there are *no more beaſts there*, he *may come at another time and take a cow*, and *at another time and take another cow*, and *at another time another cow*, till he has ſufficient diſtreſs. Br. Diſtreſs, pl. 96. cites the printed Abridgment of Aſſiſes, tit. Bar.

2. In replevin the defendant avowed; the *plaintiff pleaded hors de ſon fee*, &c. and *pending this iſſue the defendant cannot diſtrain again*; quære; for it is ſaid elſewhere, that pending an aſſiſe, if a man diſtrains he ſhall abate his aſſiſe; but contra of replevin. Br. Diſtreſs, pl. 62. cites 18 R. 2. and Fitzh. Recaption, 8.

3. Where a man *takes diſtreſs for rent, and upon avowry has return irreplevi ſable*, if *a beaſt dies in the pound*, now he may diſtrain anew; for the ſum of rent, or valuation of the damage, is not adjudged to the avowant in the replevin, and then the beaſt taken by him in execution, but where he had taken the beaſts by diſtreſs, and that is replevied from him. Now upon the right of diſtraining appearing, the beaſts are reſtored unto him in that ſtate as they were before, to remain with him as a diſtreſs lawfully taken by judgment of the court, and not to be replevied, be it in rent-ſervice, or rent-charge, or damage-feaſant, that he may diſtrain and retain till the rent or damage be ſatisfied, ſo that even as *if the beaſt had died before judgment* he might have diſtrained again, ſo *after judgment*, for it is alike in both caſes; per Hobart Ch. J. Hob. 61. cites 14 H. 4. 4. 15 E. 4. 10.

4. In reſcous, where *return of beaſts is adjudged* to a man, this is no payment of the rent, but only a pledge, till he be ſatisfied or paid the rent; for if the *beaſts die in the pound* he may diſtrain de novo; per Brian, quod nota. Br. Diſtreſs, pl. 22. cites 15 E. 4. 10.

Br. Avowry, pl. 139. cites S. C.

5. Lord and tenant by fealty and 3 *d. rent*, the lord dies, the *feme is endowed* of the ſeigniory, the feme of the lord *may diſtrain for* 1 *d. and the heir for* 2 *d.* and ſo now the tenant is charged with two diſtreſſes where he was charged but with one before; but this is not inconvenient, for he pays no more rent than he paid before. Br. Diſtreſs, pl. 59. cites 24 H. 8.

6. So

6. *So* where *a ſeigniory* is *divided by partition between heirs female*, &c. Br. Diſtreſs, pl. 59. cites 24 H. 8.

7. If for 10 *l. rent* due at one day, a man *diſtrains goods of the value of* 40 *s. only*, and *at the time of the taking* the diſtreſs *there are goods of a ſufficient value* upon the premiſes, he cannot for the ſame rent diſtrain again; for it is his folly that at the firſt he diſtrained no more; adjudged. Mo. 7. pl. 26. Mich. 3 E. 6. Anon.

8. But if there be *rent in arrear at ſeveral days*, a *diſtreſs may be taken for what was due at one of the days, and after* a diſtreſs may be taken *for what was due at the other days;* per Brown. Mo. 7. pl. 26. Mich. 3 E. 6. Anon.

9. In a *repleg' the plaintiff is nonſuit*, and the *defendant had retorn, and the plaintiff ſued a ſecond deliverance, and is alſo nonſuit* upon that, by which the defendant is to have a retorn irreplevisable; but whether the defendant ought to avow, ſhewing the certainty of the place, day, and beaſts, in order to have a writ of inquiry of damages, was doubted. Divers thought he need not, but that he * might juſtify the detaining till the plaintiff offered ſufficient amends for his damages, others held he might work the beaſts, but others e contra; becauſe he had not a property in them but as a gage; and he may *put them again into the common pound, and if they die there, he may take another diſtreſs for the firſt cauſe*, inaſmuch as he was never ſatisfied. D. 280. pl. 14. Mich. 10 & 11 Eliz. Anon.

D. 280. a. marg. pl. 14. cites it as ſo agreed per Cur. 7 Jac. C. B. For they are to be impounded again, and cites 19 E. 2. Replevin, 26.

* [177]

10. If one *takes trop petit diſtreſs for rent*, and after *takes another diſtreſs for the ſame rent*, this is not good, for he cannot avow two diſtreſſes for the ſame rent; for it was his folly that he took not a better diſtreſs at the firſt; but nota in the Abridgment of the Aſſiſes, it was ſaid, that *if there be not ſufficient diſtreſs when he diſtrained, he may diſtrain again.* Cro. E. 13. pl. 8. Hill. 25 Eliz. C. B. Anon.

Mo. 7. pl. 26. Mich. 3 E. 6. Anon. S. P. held accordingly. And per Montague, recaption lies for the ſecond diſtreſs. —— 2 Lutw. 1536. cites ſame caſes, and S. P. adjudged accordingly; and the reporter adds a quære if the ſecond diſtreſs had been juſtifiable, admitting it had been pleaded that at the time of caption of the firſt diſtreſs there was not ſufficient upon the land demiſed, and that the firſt diſtreſs was not but of ſuch a value, &c.

11. By *act of the party* the tenant ſhall not be made liable to two diſtreſſes, though by *act in law* he may. Cro. E. 742. pl. 18. Hill. 42 Eliz. C. B. in caſe of Wotton v. Shirt.

12. 17 *Car.* 2. *cap.* 7. *ſ.* 4. *Where the diſtreſs ſhall not be found to be to the value of the arrears, the party, his executors or adminiſtrators, may diſtrain again for the reſidue.*

By 19 Car. 2. cap. 5. this act is made to extend to Wales and counties palatine. —— It was a miſchief before this ſtatute, that in caſe a diſtreſs was too little one could not diſtrain again (be the demand never ſo great), but the other might plead levied by diſtreſs, which ſhew that diſtreſſes could not be ſplit; per Holt Ch. J. Comb. 546. Mich. 7 W. 3. B. R. Johnſon v. Bane.

13. In treſpaſs for taking 10 beaſts 1 Apr. and alſo for taking 12 more on the ſaid firſt day of April, the defendant pleaded, that the plaintiff had a leaſe granted to him rendering rent,

2 Lutw. 1532. 1536. Trin. 15 W. 3.

Wally and Savil. S. P. adjudged that the ſecond diſtreſs was not lawful.

and that there *was* 70 *l. rent in arrear*, and that he (the *defendant*) *did take the firſt* 10 *beaſts for* 60 *l. parcel* of the ſaid 70 *l. and the other* 12 beaſts *afterwards for* 10 *l. reſidue* of the ſaid 70 l. and upon a demurrer to this plea it was adjudged ill; for one cannot avow for two diſtreſſes made for one and the ſame rent; it was the defendant's fault to diſtrain too little at firſt. But the reporter tells us, that if the defendant had *pleaded, that at the time of the taking the firſt diſtreſs there was not ſufficient to be taken for the whole rent* upon the land, and that the firſt diſtreſs was but only of ſuch a value, it had been good. 3 Salk. 137. pl. 6. Mich. 8 W. 3. C. B. Anon.

* S. P. per Powis J. or he may bring *debt*. 12 Mod. 663.

14. If diſtreſs for *damage-feaſant dies in a pound or eſcapes*, the party ſhall not retake them, *but* if it were *for* * *rent*, in either caſe he may diſtrain de novo; and eſcape of cattle out of pound is not like eſcape of priſoner out of gaol; for if pound be not good, the diſtrainant may be his own keeper, and put them in his own pound, but he cannot be keeper of his priſoner, and every pound-keeper is the ſervant of him who impounds the cattle pro hac vice; per Holt. 12 Mod. 397. Paſch. 12 W. 3. Anon.

15. If *cattle diſtrained die in the pound*, the diſtrainor may diſtrain again if the diſtreſs was for rent. Arg. Ld. Raym. Rep. 720. cites Dr. and Stud. cap. 27.

[178]

(S) *How* it is to be taken.

Notice for what a Diſtreſs is taken.

[1. IF the *lord* diſtrains *for rents or ſervices* he need not give notice to the tenant for what thing it is he diſtrains it; for the tenant by intendment of the law knows what is in arrear from his land. 45 E. 3. 9.]

[2. The *ſame* law is, if the lord diſtrains *for an amercement in a leet*., 45 E. 3. 9.]

3. A *bailiff* who diſtrains *ought to ſhew in whoſe right* he diſtrains. Br. Diſtreſs, pl. 77. cites 7 H. 4. 28.

Br. Covenant, pl. 30. cites S. C.

4. The king may diſtrain *for his debt or* for a *thing granted by parliament, though no clauſe of diſtreſs be expreſſed* in the act of parliament thereof. Br. Diſtreſs, pl. 51. cites 17 E. 4. 6.

5. If the *bailiff* upon the diſtreſs ſhews the cauſe and reaſon of it, he cannot afterwards *vary* from it, but the other party may trick him by traverſe. But if he diſtrained generally without ſhewing cauſe, he may ſhew what cauſe he will, and the other party ſhall anſwer to it. And when a bailiff diſtrains, he ought, if he be required, to ſhew cauſe of his diſtreſs, but if he be *not required*, then he is not tied to do it. Le. 50. pl. 64. Paſch. 29 Eliz. C. B. Buller's caſe.

The perſon diſtraining muſt give

6. 2 *W. & M. ſeſſ.* 1. *cap.* 5. *ſ.* 2. *For ſelling diſtreſſes for rent in five days if not replevied, requires five days after the diſtreſs taken, and*

and notice thereof with the cauſe of taking left at the manſion houſe or other moſt notorious place in the premiſes.

notice, but need not be immediately, but *at any time* after the diſtreſs. But then the five days are to be computed from the notice. The notice ought to be *in writing*, though the act doth not in expreſs words require it, yet the nature of the thing doth, for notice is to be left at the moſt notorious place, which can never be intended a *parol* notice. The notice ought to contain the *party's name, from whom* ſuch diſtreſs is made, the *name of the land* or farm, or ſome general deſcription of the thing out of which the rent iſſues, and the *quantity of rent in arrear, and when due*; and it is adviſable to name the time *when the diſtreſs was taken*, and the *place where it is carried*; that the tenant or owner may know where to reſort to make his replevin. (All which ſeems to be the intention of the act, in requiring notice, with the cauſe of taking.) Sir Barth. Shower's obſervations on this ſtatute.

7. *Perſonal notice* is *ſufficient*, for notice is the thing required. Notice to the owner is ſufficient againſt him in trover; but if the tenant had brought replevin, that would not have ſerved as to him, but he muſt have had notice alſo. Per Cur. 1 Salk. 247. pl. 1. Trin. 7 W. 3. B. R. Walter v. Rumball.

Perſonal notice anſwers the meaning of the ſtatute, though it appoints local notice; for perſonal notice is better; per Holt Ch. J. Comb. 336. in S. C.——Notice to the owner is ſufficient, but if not it ſeems to be ſupplied after a verdict by the words juxta formam ſtatuti notitiam dedit, &c. And it ſeems to be at the election of him who diſtrains to give notice either to the tenant or to the owner of the goods; per Cur. 4 Mod. 390. 395. S. C.——12 Mod. 76. S. C. and per Cur. the intent of the ſtatute was only to give a certain notice, and ſeeing that in this caſe they have gone further than the letter of the act, a perſonal notice muſt needs be ſufficient. And though the notice was given to the owner only of the goods, and not to the tenant in poſſeſſion, the Court held notice to either ſufficient; the words of the ſtatute are in the diſjunctive.——Ld. Raym. Rep. 53. S. C. and ſame points held accordingly. But if the owner had ſued a replevin, then the notice muſt have been given to him.

8. The notice may be *to the party, or left at the chief manſion houſe*; if *no perſon there*, affix it on the fore door of the houſe; if more houſes than one, at the chief or beſt. If *no houſe, but barn or ſtable*, at the door thereof; at the gate or *moſt common entrance into a field* or wood. If in a *common field*, where neither hedge, gate, [179] or tree, then affix a ſtick at the moſt uſual entrance, with the notice on it. Sir Barth. Shower's obſervations on the ſtatute. 2 W. & M.

9. Upon the 2 W. & M. cap. 5. notice of the taking the diſtreſs is ſufficient when it is given *to the party himſelf*, as if he be met with at any place; and ſuch notice *ſaying that the diſtreſs was taken for rent due at Michaelmas laſt, without particularly mentioning the quantum*, was held ſufficient per Trevor Ch. J. C. B. at the Sittings. Mich. Vac. 11 Ann. Cheſterfield (Earl) v. Farringdon, & al'.

For more of Diſtreſs in general, ſee **Avowry**, **Rent**, and other proper titles.

Donative.

(A) Original.

It began by the conſent of all perſons who had any manner of intereſt. viz. the ordinary and pariſhioners. Per Pohpam Ch. J. Yelv. 61. —— It is a *lay foundation* as it is ſaid. 2 Roll. 343. —— It is of the foundation and erection *of the donor*, not by the ordinary. Per Eyre J. Show. 499.

1. DONATIVES *began* only by the foundation and erection of the donor, and as the incumbent comes in by the donor, ſo he may *reſign it* to him, and this determines his incumbency. Cro. J. 63. Paſch. 3 Jac. B. R. Fairchild v. Gayer.

2. Donatives are *either by royal foundation or by royal licence, or* by *original agreement with the ordinary*. 3 Salk. 140.

(B) Conſidered. How.

1. BENEFICE donative by the patron only *is a lay thing*, and *the biſhop ſhall not viſit*, and therefore ſhall not deprive, and then *if he meddles* in it *he is in the caſe of premunire* by ſome. Br. Premunire, pl. 21. cites 8 Aſſ. 29. And in this caſe was Barlow biſhop of Bath in the time of E. 6. and was compelled to obtain a pardon, inaſmuch as he had deprived the dean of Wells, which was donative by letters patents of the king by act of parliament made thereof; but 8 E. 3. above is not adjudged.

2. Donatives uſually *paſs as lay fees*, and the paſſing of them as lay fees alters not the nature of the chapels. Arg. Sty. 81. Hill. 23 Car. in caſe of Rawſon v. Bargue.

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(C) Power of the Patron.

1. THE donative *patron* when the church is *void* may take the *profits to his own uſe*, if the pariſhioners will pay them, till a new incumbent is made. Arg. 2 Roll. Rep. 100. cites Fitzh. Aide, 103. 6 H. 7. 14. but he has no remedy to compel them to pay the tithes to him.

2. A donative cannot fall in *lapſe*, but the patron may loſe the profits if he will, but if any take the profits from him, he cannot maintain the action; But he ought to put in his clerk, and he maintain the action. Arg. Cro. J. 518. cites 33 E. 3. Aid, 107. 6 H. 7. 14. 17 E. 3. 45.

3. Incumbent

3. Incumbent of a benefice donative may *reſign* to his patron, and it being of the foundation of his patron is alſo of his *viſitation* and correction, and the ordinary has nothing to do with him. Mo. 765. pl. 1062. Paſch. 3 Jac. B. R. Fairchild v. Gayer.

And where there are *two patrons*, a reſignation *to one* only is good. For it enures to both as a ſurrender ſhall do, eſpecially where they both conſent thereto and grant it de novo, as here they did. Cro. J. 63. S. C.——Reſignation by the word of *eccleſia* is ſufficient, and extends to all the poſſeſſions. Cro. J. 64. S. C.

4. The patron cannot *preſent a layman.* Per 3 juſtices againſt Popham Ch. J. Yelv. 61. Paſch. 3 Jac. B. R.

(D) Power of the Ordinary.

1. WHERE it is donative by the founder and his heirs, *the ordinary cannot viſit it, and when* a free-chapel donative is *void* the *founder may retake it, and not appoint another incumbent*, contra of a preſentative. Br. Preſentation, pl. 43. cites 6 H. 7. 14. per Keble.

2. Note, that the ordinary cannot viſit a free-chapel donative. King E. 1. had divers chapels which his commiſſioners ſhall viſit and not the ordinary, *but thoſe which have cure of ſouls ſhall be viſited by the ordinary;* per Keble. Br. Depoſition, pl. 9. cites 6 H. 7. 14.

3. If the patron of ſuch a donative *will not collate* there is no remedy to compel him; and he may in time of vacation take all the profits and ſue for the tithes in the ſpiritual court; per Popham, but denied by the reſt. See Yelv. 61. Paſch. 3 Jac. B. R. Fairchild v. Gaire.

Contra if it be with cure of ſouls. Arg. ſays the biſhop may compel. Parl. Caſes, 176. cites Cro. Car. 330. 2 Roll. 331.——It was ſaid by counſel, that in caſe of a donative the ordinary might compel the patron to put in a clerk. But Holt Ch. J. ſaid, he cannot. Holt's Rep. 659.——The biſhop may compel the patron, *by eccleſiaſtical cenſures*, to nominate a clerk. Wood. Inſt. 265.

4. The parſon of a donative is privileged from the juriſdiction of the ordinary in reſpect of the place, but if he *preach hereſy* the patron may commiſſion and *examine* the matter, and thereupon ouſt and deprive him, and ſo it happened in COVERT'S CASE, as Gawdy and Wms. J. ſaid, wherein the biſhop of Winchester was the donor of ſuch a donative. Brownl. 202. Paſch. 3 Jac. B. R. in caſe of Fairchild v. Gayer, cites 13 E. 4.

The parſon of a donative is liable to the eccleſiaſtical juriſdiction, as he is a member of the eccleſiaſtical body, for perſonal offences, though for matters relating to the church he is exempt; and therefore the * ſpiritual court ought not to deprive him; but for drunkenneſs or preaching hereſy they might cenſure him. 2 Ld. Raym. Rep. 1206. Mich. 4 Ann. in the caſe of Colefatt v. Newcomb, ſaid by the reporter in a note at the end of the caſe to have been told him by Mr. Mead and Mr. Salkeld, that they had known the ſame diſtinction taken by the Ch. Juſtice, and the reporter ſays, that that ſeems upon the conſideration of the caſe in Yelv. to be the better opinion.

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5. The *rectory* only is *exempt* from the juriſdiction of the ordinary, *and not the patron*, and this goes as well to the charges to be taxed upon the church by the ordinary, attendance in viſitations, &c. Per three J. Yelv. 61. Paſch. 3 Jac. B. R. in caſe of Fairchild v. Gayer.

6. Ordinary may *ſequeſter* a church donative if the *patron does not preſent*, and the incumbent thereof may be *deprived*. Arg. Roll. Rep. 453, cites 3 Jac. Gaer v. ....

7. The incumbent of a donative *of the king* is not *viſitable or deprivable* by any eccleſiaſtical authority, but *by the chancellor or by commiſſioners under the great ſeal*. 12 Rep. 41. Mich. 5 Jac. in the Exchequer, in Nich. Fuller's caſe.

8. If the biſhop go about to *viſit* a donative, this Court of B. R. will grant a *prohibition*; per Hale Ch. J. Mod. 90. pl. 56. Mich. 22 Car. 2. B. R. Anon.

The ordinary in this caſe cannot puniſh him for preaching without a licence,

9. The incumbent of a donative was *cited* in the ſpiritual court *to take a licence from the biſhop to preach*, and the pretence was that it was a chapel, and that the parſon was ſtipendiary; and per Cur. if it is a donative and the biſhop will viſit, a *prohibition* ſhall be granted. 3 Salk. 141. pl. 3. Anon.

but he may proceed to cite him, to convict him for ſo doing. If he preach any thing againſt the doctrine of the church, or marry without licence, the ordinary may proceed to puniſh him; a *prohibition was granted as to the ſuſpenſion, and the ſpiritual cenſures*, and putting him out of poſſeſſion; but *not as to certifying to the juſtices* for preaching without a licence; per Holt Ch. J. Holt's Rep. 659. Mich. in caſe of Bewick v. Twiſden.

Donatives which are conferred by laymen are fine cures. Vent. 15. per Curiam obiter.

10. As to Ley's opinion in Davis, 47, that a ſentence of *deprivation by an ordinary* was effectual in law till reverſed, it is not law; for it is all coram non judice, cites Br. Præmunire, 21. F. N. B. 42. The ordinary cannot *viſit* a benefice donative. Arg. Parl. Caſes, 53. in caſe of Phillips v. Bury. Paſch. 21 Car. 2. B. R.

11. Though donative be *exempted from the ordinary's juriſdiction*, the clerk of it is not, who may be puniſhed by eccleſiaſtical cenſures, but not to deprivation. 12 Mod. 640. Hill. 13 W. 3. Finch v. Harris.

12. *Libel in the ſpiritual court*, for that J. S. being the parſon of, &c. did make himſelf drunk at the ſacrament, and that he was a whore-maſter; and upon ſuggeſtion that they would proceed to *deprivation, and that the benefice was a donative*, a *prohibition* quoad the ſuing in order to deprive was granted, but not quoad the other matter. Farr. 31. Trin. 1 Ann. B. R. Anon.

2 Ld. Raym. Rep. 1206. Mich. 4 Ann. in caſe of Colefatt v. Newcomb. Powell J. ſaid he had known prohibitions denied frequently to ſuits againſt parſons of donatives for marrying without licence.

13. The ordinary *has a power as to the parſon of a donative, though not to the place*; for if the parſon marries without a licence, or *commits any miſdemeanor*, the *ordinary may puniſh him* in that reſpect, *but he cannot regulate the ſeats in the church*. And *if the patron will not preſent, the ordinary may compel him*; and the *parſon is exempt from attendance at viſitations*; per Holt Ch. J. 3 Salk. 140. pl. 1. Anon.

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14. A miniſter of a donative was *ſued in the eccleſiaſtical court, becauſe when he read prayers he did not read the whole ſervice*, but left out what parts of it he thought fit, and for *preaching without a licence*. Powell J. (abſente Holt) took a *difference where the*

the ſuit in the eccleſiaſtical court *is in order to the deprivation and where only for reformation of manners;* that *in the firſt caſe the Court will prohibit, but not in the laſt;* and therefore in this caſe if the ſpiritual court proceeded to deprivation, the Court would prohibit them, but not till then. 2 Ld. Raym. Rep. 1205. Mich. 4 Ann. Colefatt v. Newcomb.

(E) Right of the Patron preſerved; in what Caſes.

1. ADmiſſion and inſtitution of a clerk preſented to a donative vacant by a *ſtranger* is no *uſurpation* to the true patron, but it is all utterly void. Co. Litt. 344.

2. In caſe of a donative, if the king makes *the incumbent a biſhop*, he ſhall not preſent, for they are not incompatible. Cumb. 302. Mich. 6. W. & M. in B. R. obiter, in caſe of the King v. Dr. Birch.

Show. 415. S. C. and S. P. —— Arg. Parl. Caſes, 176. S. C. ——

A donative with cure of ſouls will be *void by promotion* of the incumbent. Arg. Show. 415. cites Yelv. 61. and 2 Roll. 341. that the king ſhall not preſent to a donative on the promotion of the incumbent, was admitted by all in caſe of the King v. Dr. Birch. ——— In the ſaid caſe it is given as the reaſon by S. Eyre J. that a donative makes no figure in the order and œconomy of the church, and a biſhopric and a donative are compatible. Show. 499.

(F) Deſtroyed.

1. ADmiſſion and *inſtitution* is not requiſite in caſe of a donative, but if to ſuch a donative the *patron preſents* to the ordinary, and ſuffers admiſſion and inſtitution thereupon, he thereby has made it always preſentable. Cro. J. 63. pl. 1. Paſch. 3 Jac. B. R. Fairchild v. Gayer.

Cited Parl. Caſes, 181. in the caſe of the King v. Doctor Birch.

2. Preſentation may *deſtroy* an impropriation, but not a donative, becauſe the creation thereof was by letters patents, whereby land is ſettled to the parſon and his ſucceſſors, and he to come in by donation; per Holt and Powell. 4 Salk. 541. pl. 3. Mich. 1 Ann. B. R. Ladd v. Widow.

For more of Donatives in general, ſee **Preſentation**, and Watſon's Compleat Incumbent.

Double Pleas.

(A) Double Plea. What is.

1. IN account, the *tenant ſaid that he is within age, and was within age at the time of the receipt*, and held double, but this is to the action. Thel. Dig. 214. lib. 15. cap. 3. ſ. 6. cites Paſch. 16 E. 3. Accompt, 52.

2. In writ upon the *ſtatute of labourers*, the defendant *ſaid, that he was the apprentice of the plaintiff, and the plaintiff would not inſtruct him in his myſtery, but beat him;* judgment of the writ, and held double, by which he held him to this, that he was his apprentice, and not his ſervant, &c. Thel. Dig. 215. lib. 15. cap. 3. ſ. 20. cites Mich. 39 E. 3. 28.

3. *Prior would have avoided the fine of his predeceſſor, becauſe he was dative and removeable;* the *defendant ſaid, that he had the moiety of an advowſon for the annuity in demand, and alſo that he had a common ſeal, and is perpetual.* And per Thirn. this is double, viz. *the moiety of the advowſon*, and that it is *perpetual*. Br. Double, pl. 128. cites 11 H. 4. 69.

4. In writ upon the ſtatute ſuppoſing the *foreſtalling* to be *in the port of Ciceſter;* the defendant *ſaid that the port of Ciceſter is no vill, nor hamlet, nor place known, &c. but a place which extends itſelf into divers vills*, &c. and held double; by which the defendant held himſelf to this, that it extended itſelf into divers vills, and this laſt plea held good. Thel. Dig. 215. lib. 15. cap. 3. ſ. 19. cites Paſch. 7 H. 6. 24. 37.

5. If the *king confirms W. N. in the advowſon of D. and wills by the ſame patent that he ſhall not be thereof vexed nor troubled*, and *he pleads it accordingly*, yet this is not double; per Cur. Br. Double Plea, pl. 117. cites 32 H. 6. 21.

6. If a man *pleads deviſe of goods, and that he took them by command of the executor*, this is not double; for the one cannot be without the other; for the deviſee cannot take them without command to take, or by delivery of them to him made. Contrary of gift of goods; for the donee may take them. Br. Double Plea, pl. 140. cites 37 H. 6. 30.

7. *Several cauſes of ſuſpicion of felony* are not double; for it is only a *conveyance to prove the cauſe to arreſt him.* Br. Double, pl. 148. cites 2 E. 4. 8.

8. Note, per Brian, if a *man makes two attornies in one and the ſame action conjunctim & diviſim*, they ought to join in plea; for if they *ſever in plea* it ſhall be ſaid double; quære. Br. Double, pl. 156. cites 12 H. 7. 10.

9. In

9. In *caſe againſt a ſheriff*; the plaintiff *declared that an execution was directed to him, by virtue whereof he had taken goods to the value of the debt, and had ſold them, and had not returned the writ.* Defendant * demurred, alleging that it was double; but per Cur. if *the one matter is depending on the other*, the declaration ſhall not be double, and here all is for not returning the writ. Goldſb. 96. pl. 13. Trin. 30 Eliz. Matthew's caſe.

10. *Inducement* does not make a plea double. Goldſb. 88. pl. 13. Paſch. 30 Eliz. White's caſe.

11. Whether, where the *words in a deed* are *ſufficient to paſs a thing by ſeveral means*, and they are *pleaded generally without ſhewing any election* which way the thing paſſes, whether this be a double plea, was doubted. Skin. 63. pl. 7. Mich. 34 Car. 2. B. R. in caſe of Pauling and Hardy.

12. Where *matter of fact and law* is aſſigned for error it is double, and plaintiff may have advantage of it on a demurrer, but after in nullo eſt erratum pleaded it is too late. Carth. 338. Hill. 6 W. 3. B. R. Edmonds v. Probert.

As to Agreement.

13. Note, By the beſt opinion, that where a *man ſuppoſes that he retained a carpenter to make a houſe, and that the carpenter aſſumed to do it*, &c. *or* that he *retained ſuch a ſervant to ſerve*, &c. to *which*, &c. *the ſervant agreed*, this is not double; for it is no bargain unleſs both parties aſſent. Br. Double, pl. 116. cites 11 H. 6. 18.

14. And per Newton, a man may *aver all matters agreed in an aſſumption in one and the ſame action.* Br. Double, pl. 116. cites 11 H. 6. 18.

15. As a man may declare of *all the covenants in one and the ſame indenture*, and it is not double; quod non negatur. Br. Double, pl. 116. cites 11 H. 6. 18.

Annuity.

16. *Annuity* was granted *pro conſilio & auxilio habend'*; the *defendant ſhewed that he had demanded counſel and aid of the plaintiff, who was a phyſician, and he would not give it*; and it was held that the demand de conſilio & auxilio is not double; for *the one depends upon the other.* Br. Double, pl. 20. cites 41 E. 3. 6.

Aſſiſe.

17. In aſſiſe the *tenant pleaded fine upon grant and render of the anceſtor of the plaintiff to two with warranty, and that the one releaſed to the other, who infeoffed the tenant*; judgment, &c. and *relied upon all the fine and warranty*, and admitted. Br. Double, pl. 38. cites 38 E. 3. 34.

18. *So* of a *deed with warranty.* Br. Double, pl. 38. cites 38 E. 3. 34.

19. *Contra* it is ſaid elſewhere *of feoffment with warranty*; for the feoffment may be without deed, and the warranty by deed. Br. Double, pl. 38. cites 38 E. 3. 34.

20. In aſſiſe, the *tenant pleaded the deed of the great grandfather with warranty to W. P. who infeoffed J. who infeoffed the tenant*; judgment, &c. The *plaintiff ſaid, that after this his great grand-*

father

father was ſeiſed, and died ſeiſed, and his grandfather entered, and died ſeiſed, and he entered as heir, and was ſeiſed, and diſſeiſed by the defendant, and relied upon the dying ſeiſed of his great grandfather, and nevertheleſs well, and otherwiſe double. Br. Double, pl. 37. cites 38 E. 3. 21.

21. *Aſſiſe of rent*; the *tenant ſaid, that A. brought aſſiſe of other land againſt B. father of J. which deed of grant of the rent is now ſhewn, and recovered the land and damages, and took elegit for execution of the damages, and had the moiety of the land put in view in execution, and pleaded all in certain*, (as he ought,) *and after A. who*
[185] *recovered leaſed his eſtate to the now tenant, and after B. granted the rent-charge now in plaint to the plaintiff his ſon and heir apparent, and after B. granted, ratified, and confirmed to the now tenant for term of their lives, and after B. by his deed ſhewn*, &c. *releaſed all his right to the tenant, and warranted the land to him and died, and* ſo *demanded judgment, becauſe the plaintiff as heir of B. the grantor is bound to warrant the land diſcharged, if againſt the deed of your anceſtor aſſiſe ought to be, and averred that execution is not yet incurred, and* it was held double, viz. *the execution before the charge*, and the *releaſe with warranty*, by which he relied upon the releaſe with warranty. Br. Double, pl. 87. cites 31 Aſſ. 13.

22. In aſſiſe, *leaſe for term of life*, and *releaſe of the leſſor with warranty*, was admitted for a good plea, and it was not excepted for the doubleneſs; for it ſeems that it *is only conveyance*, but the *plaintiff was not heir to the warranty*; for this countervails feoffment with colour. Br. Double, pl. 142. cites 37 H. 6. 16.

23. In aſſiſe, the *tenant pleaded a gift in tail, and confirmation in fee*, this is double. Br. Double, pl. 110. cites 30 H. 6. 9 E. 4. 4.

24. In aſſiſe, the *tenant pleaded in bar that J. S. was ſeiſed, and leaſed to A. for life, and after granted the reverſion to his father, and the tenant attorned and died, and the father entered and died, and the tenant entered as heir*, and gave colour; and per Cur. this *grant of the reverſion*, and the *entry of the heir* upon this title, are double, though he does not plead it as a dying ſeiſed; for if the father was diſſeiſed and died, and he re-entered, he is in as heir, and the entry of another tolled, and ſo double, by which he relied upon the grant of reverſion. Br. Double, pl. 29. cites 9 H. 4. 4, 5.

25. And there it was agreed, that where the *plaintiff alleges a dying ſeiſed* after, and the *tenant alleges a continual claim in his father, and another in himſelf after the death of his father*, it is double, by which he held him to the claim of his father. Br. Double, pl. 29. cites 9 H. 4. 4, 5.

26. *So* of a *leaſe for life and a releaſe*, it is double; for the one of the matters with colour to the plaintiff makes a good bar; ſo of a *grant of the reverſion* in aſſiſe, *and after the tenant ſurrendered, and the grantee died ſeiſed*, this is double; for the dying ſeiſed is ſufficient. Br. Double, pl. 110. cites 30 H. 6. and 9 H. 4. 4.

27. But *where the contention is between the heir of the donor or grantor, and the tenant upon the execution of the fee-ſimple*, there *he may plead both*, and it is not double; for he cannot do otherwiſe. Br. Double, pl. 110. cites 30 H. 6. and 9 H. 4. 4.

28. *In*

28. *In aſſiſe, and* divers *other actions of treſpaſs, two deſcents* are double; *but* it is ſaid there, that *in formedon* it is otherwiſe; for there the *gift* only is traverſable, and not the *deſcents*. Br. Double, pl. 16. cites 33 H. 6. 32.

29. In *aſſiſe*, the *tenant pleaded fine levied by the anceſtor of all in demand, and concluded to the moiety, and pleaded recovery or releaſe of the anceſtor of the whole, and concluded to the other moiety;* judgment if aſſiſe, and it was challenged for doubleneſs, and the beſt opinion was that it is not double, unleſs he concludes his plea to the whole, quod nota, by which the plaintiff paſſed over and made title. Br. Double, pl. 139. cites 37 H. 6. 23.

30. *Aſſiſe by two of the office of clerk of the crown in the Chancery,* and *to one the defendant ſaid that he was an alien born,* and *to the other, that there was no ſuch office,* and per Cur. the laſt plea goes to all, and therefore both make it double; for the laſt plea goes to both the defendants, and therefore he has pleaded a plea to both, and two pleas againſt the alien born, by which he amended his plea. Br. Double, pl. 152. cites 7 E. 4. 29. [186]

31. In aſſiſe, the *tenant ſaid that he himſelf was ſeiſed till by the plaintiff diſſeiſed, againſt whom he brought aſſiſe and recovered,* this plea is not double, per Huſſey Ch. J. and Fineux, and tot. Cur. conceſſit, and yet he alleged *ſeiſin and diſſeiſin,* and alſo a *recovery;* but the one is *conveyance* to the other. Br. Double, pl. 95. cites 9 H. 7. 23.

Br. Aſſiſe, pl. 382. cites S. C. —— Jenk. 182. pl. 68. cites S. C. by the judges in the Exchequer Chamber.

Audita Querela.

32. In audita querela, the *conuſor put two releaſes,* the *one general,* and the *other of the ſum in the ſtatute-merchant,* and therefore was compelled to keep to one; for each grows to all. Br. Double, pl. 63. cites 24 E. 3. 27.

So of feaſance by indenture, and releaſe of all actions, is double, and therefore he held him to the indenture, and yet it ſeems that the releaſe is not good; for releaſe of actions ſhall not ſerve for execution. Br. Double, pl. 123. cites 44 E. 3. 36.

Avowry.

33. Avowry *for rent reſerved between three ſiſters for equality of partition,* and the *plaintiff ſaid, that the place where the diſtreſs was taken was not parcel of the land put in partition, and that this is in the ſeiſin of the king,* and therefore double; per Cur. by which he *took the ſeiſin of the king by proteſtation, and the other matter by plea.* Br. Double, pl. 2. cites 2 H. 6. 14, 15.

34. Avowry *for homage and 20 s. rent,* the *plaintiff prayed aid,* and the *plaintiff and the prayee joined and ſaid that one A. was ſeiſed of the ſeigniory, whoſe eſtate the defendant has, and one B. was ſeiſed of the tenancy and of other land, whoſe eſtate the prayee has in the tenancy, to which B. the ſaid A. then lord, releaſed all his right that he had in the land, rendering 1 d. for all ſervices,* and demanded *judgment if for ſeveral ſervices,* &c. and not double, per Martin, viz. the *releaſe* and the *tenure of this land and other by one entire ſervice,* becauſe he *relied upon the releaſe,* judgment if for ſeveral ſervices,

vices, &c. quod admittitur, &c. Br. Double, pl. 4. cites 3 H. 6. 28.

35. In avowry the *defendant avowed becauſe* J. *lord of the manor of D. was ſeiſed of the ſervices*, &c. *and fine ſe levavit between him and one P. upon conuſance of right come ceo*, &c. *which P. granted and rendered to the ſaid J. for life, the remainder over to the avowant*, and *alleged ſeiſin in the tenant for life who is dead, and in him in remainder who now avows*, and the avowry was held double, becauſe he alleged a *ſeiſin in the lord of the manor in fee, and two others, the one in the lord for life, and another in him in the remainder*, where *one ſeiſin in the conuſor and another in the grantee for or in him in remainder ſuffices*; for they two are *as one and the ſame lord*, and therefore ſhall not allege it in both, &c. and therefore he amended the avowry. Br. Double, pl. 14. cites 20 H. 6. 7.

* S. P. Br. Double, pl. 121. cites 3 H. 6. 43.

36. Avowry *of a rent-charge*, the *plaintiff ſaid, that after the grant the avowant and J. were ſeiſed in fee, and enfeoffed A. B. who enfeoffed the plaintiff*, and this is ſingle plea and is not double, viz. the * *ſeiſin* and *feoffment*; for a feoffment cannot be pleaded without ſeiſin. Br. Double, pl. 89. cites 4 H. 7. 17.

37. *So in writ of aiel*, to ſay that *after the death of the grandfather the demandant himſelf was ſeiſed and infeoffed him*; per Townſend, Brian, and Haughes J. Br. Double, pl. 89. cites 4 H. 7. 17.

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38. Avowry *for* 10*s. due for two acres of land of the defendant*, the *plaintiff ſaid that he had of him theſe two acres, and two other acres by* 4*s. abſque hoc that he held the two acres by* 10*s.* and therefore double; per Keble; for he ought to take the one by proteſtation. Contra per Brian, and that the plaintiff cannot do otherwiſe, for the falſe avowry of the defendant ſhall not prejudice the plaintiff. Quære. Br. Double, pl. 93. cites 8 H. 7. 5.

39. The caſe on the pleading to an avowry was thus; *A. ſeiſed of the place where*, &c. *and other lands, granted* to the plaintiff 20 *l. per ann. in fee out of the other lands, with clauſe of diſtreſs, and after ſold the lands charged to the defendant, and to free them* of this incumbrance *granted a rent of* 20 *l. per ann. out of the place where*, &c. to commence *from the time that a diſtreſs for the* 20 *l. ſhould be taken in the lands charged, and ſhews how that at ſuch a day a diſtreſs was taken*; and therefore, &c. in bar of the avowry they come and *traverſe abſque hoc that any diſtreſs was taken for rent-arrear*, &c. to this they demur ſpecially, for that it is a complicated traverſe, whereas it ſhould be a point ſingle, and that riens-arrere, &c. and of this opinion was the Court, and ordered judgment, niſi they re-plead and pay coſts. Skinn. 63. pl. 8. Mich. 34 Car. 2. B. R. Amias and Chaplein.

Champerty.

Br. Champerty, pl. 6. cites S. C.

40. In champerty, the *defendant ſaid, that the plaintiff in the firſt ſuit for whom it is ſuppoſed that he maintained, was an alien born in Burgundy out of the king's allegiance, and can neither ſpeak Engliſh or Latin, and prayed this defendant, who could ſpeak his language, to obtain him men of law to be of his counſel, and where the ſame*

alien was in debt to this defendant, he granted him that if he recovered in this ſuit, that he ſhould be paid of the ſum ſo to be recovered, &c. *by which he gained him counſel*, which is the ſame maintenance, &c. and a good plea, and is not double; quod nota. Br. Double, pl. 58. cites 15 H. 7. 2.

Conſpiracy.

41. Conſpiracy *againſt two becauſe they procured A. to ouſt the plaintiff of his land, againſt which A. one J. N. recovered by ſcire facias, by which the plaintiff loſt his warranty*, and the *procurement*, and the *recovery* was not adjudged vicious for doubleneſs; for the procurement without doing more does not give cauſe of action. Br. Double, pl. 157. cites 42 E. 3. 1.

Covenant.

42. Covenant *for ouſting of a termor*, the *defendant juſtified by clauſe of re-entry for rent-arrear*, and the *plaintiff ſaid that there being a diſcourſe between him and the defendant, that the defendant ſhould be at table with him, and ſhould recoup his rent ſecundum ratam*, &c. *and that he was at table for ſo long time, which amounted to* 40 *s. of the rent, and as to* 4 *s. he tendered it to the defendant, and he refuſed and entered*, and this *diſcourſe* and the *tender* was held good, and not double; for the *one goes to part of the rent, and the other to the reſt*. Br. Double, pl. 27. cites * 47 E. 3. 77.

* All the editions of Brooke are as here, but the ſame is miſprinted.

43. In writ of covenant, a man may *allege as many covenants broken* as he will, and it is not double. Br. Double, pl. 94. cites 9 H. 7. 13.

Cuſtom.

44. Cuſtom *to tax a ſum for reparation of a church by aſſent of the pariſhioners* was not held double; but the *aſſent* is the effect, and the *cuſtom* ſhall enforce; per Thorp. Br. Double, pl. 24. cites 44 E. 3. 19.

Br. Cuſtoms, pl. 6. cites 44 E. 3. 18, 19.

Debt.

45. Debt *againſt executors* who *plead plene adminiſtravit & riens enter mains* the day of the writ purchaſed nor ever after, this is not a double plea; for *aſſets anſwer all*; quod nota; per Cur. Br. Double, pl. 3. cites 3 H. 6. 4.

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46. Where a *man ſhews bill of* 40 *l. to the collector of tenths, and he refuſes to pay*, by which *he brings debt*, the *collector ſhall plead that writ was directed reciting the act of parliament, becauſe the mayor of the ſtaple had lent to the king* 1000 *l. the which ſhall be firſt paid, and that the writ commanded him to pay to him* 300 *l. and another bill came to him by another of* 100 *l. before the bill of the plaintiff ſhewn, and beyond* 400 *l. he has not any thing in his hands to pay*; judgment &c. and the plaintiff demurred, and therefore was barred, and brought writ of error; and per Cur. the plea ſhall be good and not double as the plaintiff aſſigned, viz. the *act of parliament*, and that he *had only* 400 *l.* For the 400 *l.* is the matter, and the other is only the *recital and introduction*; and alſo it is a particular act whereof ſtrangers to it ſhall not be bound to take conuſance as of a general act. Br. Double, pl. 74. cites 37 H. 6. 15.

Br. Taile de Exchequer, pl. 3. cites S. C. accordingly.

47. Debt

47. Debt *upon obligation*, the *defendant ſaid that he is lay and not lettered, and the deed was not read to him by other days of payment, and alſo that he ſealed it and delivered it to T. N. as an eſcrow, to the intent that* if J. N. named in the obligation would ſeal it, then to deliver it as his deed, and if not, to retain it, and ſaid that J. N. ſealed it, and yet T. delivered it to the plaintiff, *and ſo not his deed*, and is not double, viz. the *nient literat'*, and the *delivery as an eſcrow*, becauſe he concludes non eſt factum, which is only the plea, and the other is but evidence; and a man *may allege* 20 *matters to avoid a deed when he concludes non eſt factum*; quod nota, per Cur. Br. Double, pl. 80. cites 38 H. 6. 13.

48. In debt, the *plaintiff counted that the prior of J. parſon of O. in proper uſe leaſed to him for ſix years, and he leaſed to the defendant for four years rendering rent, and for the rent-arrear*, &c. The *defendant ſaid that before this the prior leaſed to W. N. for* 10 *years the ſame year; and after he leaſed to the plaintiff, and after W. N. ſurrendered, to which the prior agreed, and after leaſed to the defendant for ten years, and that the vicar is endowed of the ſmall tithes, and leaſed them to the defendant alſo, and the plaintiff would have taken them, and the defendant would not ſuffer him*, and this was held double, viz. *the old leaſe* and *the endowment of the vicar*, by which he relied upon the old leaſe, and took the other by proteſtation. Br. Double, pl. 34. cites 9 H. 5. 8.

Br. Count, pl. 10. cites S. C.

49. The plaintiff comes and *counts upon an obligation of an abbot, predeceſſor ſealed with his ſeal only, and* counts *how the thing came to the uſe of the houſe*, and yet well and not double. Br. Double, pl. 10. cites 9 H. 6. 25.

50. *Debt upon obligation againſt executors*; per Danby, the *deceaſed made the defendant and A. his executors*, and died, after whoſe death *Alice adminiſtered as executrix, to whom the plaintiff by the deed*, &c. *releaſed, and after the defendant married the ſaid Alice*; and per Paſton, Aſcue, and Port. the plea is not double, viz. the *releaſe*, and that he has *another executor*; for it is not alleged that A. is alive, and he *concludes upon the releaſe to the action*; and per Cur. he may anſwer without abating the writ, by which the plaintiff ſaid, that not his deed, &c. Br. Double, pl. 52. cites 22 H. 6. 59.

51. Debt *upon obligation* which had *a condition that if the defendant was ready when he ſhould be warned at D. at the coſts of the plaintiff to account and to pay*, that then, &c. and *ſaid that he was not warned to come at the coſts of the plaintiff*, judgment, &c. per Perſey, the plea is double, viz. the *garniſhment*, and the *coming at the coſts*, &c. & non allocatur. For if there are *divers conditions in one defeaſance*, he ought to anſwer to all. Br. Double, pl. 124. cites 46 E. 3. 16.

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52. *Debt againſt an abbot upon an obligation ſealed* with the covent ſeal*, the *defendant ſaid, that the abbot impriſoned the prior, and menaced all the monks to make the obligation*, by which they made it; judgment; and it was held double, the *impriſonment* and the *menace*; by which he held him to the menace by award; for this

* Orig. (enter).— S. P. and yet the impriſonment of the prior

goes to all by reaſon of the menace of all; for the greater number ſuffices. Br. Double, pl. 54. cites 15 E. 4. 1, 2.

is no plea; for it was brought

againſt the abbot ſucceſſor of him who made the obligation, and ſo ſee that *two matters* ſhall be double, *though the one be no plea*, as a feoffment with warranty in aſſiſe; for a feoffment only is no plea, and therefore it is uſual to rely upon the warranty to avoid the doubleneſs. Br. Double, pl. 133. cites S. C.

53. *Debt upon obligation of* 10*l. with condition to pay* 5*l.* the *defendant pleaded payment to the bailiff of the plaintiff by his command, which came to the uſe of the plaintiff*, this is a double plea, by which he relinquiſhed the *coming to the uſe of the plaintiff*, and then a good plea; quod nota. Br. Double, pl. 107. cites 22 E. 4. 25.

54. *Debt upon obligation of* 40*l.* againſt D. who *ſaid that he had paid the* 40*l. and the plaintiff had re-delivered the obligation in lieu of acquittance, and after the plaintiff re-took it with force and arms*, judgment ſi actio. Per Vaviſor the plea is double, viz. the *payment* and the *re-delivery of the obligation* in lieu of acquittance. Per Colow, no; for it is *purſuant*, *as* to ſay that J. N. was *ſeiſed in fee, and enfeoffed him*, this is not double, viz. the *ſeiſin* and *feoffment* are not double. Per Keble, it is ſingle; for it ſhall not be ſaid double, but where the Court ſhall be inveigled to give judgment where the one part is found with the plaintiff, and the other with the defendant, or for the miſchief where the plaint anſwers to one part, and the defendant concludes to the other, and here there is not any of theſe points; for the payment is only for one conformity of the plea, and the one may *depend* upon the other, and that *payment* and *acquittance* is not double; quod fuit conceſſum. Townſend and Brian ad idem; for here the *payment is not iſſuable nor contrariant to the re-delivery of the obligation*, and ſo by all, it is not double, but becauſe the re-delivery is no plea, therefore the plaintiff recovered. Br. Double, pl. 88. cites 1 H. 7. 14.

55. *Debt upon obligation* which was *upon condition to ſtand to the arbitrement of J. N. ſo that he made it and delivered it to the parties by ſuch a day*, the *defendant ſaid that no arbitrement was made nor delivered before the day*, and this is double, per tot. Cur. For it is a good plea that he did not make any arbitrement by the day, and it is a good plea that he did not deliver the arbitrement before the day. Br. Double, pl. 90. cites 5 H. 7. 7.

56. And the ſame quod *non deliveravit arbitrium in ſcript'*, &c. where the ſubmiſſion is to be in writing. Br. Double, pl. 90. cites 5 H. 7. 7.

57. And ibid. in a note, *debt upon indenture*, the plaintiff *counted of ſeveral covenants broken*, and not double; for the defendant pleaded all performed, and the plaintiff ſhall ſhew one broken only, upon which the iſſue ſhall be joined. Br. Double, pl. 90. cites 5 H. 7. 7.

58. *Debt againſt a ſucceſſor of an abbot*, he *counted of the obligation of the predeceſſor, and of a contract which came to the uſe of the houſe*, this is double. Br. Double, pl. 161. cites 10 H. 7. 21.

59. *One action* of debt was brought *on two bonds*, and the defendant pleaded *non ſunt facta*, or per minas; and adjudged good by *one plea*. Noy, 132. Denton's caſe.

Deeds.

60. Where a man *pleads two deeds of the anceſtor of the plaintiff*, though none of them ſhall be a bar by itſelf, yet it ſhall be double and inſufficient. Br. Double, pl. 78. cites 21 H. 7. 10.

Deſcent.

* 61. Note per Brian & Cur. that *two deſcents of one tail* ſhall be double; for a man cannot traverſe the gift where there was ſuch gift in fact; and if he traverſes the one deſcent, the other may rely † upon the other. Br. Double, pl. 154. cites 20 E. 4. 3.

† Orig. (pur) and ſo are all the editions.

Detinue.

62. *Detinue of charters*, the *plaintiff counted of a bailment made by his father to re-bail to him or his heirs, and ſhewed how the land was given by his anceſtor, whoſe heir he is in tail, and that the reverſion is reverted to him as heir by the death of the tenant in tail without iſſue;* and this is double by three juſtices, viz. the *bailment* to re-bail to him or his heirs, and the *title to the land*, by which he *relinquiſhed the deſcent of the reverſion*. Br. Double, pl. 7. cites 9 H. 6. 4.

‡ S. P. per Newton. Br. Double, pl. 45. cites 19 H. 6. 11.

63. Note, that *in detinue of charters* the *plaintiff counted how the deed was delivered to the defendant to enſure the eſtate of the land, and ſaid that he is heir to the land*, &c. This is not double. ‡ Contra if he had ſaid that the deed had been *delivered to re-deliver* to the plaintiff, and that he is *heir to the land*; for this is two titles, nota differentiam. Br. Double, pl. 8. cites 9 H. 6. 14.

64. In detinue the *garniſhee came and ſaid that the two obligations in demand were delivered to the defendant upon condition, that if the plaintiff and garniſhee ſtood to the arbitrement of the defendant, and if*, &c. that *then each ſhould have his own obligation, but otherwiſe if any broke the award, and the other performed it, that he who performed it ſhould have both, and that they awarded that the plaintiff ſhould recover the profits of a manor from Midſummer to Michaelmas, and ſhould pay* 10 *marks to the ſaid garniſhee, and that the plaintiff ſhould make partition of the ſame lands and ſuffer the garniſhee to chuſe his moiety, and the plaintiff ſhall have the other moiety*, and *ſaid that W. the plaintiff did not make the partition, nor did he pay the* 10 *marks*, and prayed delivery of the obligation. Per Newton, Paſton, & Cur. the plea is double, the one that the plaintiff *did not make a partition*, the other that the plaintiff *did not pay to the garniſhee* the 10 marks; for *both entitles the garniſhee to the writings*. Br. Double, pl. 48. cites 21 H. 6. 18.

Dal. 30. pl. 9. S. C. held accordingly. —— S. C. cited 2 Lutw. 1492.

65. In *detinue* for goods bailed the defendant pleaded, that *after the bailment plaintiff married J. S. who during the eſpouſals releaſed* to the defendant, and held by all the juſtices not to be double, for he could not plead the refuſal without ſhewing the marriage. Mo. 25. pl. 85. Paſch. 3 Eliz. B. R. Audley's caſe.

Dower.

66. In *dower* the *tenant ſaid that he had nothing but in ward with W. N. of the grant of G. of whom the anceſtor of the infant ſon of the baron held in chivalry*, &c. Per Hals, the plea is double, one that he has *nothing but in ward*, and the other that he *held iointly*, and

and becauſe if he ſhall be compelled to hold to the one, he at another time ſhall loſe the other, therefore for the miſchief, he ſhall have the plea; per tot. Cur. Br. Double, pl. 33. cites 9 H. 5. 4.

Entry.

67. *Entry ſur diſſeiſin made to C. his couſin, whoſe heir he is, viz. C. was the daughter of T. ſiſter of the demandant,* the *tenant ſaid that J. brother of the demandant, whoſe heir the demandant is, was ſeiſed in fee, and gave to T. and A. in tail between whom C. was iſſue, and C. died without heir of her body, and J. your brother entered as in his reverſion and infeoffed the tenant, and after by his deed releaſed to us,* judgment if againſt the deed comprehending warranty, &c. and becauſe he *relied upon the deed with warranty,* therefore good, notwithſtanding that he alleged tail where the demandant demanded fee-ſimple, and the feoffment, and releaſe with warranty. Br. Double, pl. 65. cites 24 E. 3. 75. [191]

68. Entry *in nature of aſſiſe, defendant pleaded that he is in by leaſe for* 40 *years of the leaſe of the predeceſſor of the plaintiff by indenture, and ſo has he nothing but for term of years, and that the demandant himſelf is ſeiſed of the franktenement,* judgment of the writ, and per tot. Cur. this is a double plea, viz. *leaſe by indenture,* and that the *plaintiff himſelf is ſeiſed of the franktenement.* For if the plaintiff anſwers to the leaſe, the other may demur becauſe he does not deny but that he himſelf is tenant of the franktenement; and if he anſwers to the franktenement, the other may likewiſe rely upon the leaſe by indenture, which is eſtoppel; by which he was *awarded to hold him to the one,* and ſo he did, viz. that the plaintiff himſelf is tenant. Br. Double, pl. 68. cites 4 H. 6. 27. Thel. Dig. 215. lib. 15. cap. 3. ſ. 23. cites Trin. S. C.

70. *Entry in nature of an aſſiſe in* 100 *acres of land;* the *tenant ſaid that he had common there appendant to his manor of B. by which he put his beaſts in, abſque hoc that he claimed any thing but the common, and abſque hoc that he had other poſſeſſion or eſtate in the land, and that W. N. was tenant the day of the writ purchaſed, and yet is, not named in the writ;* judgment of the writ; and per Cotteſmore J. it is a good plea, and not double; for the common is nothing to the purpoſe, and the plea is a *ſpecial nontenure,* and the *common is mentioned to prove his entry into the land to uſe his common, and not to have franktenement in the land,* by which the plaintiff imparled. Br. Double, pl. 44. cites 8 H. 6. 33.

Eſcheat.

71. *Eſcheat upon ſeiſin of A. ſuppoſing that he died without heir;* the *tenant ſaid that A. had iſſue K. who entered and endowed the feme of A. and after releaſed to her, whoſe releaſe the tenant has;* judgment, &c. And by the beſt opinion the plea is double; for the *ſeiſin of the heir goes to the writ,* and the *releaſe conveyed the right, and goes to the bar,* by which he relied upon the laſt ſeiſin of K. the heir of A. to which the demandant ſaid, that the ſaid A. had no ſuch daughter as K. who ſurvived, &c. Br. Double, pl. 159. cites 11 H. 4. 10.

Forcible entry.

72. Treſpaſs of forcible entry; the *defendant ſaid that J. was ſeiſed, and gave to his father in tail, who died ſeiſed,* and *the land deſcended to him,* and *he entered and was ſeiſed till by the plaintiff diſſeiſed, upon whom he entered;* per Littleton, the plea is double, viz. the *gift* and *deſcent,* and Laicon and Priſot contra; for it is ſufficient to ſay that he was ſeiſed till by the plaintiff diſſeiſed, upon whom he entered, and *cannot ſay ſeiſed in tail without ſhewing how,* and therefore the reſidue is only *conveyance to it.* Br. Double, pl. 18. cites 3 H. 6. 15.

73. *Contra in aſſiſe,* and then if he *ſhews ſpecially how he was ſeiſed by tail,* as here, the plea is not the better, and *one anſwer may make an end of all,* viz. *ne dona pas;* by which the plaintiff replied, and the defendant imparled, &c. Br. Double, pl. 18. cites 3 H. 6. 35.

74. In forcible entry, the *defendant juſtified his entry by gift to J. for life, the remainder to his father in tail, who was ſeiſed, and died ſeiſed, and he entered as heir in tail;* the *gift in tail* and the *deſcent* is double, therefore he ought to take the one by proteſtation, and the other by matter in fact, quod fuit conceſſum; per Hody and Paſton, but it is not argued. Br. Double, pl. 129. cites 9 H. 6. 13.

[192] 75. Treſpaſs upon the ſtatute of *forcible entry;* the *defendant alleged bar,* and the *plaintiff alleged deſcent to him to avoid the entry of the defendant,* and *he avoided it by continual claim made by his predeceſſor, and by himſelf;* per Port. the plea is double; for if the anceſtor died in the life of your predeceſſor, then your claim is void, and if he died in your time, then the continual claim in the time of your predeceſſor is not good; by which he alleged continual claim in his time only, and that the anceſtor died in his time, and then well; quod nota; and otherwiſe double. Br. Double, pl. 50. cites 22 H. 6. 37.

Formedon.

76. In *formedon,* the *tenant pleaded a fine of the anceſtor upon conuſance of right with warranty,* and not double, nor was the tenant compelled to rely upon the one by award; for it is only one intire deed. Br. Double, pl. 25. cites 46 E. 3. 14.

77. In *formedon,* the *tenant ſaid that the donee was ſeiſed in fee till by the donor diſſeiſed, and after the donor married the donee to his daughter, and gave to him in tail, and compelled him by menace to take the gift, whoſe eſtate the tenant has, and ſo remitted to the fee ſimple; judgment,* &c. and per Culpepper and Martin, the plea is double, viz. the *diſſeiſin* and *remitter by repriſal,* and the *taking by menace:* contra per Hank. and that the diſſeiſin and repriſal is the effect. Brook ſays, contrarium videtur lex. Br. Double, pl. 31. cites 12 H. 4. 19.

78. In formedon in deſcender, the plaintiff declared of a gift in tail to his father who died, and that the land deſcended to demandant's elder brother, who alſo died without iſſue. The tenant pleaded *that the elder brother had iſſue a daughter, who levied a fine to him,* and he relied upon the fine and the proclamation.

S. C. cited 2 Lutw. 1492. in caſe of Pell v. Garlick. —12 Mod. 507. cites S. C.

It

It was objected that this plea was double, that the one is the iſſue, and the other is the fine. But per Cur. ſince he cannot come to the one without ſhewing the other, it ſhall not be double; beſides, here he relies upon the eſtoppel. Gouldſb. 88. pl. 13. Paſch. 30 Eliz. White's caſe.

Garniſhment.

79. Where a plea include double matter, as *garniſhment by the ſheriff to levy a fine*, and *garniſhment by the party*, this is double, *though one ſhall not be material.* Br. Double, pl. 127. cites 11 H. 4. 18. per Thirn. and Culpeper.

Juris Utrum.

80. In juris utrum the *tenant ſaid, that his father was ſeiſed and died ſeiſed, and the predeceſſor of the plaintiff abated, againſt whom he recovered in mortdanceſtor and entered, and ſo this is his lay-fee, and not the frankalmoigne of the plaintiff;* and this is not double, per Cur. viz. the *recovery* and the *lay-fee*, &c. for he ought ſo to conclude, becauſe it is a writ of right in its nature, and ſo in writ of right if he pleads a recovery he ſhall conclude, and ſo has he more than mere right. Br. Double, pl. 1. cites 19 H. 8. 7.

Maintenance.

81. In *maintenance*, the *defendant juſtified as attorney of the plaintiff*, and the *plaintiff ſaid, that the gave 10 s. to one jury, and 10 s. to another, to give verdict for his client*, and it is not double, per tot. Cur. becauſe *all* does not *prove but one ſpecial matter;* quod *miror!* Br. Double, pl. 114. cites 11 H. 6. 10.

Monſtraverunt.

82. In monſtraverunt, the *defendant ſaid that he held of a manor in the ſame vill, which is ſub titulo terræ epiſcopi de E. tempore E. regis & confeſſoris, and not in the manor of the ſame name contained in the book of Doomſday, ſub titulo terræ regis, and that the plaintiffs held of him at will*, and it was held double matter; *for each of them is a good bar.* Br. Double, pl. 19. cites 40 E. 3. 45.

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Replevin.

83. In replevin, *avowry* is made *for rent reſerved upon equality of partition made between two coparceners;* the *plaintiff ſaid that there were three coparceners, and the third was extra patriam tempore partitionis, and returned within age and entered, by which they made new partition*, &c. and the *re-entry* and new *partition* were ſuffered by award, and the plea ſingle; nota. Br. Double, pl. 62. cites 24 E. 3. 52.

84. In replevin, the defendant ſaid, that the *property of the beaſts is in another, and that he took them in another vill;* and this is double; quod nota. Br. Double, pl. 21. cites 42 E. 3. 18.

Thel. Dig. 214. lib. 15. cap. 3. ſ. 16. cites 42 E. 3. 19. S. C.

that the defendant was compelled to hold himſelf to the one. ——— *But* in replevin, *as to one ox*, the defendant *ſaid, that the property was to a ſtranger, and as to another ox, that he took it in another place, and in another vill*, &c. And this laſt plea was held double; for the one part of the plea goes to the place, and the other to the vill. Thel. Dig. 214. lib. 15. cap. 3. ſ. 16. cites Mich. 9 H. 6. 39.

Br. Avowry, pl. 8. cites S. C.

85. In replevin, the *demandant avowed by two avowries upon the plaintiff for two ſeveral tenures of two acres*, &c. *as upon tenant of fee-ſimple*, and the *defendant ſaid that the father of the defendant, whoſe*

whoſe heir, &c. *gave them to him in tail, to hold by one and the ſame tenure; judgment of the avowry ſuppoſing two ſeveral tenures*, and it is not double, viz. the *tenure of fee-tail*, and the *intire tenure*; becauſe he *relied upon the laſt*. Br. Double, pl. 12. cites 9 H. 6. 26.

86. In replevin, if a *man pleads two matters to the avowry, of which the one goes in the abatement of the avowry* to prove that they ought to have made another manner of avowry, *and the other matter goes in bar of the avowry*, this is double. Br. Double, pl. 158. cites 35 H. 6. 51.

87. In replevin, *where the defendant ought to have gaged deliverance*, he *ſaid, that the beaſts died in default of the plaintiff, where the defendant diſtrained for ſuch cauſe, and put them in open pound*, &c. the *plaintiff ſaid that the defendant eſloigned them to a place unknown, and there they died in default of the defendant*; & non allocatur; for it ſuffices to ſay that he *eſloigned* them only, which *ſhall be intended out of the county*, &c. and it is ſufficient to ſay that they died in default of the defendant; quod nota, per Cur. therefore two matters. Br. Double, pl. 91. cites 5 H. 7. 9.

88. In replevin, the *tenant in tail of a rent purchaſed the land and made a feoffment in fee of land diſcharged with warranty, and died, and aſſets is deſcended, the iſſue in tail was vouched for the rent*, and this matter is pleaded in bar of the avowry; and becauſe he *did not ſhew whether the anceſtor who made the feoffment with warranty was anceſtor collateral or lineal*, therefore per Cur. the bar is ill, and it *ſhall be intended anceſtor collateral*; per Vaviſor J. and then this and the *aſſets* are double, and he ought to have rehearſed the *warranty*, or upon one of them. Br. Double, pl. 78. cites 21 H. 7. 10.

Reſummons.

89. Reſummons *upon writ of ward againſt executors*, who *ſaid that the heir was of full age in the life of teſtator, and that they have fully adminiſtered*; and Wilby awarded the plaintiff to anſwer to the laſt plea, and awarded that the plaintiff ſhould recover the ward, and that they try the iſſue of fully adminiſtered for damages. Br. Double, pl. 61. cites 24 E. 3. 49.

Quare ejecit.

* 90. Quare ejecit infra terminum againſt B. *that C. was ſeiſed and leaſed to him for* 10 *years, and B. ejected him*; Port. ſaid, that *C. leaſed and entered, and enfeoffed us, and after the plaintiff made a regreſs, and after ſurrendered to us, and we entered, which is the ſame ejectment.* And per Newton and others, the plea is not double, viz. the *leaſe*, and the *feoffment*, and the *regreſs* of the tenant, and after the *ſurrender*; for he cannot come to plead the ſurrender without *conveying the reverſion* to him; quod nota. Br. Double, pl. 45. (bis) cites 19 H. 6. 55, 56.

* [194]

Recordare.

91. In recordare, the *leſſor avowed for a fine for alienation made by his tenant*; the *tenant pleaded that the lord was ſeiſed of the ſame land within time of memory, and by deed aliened to R. whoſe eſtate the plaintiff has, to hold to him by certain rent and ſervices pro omnibus ſerviciis et demand'*; and this held double, viz. the *unity of poſſeſſion*,

poſſeſſion, and the *deed to hold* ut ſupra; and yet he cannot plead the gift, but he ought to allege the ſeiſin in the donor or feoffor; nor can a man plead a deed of feoffment with warranty, but he ſhall mention both, but he ought to rely upon the warranty only, or rely upon the deed of gift in the caſe ſupra only, and then this is not double; quod nota; per Hank. & nemo negavit. Br. Double, pl. 32. cites 14 H. 4. 5.

Scire Facias.

92. Scire facias *out of a fine* by which *W. and K. his feme gave to M. in tail, ſaving the reverſion to K. and his heirs, of whoſe inheritance the land was, and that W. died, and K. married R. and* [*M.*] *died without iſſue, by which R. and K. brought the ſcire facias to execute the fine*, the *tenant ſaid that W. and K. were ſeiſed as in their reverſion after the death of M. and enfeoffed T. whoſe eſtate he has*; judgment ſi actio; per Wich. the plea is double, viz. *ſeiſin* by the reverſion after the tail determined, which is execution, and alſo *feoffment* after; per Thorp, the feoffment is the ſubſtance, and the ſeiſin is only *conveyance*, by which anſwer. Br. Double, pl. 36. cites 38 E. 3. 16.

93. By which the *plaintiff ſaid that another time he recovered upon ſcire facias upon the ſame fine againſt the ſame tenant, and after the execution he enfeoffed the ſame T. upon condition, and for the condition broken he entered, and the now tenant brought writ of diſceit, and reverſed the firſt judgment and execution, after which he was not warned and entered, and now the plaintiff brought other ſcire facias*; per Belk. the plea is double, one that the *feoffment is undone by the condition*, and another that his *ſeiſin is undone by writ of diſceit*; per Finchden, the concluſion is all upon the feoffment, by which other paſſed over. Br. Double, pl. 36. cites 38 E. 3. 16.

Treſpaſs.

94. In treſpaſs, the *defendant ſaid that the franktenement belonged to a ſtranger who leaſed to him for five years, which yet endure, by which he entered and did the treſpaſs*; judgment, &c. Godred ſaid the plea is double, viz. the *franktenement* is in a ſtranger, and he has a *leaſe* for five years, but tot. Cur. contra eum; for *the leaſe is only conveyance*. Br. Double, pl. 6. cites 3 H. 6. 50.

95. Treſpaſs upon the ſtatute of *foreſtalling at the port of C.* Paſton ſaid there is *no ſuch vill, hamlet, or place, known out of the vill and hamlet, but* is a place which *extends into divers vills*, viz. into A. B. and D. Per Strange, this is double, viz, *no ſuch vill* or place, &c. and alſo that it *is a place which extends into divers vills*, &c. Br. Double, pl. 40. cites 7 H. 6. 22.

96. In treſpaſs the *defendant pleaded arbitrement*, &c. who *awarded that he ſhould pay* 10 *l. to the plaintiff in ſatisfaction of the treſpaſs, which he has paid*; judgment and the plea good, and not double, viz. the *arbitrement* and the *payment*; for the one is *purſuant* upon the other; for per Martin, arbitrement is no plea if he does not plead it performed, or ſays that he has been at all times ready, and yet is, &c. Br. Double, pl. 43. cites 8 H. 6. 25. [195]

97. In *treſpaſs* the *defendant pleaded his franktenement;* the *plaintiff ſhall not ſay that before this J. N. was ſeiſed and enfeoffed A. who enfeoffed the plaintiff;* for it ſuffices to ſay, that A. was ſeiſed in fee and enfeoffed the plaintiff, &c. Br. Double, pl. 131. cites 19 H. 6. 32.

98. Treſpaſs *quare filium ſuum et hæredem rapuit et abduxit apud D. Defendant ſhewed by proteſtation that he had re-delivered the infant, and for plea, that the plaintiff married Jane P. and had iſſue the ſon, and J. died, and after it was noiſed in the country that the plaintiff was dead, and that the defendant as prochein amy of the infant ſaw the infant in ward, ſcil. ill-governed and out of good ward, in negligence of N. his nurſe, by which he took the infant as lawfully he might,* &c. and it is not double, ſcil. that he is *prochein amy,* and that the *infant was ill-governed;* for the one *depends upon the other,* but if he had not taken the re-delivery by proteſtation but for plea, then it had been double. Br. Double, pl. 47. cites 21 H. 6. 15.

99. Treſpaſs of a cloſe broken and graſs ſpoiled, the *defendant pleaded his franktenement;* the *plaintiff ſaid* that to this he ſhall not be received; for the *father of the plaintiff whoſe heir,* &c. *enfeoffed him with warranty by the deed which he ſhewed,* &c. Judgment if againſt the deed of his anceſtor which comprehends warranty he ſhall be received to ſay that it is a franktenement. The *defendant ſaid that R. N. was ſeiſed in fee, and enfeoffed him and his father and to the heirs of his ſon, and the father enfeoffed the plaintiff, by which he entered into the one moiety in the life of the father by alienation to his diſinheritance, and into the other moiety he entered after the death of the father for the diſſeiſin of this moiety;* per Newton, the plea is double; for if any of the iſſues are found for the defendant the plaintiff ſhall be barred; for if he enters into a moiety only, then the plaintiff is tenant in common with the defendant, and one tenant in common or joint-tenant cannot have action againſt the other. Br. Double, pl. 51. cites 22 H. 6. 50, 51.

100. *By which* the *defendant pleaded as above, and alleged the entry into the whole in the life of the father,* and the *plaintiff alleged the feoffment of the father with warranty as above, abſque hoc that R. enfeoffed the defendant and his father modo et forma,* and ſo ad patriam. Br. Double, pl. 51. cites 22 H. 6. 50, 51.

101. In treſpaſs, the *plaintiff counted that a leaſe for years, and a deed indented of it was deviſed to him by the leſſee, and he died, and the executors bailed to him,* &c. and it is not double, viz. the *deviſe* and the *bailment* of the executors, for the one is *conveyance* to the other; quod nota, per Cur. Br. Double, pl. 15. cites 27 H. 6. 8.

102. In treſpaſs, the *defendant preſcribed in a way to the market of B. and to the church of D.* and held double; quære inde; for it ſeems that he ought to claim the way as his title is; quære; for it is only the opinion of the reporter in a ſhort note. Br. Double, pl. 128. (bis) cites 28 H. 6. 9.

103. Treſpaſs

103. Treſpaſs *of aſſault and menace*, theſe words *dixit, retulit, & publicavit*, &c. make not any plea double or treble, per Cur. Br. Double, pl. 72. cites 37 H. 6. 20.

104. Treſpaſs *in land*, the *defendant juſtified for the third part for one cauſe, and for the two parts for another cauſe*, this is not double; for *it cannot be that the third part is in ſeveralty*, and then the plaintiff and defendant ſhall not be tenants in common; for if they were tenants in common, juſtification for the one part undivided ſuffices. Br. Double, pl. 141. cites 37 H. 6. 38. [196]

105. In treſpaſs, where *a* man *pleads a recovery and ſhews title, by which he recovers alſo*, this is double; per Littleton, which Danby J. denied; for the one is *ſubſequent* to the other. Br. Double, pl. 75. cites 39 H. 6. 24. & concordat 9 H. 7.

106. In treſpaſs *abatement* and *intruſion* are double, and yet it ſeems that both ſhall be of one and the ſame nature, and where a man pleads double plea, and relies upon the one, then it is not double. Br. Double, pl. 147. cites 39 H. 6. 27.

107. Treſpaſs upon the *caſe eo quod liberavit obligation' defend' ad ſalvum cuſtod' & reliberand' cum*, &c. *and that the defendant has broken it.* The *defendant ſaid, that it was bailed to him by the plaintiff to deliver to W. N. the which he has done, abſque hoc that he broke it*; per Priſot, the plea is double; for it is a good plea that it was delivered to him to deliver to W. N. which he has done; and then [if] he breaks the obligation, action is given to W. N. and not to the plaintiff, which is another matter of bar; by which Coke *ſaid* for the defendant *ut ſupra, abſque hoc that he broke the obligation before the delivery made to W. N.* and per Cur. now he *ought to ſhew what day he delivered it to W. N.* and *ſo he did, and traverſed ut ſupra*; then the plaintiff demurred, and the defendant ſimiliter, and it ſeems that this traverſe is pregnant, viz. the breaking before the delivery to W. N. Br. Double, pl. 84. cites 39 H. 6. 44.

108. In treſpaſs a *leaſe at will*, and a *licence to cut the underwood*, is not double; for tenant at will cannot cut underwood without licence. Br. Double, pl. 149. cites 2 E. 4. 22. Br. Treſpaſs, pl. 302. cites S. C.

109. Treſpaſs *of a cloſe broken*, viz. *two acres*, and the *defendant juſtified the breaking of one, and the entry* * [*into one*] *for one matter, and into the other for another matter*, and therefore double, per Cur. for he has juſtified two breakings; *quære*; for contra in treſpaſs upon 5 R. 2. Br. Double, pl. 153. cites 18 E. 4. 11. * All the editions are without thoſe words.

110. In treſpaſs where *deſcent is pleaded*, the *plaintiff pleaded diſſeiſin to his father by him who died ſeiſed, and that his father made continual claim and died, and after he made continual claim, and the diſſeiſor died ſeiſed within the year*, &c. and per Cur. he ſhall plead the one continual claim only, viz. of him in whoſe time the deſcent came. Br. Double, pl. 53. cites 15 E. 4. 22.

111. In treſpaſs it was agreed, that where a man *makes a bar or title by gift in tail of land or advowſon*, and *alleges divers deſcents or preſentations*, this is not double; for the traverſe of the gift anſwers to all. Br. Double, pl. 104. cites 19 E. 4. 4.——And yet

yet contra per Brian and Cur. 20 E. 4. fol. 3. but quære thereof. Ibid.

112. In treſpaſs, if a man makes *avowry or replevin or juſtification in treſpaſs for homage, fealty, ſuit, rent,* &c. this is not double; for this *is all one and the ſame tenure. Contra* if it be for a *rent-charge and rent-ſervice* in one and the ſame avowry. Br. Double, pl. 94. cites 9 H. 7. 13.

113. Treſpaſs *againſt ſeveral of a cloſe broken;* the *defendant ſaid that each of them has common there appendant to his franktenement ſeverally, by which they entered and broke,* &c. *to uſe their common,* and a good plea, per Cur. and not double; for *it ſhall be intended that each juſtified for his own intereſt, and none for the intereſt of his companion.* Br. Double, pl. 59. cites 15 H. 7. 10.

[197] 114. *But* in treſpaſs of a cloſe broken, *if the defendant ſays that A. has common there, and B. ſimiliter, and C. ſimiliter, and he as their ſervant, and by their commandment, put in the beaſts,* this is double, per Cur. Br. Double, pl. 59. cites 15 H. 7. 10.

115. *But* if he *ſays that he put in two beaſts for A. and three for B. and the reſt for C.* this is a good plea, and is not double, per Cur. Br. Double, pl. 59. cites 15 H. 7. 10.

116. In treſpaſs, it was agreed that where *one intitled himſelf that A. was ſeiſed in fee, and infeoffed B. who infeoffed C. who infeoffed D. whoſe eſtate the defendant has, and gave colour to the plaintiff by the firſt feoffor,* this is not double; and the reaſon ſeems to be, becauſe all theſe are only *conveyances.* Br. Double, pl. 60. cites 15 H. 7. 11.

Outlawry.

117. Defendant pleads *ten outlawries* againſt the plaintiff; this is double; for he is as much diſabled by one as by the other nine, to which ſeveral anſwers are required. Carth. 8. Trin. 3 Jac. 2. B. R. Trevillian v. Secomb.

Ward.

118. In ward, the plaintiff *counted that he held of him by homage, eſcuage, and ſervage, which gives ward by uſage of the country,* and therefore double; by which he was compelled to keep to the one. Br. Double, pl. 26. cites 46 E. 3. 25.

Br. Raviſhment de Garde, pl. 6. cites S. C.

119. If the defendant in raviſhment of ward *traverſe the title of the plaintiff, and makes title to himſelf,* this is not double, for he ought ſo to do; nota. Br. Double, pl. 28. cites 2 H. 4. 12.

120. Ward of land and body, the *defendant pleaded a feoffment,* and the *plaintiff alleged,* that it was by *colluſion, and* it was upon *condition to infeoff the heir at full age to toll him of his ward,* and therefore double, viz. the *colluſion* and the *condition,* by which he omitted the condition and held him to the colluſion, to which the defendant ſaid that it was bona fide, and not by colluſion; but per Cur. Trin. 4 H. 6. fol. 29. the plea pleaded in bar is not good if he does not *traverſe the dying in his homage.* Br. Double, pl. 5. cites 3 H. 6. 32.

S. P. but Brooke ſays miror inde; for by the

121. In ward, the *tenant pleaded jointenancy by fine to the anceſtor and to him, and that he is in by ſurvivor;* judgment, &c. The *plaintiff ſaid that the conuſor enfeoffed certain perſons to enfeoff the heir*

heir at his full age by colluſion to toll him of his ward, abſque hoc, that thoſe who were parties to the fine had any thing at the time levied, and it was held double, viz. the *colluſion* and the *voidance of the fine,* by which he held himſelf alone to the voidance of the fine. Br. Double, pl. 39. cites 7 H. 6. 20.

traverſe he relied upon one, and therefore it ſeems beſt that he plead the feoff-

ment without ſpeaking of the colluſion, and traverſe the ſeiſin at the time of the fine. Br. Double, pl. 130. cites 4 H. 6. 14.

Warrantia Chartæ.

122. Warrantia chartæ *quod de eo tenet et unde chartam ſuam habet,* this is not double lien but ancient form of the writ; quod nota per Cur. Br. Double, pl. 64. cites 24 E. 3. 74.

123. Scire facias *upon a fine, the plaintiff conveyed himſelf by deſcent to two coparceners, and from them to him,* and the *tenant pleads releaſe with warranty of theſe two parceners, judgment if contrary to the deed of his anceſtors, which compriſes warranty, action,* &c. the plaintiff ſaid that it was double by reaſon of the *two warranties,* and therefore he held him to the one, notwithſtanding that he pleaded according to the fine. Br. Double, pl. 35. cites 9 H. 5. 12, 13.

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124. If a man pleads *releaſe with warranty and relies upon the whole,* this is not double; for one anſwer may make an end of all. Br. Double, pl. 117. cites 32 H. 6. 21.

125. But *feoffment with warranty* is double if he does not rely upon the warranty; for feoffment may be without deed, and [paſſes] by two circumſtances. Br. Double, pl. 117. cites 32 H. 6. 21.

126. But *releaſe with warranty,* or *confirmation and grant that he ſhall not be vexed* as above, all this *paſſes by one deed or patent.* Br. Double, pl. 117. cites 32 H. 6. 21.

Waſt.

126. Waſt, *in grange* as *to a moiety the defendant decay before the leaſe,* and *as to the reſt it was uncovered by tempeſt, and before the defendant could repair it the plaintiff entered, and was ſeiſed the day of the writ;* judgment, &c. and per Hank. this is double, the *tempeſt* and the *entry* of the plaintiff. Contra per Hull, for the entry is all the matter; for the tempeſt is not waſt unleſs the defendant permits the timber to putrify after the tempeſt. Br. Double, pl. 30. cites 12 H. 4. 5.

127. Waſt, *in cutting* 10 *oaks, the defendant ſaid that the plaintiff granted the* 10 *oaks to R. C. and commanded the defendant to cut and deliver them to the ſaid R. C.* which he did. Per Markham, the plea is double, viz. the *grant* and the *commandment.* Per Newton and Paſton the plea is good; for it is *purſuant,* by which the plaintiff replied and denied the commandment; quod nota. Br. Double, pl. 49. cites 21 H. 6. 46.

(B) Allowed in what Caſes.

1. IN *aſſiſe of rent,* the tenant *cannot plead miſnoſmer of himſelf, and if it be found, hors de ſon fee,* &c. for the firſt plea is waived

waived by the other. Thel. Dig. 214. lib. 15. cap. 3. ſ. 1. cites Paſch. 3 E. 3. 78. 3 Aſſ. 9.

2. In *ſur cui in vita of a houſe and 2 s. rent*, the tenant *ſaid that the demandant had put in view only a houſe, and ſo he ſuppoſes that the rent is ariſing from this houſe, in which houſe he has nothing unleſs jointly with ſuch a one not named*; judgment of the writ, and held that he ſhall have the two pleas. Thel. Dig. 214. lib. 15. cap. 3. ſ. 2. cites Trin. 5 E. 3. 192.

3. In writ of *waſte* as to parcel, the tenant *falſified the demiſe ſuppoſed by the writ, in abatement of the writ, and as to other parcel he ſaid that it was within the vill* ſuppoſed by the writ, &c. and had both the pleas. Thel. Dig. 214. lib. 15. cap. 3. ſ. 5. cites Paſch. 8 E. 3. 402.

4. In *writ of entry*, the tenant pleaded *that one Tho. was ſeiſed and died ſeiſed, from whom the tenements deſcended to three daughters, and the tenant is iſſue of one of them, and he has the eſtate of the other by purchaſe, and one Ro. has the eſtate of the third by purchaſe, and ſo he holds in common pro indiviſo with Ro. not named*, &c. And held that he ſhall not have the two pleas, ſcil. the nontenure of the third part, and the tenancy in common of the whole. Thel. Dig. 214. lib. 15. cap. 3. ſ. 7. cites Trin. 8 E. 3. 218. Quære.

[199] 5. In *treſpaſs for a cloſe broken, brought by two, as to one of the plaintiffs the defendant ſaid that he was tenant in common of this cloſe with the plaintiff*, judgment of the writ, *and as to the other plaintiff, the defendant pleaded not guilty*, &c. Thel. Dig. 215. lib. 15. cap. 3. ſ. 21. cites 8 E. 3. 436. in mortdanceſter. Quære.

6. In *quare impedit*, the defendant may *plead darrein preſentment* to the writ, *and make title of right alſo to the preſentment*, and his plea ſhall be taken according to that which he concludes to the writ by the darrein preſentment, or action by the title. Thel. Dig. 215. lib. 15. cap. 3. ſ. 22. cites Mich. 8 E. 3. 426.

7. In *debt by two femes as executrixes of the teſtament of ſuch a one*, the defendant as to one *ſaid that ſhe was covert of baron the day of the writ purchaſed, and yet is, &c.* and *as to the other that ſhe has taken baron pending the writ*, &c. and had both the pleas, but the iſſue was taken upon the one. Thel. Dig. 214. lib. 15. cap. 3. ſ. 8. cites Mich. 8 E. 3. 441. Mich. 9 E. 3. 477.

8. In *aſſiſe of rent* the tenant *pleaded miſnoſmer of the vill, and* if it be found, &c. *that another is tenant of the rent not named*, &c. Thel. Dig. 214. lib. 15. cap. 3. ſ. 10. cites Mich. 15 E. 3. Aſſiſe, 95.

9. The tenant *pleaded non-tenure of parcel, and ſhewed who was tenant, and as to the other parcel pleaded non-tenure alſo by reaſon of recovery, and execution ſued againſt him pending the writ*, and had both the pleas. Thel. Dig. 214. lib. 15. cap. 3. ſ. 11. cites Trin. 15 E. 3. Brief, 285.

10. In *treſpaſs of beaſts taken*, the defendant cannot *plead that the deliverance is made by replevin in the county, and alſo juſtify as diſtreſs*, &c. Thel. Dig. 214. lib. 15. cap. 3. ſ. 12. cites Mich. 17 E. 3. 585.

11. In

11. In *writ of aiel* the tenant was received to *plead laſt ſeiſin in his father who was ſon and heir to the grandfather, and that the demandant was ſon and heir to the younger ſon of the grandfather, and ſo he could demand nothing.* Thel. Dig. 214. lib. 15. cap. 3. ſ. 9. cites Hill. 10 E. 3. 483.

12. In *aſſiſe* the *tenant ſaid that he had another ſurname, and pleaded jointenancy with one not named,* &c. And held good without ſaying that he is the ſame perſon, &c. and the plaintiff cannot reply to the miſnoſmer but to the jointenancy. Thel. Dig. 214. lib. 15. cap. 3. ſ. 4. cites Mich. 5 E. 3. 215. and ſays, ſee 22 Aſſ. 1.

13. A man ſhall plead *nontenure of parcel of which another is tenant, and alſo that the demandant himſelf is ſeiſed of parcel.* Thel. Dig. 214. lib. 15. cap. 3. ſ. 13. cites Mich. 19 E. 3. Brief, 244. And that a man ſhall plead 20 *nontenures to the writ, but* the tenant was *not* received to plead *nontenure of parcel and jointenancy of parcel* alſo. Paſch. 22 E. 3. 6.

14. In *writ of aiel* it is ſaid that the tenant may *plead laſt ſeiſin in the demandant, and* after *waive this and plead laſt ſeiſin in the father of the demandant.* Thel. Dig. 214. lib. 15. cap. 3. ſ. 14. cites Paſch. 32 E. 3. Nuper obiit, 2.

15. In *aſſiſe of common,* the *defendant ſaid that the land in which,* &c. *is 60 acres, and that the grantor had nothing in the land unleſs in five acres at the time of the condition,* and *to the five acres that the grantee of the common who granted his intereſt to the plaintiff had nothing in the common at the time of the gift,* and had both the pleas; for the one plea goes to the five acres, and the other plea to the reſt, contra if each plea had been pleaded to the whole. Br. Deux Plees, pl. 31. cites 37 Aſſ. 14.

16. *Debt againſt executors* who *pleaded acquittance as to parcel, and fully adminiſtered as to the reſt,* and both were ſuffered, quod nota. Br. Deux Plees, pl. 27. cites 28 E. 3. 91. [200]

17. *Three iſſues were permitted in alleging that the bailiffs of the franchiſe after conuſance of the plea granted had failed of right to the plaintiff,* inaſmuch as it *confirms the juriſdiction of the court of the king, and the king is as party to it,* the plea of which ſhall not be challenged for doubleneſs. Br. Double, pl. 119. cites 40 E. 3. 11. Br. Conuſance, pl. 10. cites S. C.

18. In *dower* the *tenant ſaid that baron had nothing unleſs in ſpecial tail to him and his firſt feme,* the *remainder to J. N. in tail,* the *remainder to the baron in fee,* the *baron died, and* he in the *meſne remainder ſurvived,* the *demandant ſaid to parcel nient compriſe,* and *to the reſt that he in remainder did not ſurvive the baron, by which the baron was ſeiſed in fee; for he had no iſſue by the firſt feme,* and he had both the pleas, and yet if the baron ſurvived ſhe ought to have dower. Br. Deux Plees, pl. 34. cites 46 E. 3. 16.

19. In *ward of land and body,* the *defendant as to the body pleaded delivery by the plaintiff himſelf upon certain conditions performed to redeliver, and otherwiſe to retain him,* &c. and *to the land that the anceſtor in his life infeoffed J. N. que eſtate he has,* and becauſe this laſt plea goes to all, therefore per Cur. he was drove to the one, by which he held him to the feoffment. Br. Deux Plees, pl. 2. cites 3 H. 6. 32. But ſee 4 H. 6. 29. the plea is not good if he does not *traverſe the dying in his homage.* Per Cur.

20. In

20. In *dower againſt one Jo.* he *ſaid, that he and one Ro. not named, held the tenements jointly as guardians in chivalry by the nonage of ſuch an one heir*, &c. Judgment of the writ, &c. And adjudged that he ſhould have the plea, &c. notwithſtanding that it is double, viz. that he was guardian not named guardian, and the jointenancy. Thel. Dig. 215. lib. 15. cap. 3. ſ. 17. cites Paſch. 9 H. 5. 4.

21. In *dower*, the *tenant ſaid, that he had nothing but in ward with W. N. of the grant of G. of whom the anceſtor of the infant, ſon of the baron, held in chivalry*, &c. per Hals, the plea is double, one that he has *nothing but in ward*, and the other that he *holds jointly*; and becauſe if he ſhould be compelled to hold to the one, he at another time ſhould loſe the other, therefore for the *miſchief* he ſhall have plea; per tot. Cur. Br. Double, pl. 33. cites 9 H. 5. 4.

22. It is held, that *in appeal of death*, the defendant may *plead that there is another appeal pending, and nul tiel vill, &c. alſo, and miſnoſmer of himſelf, and nul tiel vill*, &c. and pray allowance of them, &c. *and as to the felony plead not guilty.* Thel. Dig. 215. lib. 15. cap. 3. ſ. 18. cites Hill. 4 H. 6. 15.

23. A *rule* is laid down, that when a man has two *matters*, he may plead either of them, and if he *cannot come at one without alleging the other*, the alleging it will not make his plea double; Arg. 12 Mod. 507. in caſe of Pell v. Garlick, cites 5 H. 7. 38.

24. In *ſcire facias out of a fine*, the tenant *pleaded that it was once executed, and alſo that he is in by tail made before this fine*, and held that he ſhould have both. Thel. Dig. 214. lib. 15. cap. 3. ſ. 15. cites Paſch. 32 E. 3. Scire Facias, 102. 145. and 18 H. 6. 3.

25. *Aſſiſe by the maſter and confreres of the fraternity of the* nine orders of the angels in B. in the county of Middleſex, the *defendant ſaid that there is not any ſuch corporation by the name ut ſupra in the ſame county, and if*, &c. *nul tort*, &c. and was not ſuffered to have both, for the firſt plea goes in bar, and he *ſhall not have the bar and alſo a general iſſue*, quod nota, per Cur. Br. Barre, pl. 91. cites 22 E. 4. 34.

26. Where double plea is pleaded, and the *demandant relies upon the one article, and ſo to iſſue*, there no party ſhall have advantage of the doubleneſs afterwards. Br. Repleader, pl. 18. cites 22 H. 6. 14.

[201] 27. Where there is *but one tenant, and one defendant*, he *cannot have two ſuch pleas as each of them do go to the whole; but where* there are *divers, each* of them *may plead ſeveral pleas*, which extend to the whole. Co. Litt. 303. a.

28. The *plea which contains duplicity*, or multiplicity *of diſtinct matter to one and the ſame thing whereunto ſeveral anſwers* (admitting each of them to be good) *are required, is not allowable in law*; and this rule *extends* to pleas perpetual or peremptory, and *not to pleas dilatory*; for in their time and place a man may uſe divers of them. Co. Litt. 304. a.

29. Double

29. Double or treble pleas are allowable *in an aſſiſe of novel diſſeiſin, mortdanceſtor, juris utrum, attaint,* or *certificate of aſſiſe,* which would have juries returnable on the firſt day before any plea pleaded; for theſe are feſtina remedia; but double pleas are not allowable in other actions; for there is an original writ, plea, and iſſue, and upon this a venire facias, &c. and a trial. Jenk. 75. pl. 43. cites 3 H. 4. 2.

30. *Preſcription* by freeholders, *and cuſtom by copyholders,* may be joined in one plea. Lev. 269. Trin. 21 Car. 2. B. R. Potter v. North.

31. Duplicity is not a good exception to a plea *in abatement;* but in plea *in bar* duplicity of matter makes the whole void; admitted. But the Court took a *difference* between a plea of *outlawry in diſability,* and *other pleas in abatement,* and that a plea of ten outlawries is double, becauſe a plaintiff is diſabled as well by one as by the other nine. Carth. 8. Trin. 3 Jac. 2. B. R. Trevilian v. Secomb.

Ibid. cites Co. Litt. 304. and 4 H. 6. 16. a.

32. One defendant could not plead two pleas that went to the whole (but now by 4 & 5 *Annæ* for amendment of the law he may). 1 Salk. 218. pl. 3. Mich. 5 W. & M. in B. R. Combe v. Talbott.

33. 4 & 5 *Annæ, cap.* 16. *ſ.* 4. enacts, that *it ſhall be lawful for any defendant or tenant, or plaintiff, in any replevin, in any court of record, with leave of the court, to plead as many ſeveral matters as are neceſſary.*

Plaintiff brings a writ of error to reverſe a common recovery. Defendant moved for liberty to plead double. The motion was oppoſed, becauſe the act for the amendment of the law, whereby a defendant, by the leave of the Court firſt obtained, may plead double, was not to be underſtood of a defendant in a *writ of error,* but a defendant in an original action. But it was inſiſted upon by the counſel on the ſide with the motion, that this act did extend to the defendant in a writ of error, as well as in an original action; that the one might have as great occaſion of pleading double as the other. That it had lately been reſolved, that a writ of error did not abate by the death of one of the plaintiffs, whereas, as the law ſtood before that act of parliament, it would. That by the ſame reaſon by which the word plaintiff, in that part of the act of parliament, was to be extended to a plaintiff in error, the word defendant ſhould likewiſe. It was further urged, that the pleading double was at their own peril; for if the Court had not power by this act of parliament to grant them leave to plead double, the other ſide may demur. And to this opinion the Court inclined; but the Court made their motion fruitleſs, by declaring, that one of the things they deſigned to plead did upon the record appear to be falſe. 10 Mod. 326. Paſch. 2 Geo. B. R. Hurtſon v. Aglionby.

The Court was moved for leave to plead and *demur,* but refuſed the ſame; for demurring is not pleading. 10 Mod. 280. Hill. 1 Geo. B. R. Hayſon & al' (Aſſignees) v. Jeffreys.

An *heir* ſhall not have leave to plead *riens per deſcent* with another plea, except he make *affidavit* that he has riens per deſcent; nor ſhall an *adminiſtrator* have leave to plead *plene adminiſtravit, and no aſſets,* without an affidavit that he has no aſſets. 10 Mod. 334. Trin. 2 Geo. B. R. Carrington v. Warren.

34. Upon a writ of error brought upon a *judgment* in C. B. *in a formedon in remainder* for lands in Lincolnſhire, the caſe was this, viz. Sir Edward Huſſey the *demandant counted of a gift by Sir Thomas Huſſey* to J. B. R. M. and T. L. Eſq. *in fee, to the uſe of the ſaid Sir Thomas, and the heirs male of his body begotten upon the body of S. his wife,* and for default of ſuch iſſue, *to the uſe of the heirs male of the body of the ſaid Sir Thomas,* and for default of ſuch iſſue, *to the uſe of William Huſſey, Eſq. for life,* and after his deceaſe *to the uſe of the firſt and every other ſon of the ſaid William in tail male,* and for default of ſuch iſſue, and if the ſaid Williams's wife ſhould be with child at the time of his deceaſe, and

Comyns's Rep. 260. pl. 143. S. C. but no judgment.

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and ſuch child ſhould be a ſon, *to the uſe of* ſuch *poſthumous ſon, and the heirs male of his body*, and for default of ſuch iſſue, *to the uſe of Sir Edward the demandant*, and that the ſaid *William H. died in the life-time of the ſaid Sir Thomas without heir male* of his body, *and* that *there was not any poſthumous ſon* of the ſaid William, and that afterwards the ſaid *Sir Thomas died without heir male of his body*, ſo that the right remained in the ſaid Sir Edward the demandant, &c.

The tenants, having obtained liberty to plead double, *pleaded* 1ſt, *that* the ſaid *Sir Thomas being ſeiſed* of, &c. *in fee the 8th Decemb.* 1682, *by indenture of bargain and ſale* between the ſaid Sir Thomas of the one part, and the ſaid J. B. R. M. and T. L. by the name of T. L. of London, merchant, of the other part, *bargained and ſold to the ſaid J. B. R. M. and T. L.* the, &c. *for one year*, from the day next before the date of the ſaid indenture, by virtue of which indenture of bargain and ſale, &c. the ſaid J. B. &c. were poſſeſſed, &c. *and that on the 9th of December* 1682, *by another indenture made between the ſaid Sir Thomas and ſeveral others* (naming them) *of the one part, and the ſaid J. B. R. M. and T. L.* by the name of as above, *of the other part*, the ſaid *Sir Thomas releaſed his reverſion* of the, &c. *to the ſaid J. B. R. M. and T. L. and their heirs, to the uſe of the ſaid Sir Thomas for life, without impeachment of waſte, and after his deceaſe to the intent that S. his wife ſhould receive 600 l. per annum for her life.* And as to the ſaid, &c. charged with the ſaid 600 l. per ann. after the deceaſe of the ſaid Sir Thomas, to the uſe of the ſaid J. B. R. M. and T. L. for 500 years, upon truſt, &c. And after the determination of the ſaid term, to the uſe of the heirs male of the body of the ſaid Sir Thomas, begotten upon the body of his ſaid wife, and for default of ſuch iſſue, to the uſe of the heirs male of the body of the ſaid Sir Thomas, and for default of ſuch iſſue, to the uſe of William Huſſey of London, merchant, brother of the ſaid Sir Thomas, for life, and after his deceaſe to the uſe of the firſt, and every other ſon of the ſaid William in tail male, and for default of ſuch iſſue, and if the ſaid William's wife ſhould be with child at the time of his death, and ſuch child ſhould be a ſon, to the uſe of ſuch poſthumous ſon, and the heirs male of his body, and for default of ſuch iſſue, to the uſe of the ſaid Sir Edward the demandant for life (with divers uſes over by way of remainder); and that *by the ſame indenture of releaſe it was provided, that the ſaid Sir Thomas might revoke, or alter all or any of the uſes or eſtates in the ſaid releaſe, and declare and limit any other uſes or eſtates*, as to the ſaid Sir Thomas ſhould ſeem meet; and that *on the* 12 *Feb.* 1 *Jac.* 2. *the ſaid Sir Thomas, in purſuance of the ſaid power, by a writing ſigned and ſealed, &c. revoked the ſaid uſe and eſtate limited to the ſaid Sir Edward* the demandant, *and that afterwards*, viz. 1 *May* 1701, *the ſaid Sir Thomas, by another writing ſigned and ſealed, &c. revoked all the uſes and eſtates limited by the ſaid releaſe concerning the lands in queſtion, and limited the uſe thereof to himſelf in fee, and died ſo ſeiſed, upon whoſe death the lands deſcended to the defendants as his heirs*, &c. *abſque hoc that the ſaid Sir Thomas gave the lands* in queſtion, *modo & forma as the demandant has alleged, &c.*

And

And the *ſaid tenants for their ſecond plea pleaded the ſame matter in bar, concluding with an hoc parat' verificare*, &c.

* The demandant averred, that the ſaid William Huſſey, Eſq. and the ſaid William Huſſey of London, merchant, brother of the ſaid Sir Thomas, are the ſame perſons, and demurred to the pleas, and for cauſe ſaid, that the ſeveral matters pleaded by the tenants were inconſiſtent and repugnant in themſelves, and every of the ſaid pleas are either contradictions to itſelf, or to the other, (viz.) the ſecond plea was repugnant to the firſt in this, that the ſecond ſuppoſed and confeſſed the gift of the lands in queſtion as the demandant alleged, and upon that ſuppoſition it was founded, otherwiſe it was ſuperfluous, and to no purpoſe, and the inducement to the traverſe in the firſt plea ſuppoſed the gift to be made to the ſame effect contained in the writ and count, though not in the ſame words, and upon that ſuppoſition the ſaid power of revocation, and the revocation of the uſe and eſtate limited to the ſaid Sir Edward, were in both the pleas (though inſufficiently) pleaded, yet the ſaid gift, as alleged by the ſaid Sir Edward, was by the firſt plea traverſed and denied, and ſo the firſt plea repugnant to itſelf, and to the ſecond plea; and where in the ſaid pleas after the pleading of the indenture of bargain and ſale it was ſaid, by virtue of which indenture of bargain and ſale, &c. whereas it ought to have been ſaid, by virtue of which bargain and ſale, &c. and not by which indenture, &c. Alſo the tenants did not produce nor allege to have produced the writings mentioned to be ſealed with the ſeal of the ſaid Sir Thomas, whereby the uſes aforeſaid were alleged to be revoked. Moreover, if the firſt plea was not repugnant as aforeſaid, it at the beſt only amounted to the general iſſue, and ſo ought to have been pleaded generally; and though it was lawful for the tenants with licence to plead ſeveral matters, no one can plead ſeveral matters which are inconſiſtent, or the ſame matter ſeveral ways.

Laſtly, that the pleas were inſufficient, becauſe it did not appear whether William Huſſey named in them, and William Huſſey named in the writ and count, were the ſame perſon or divers, nor whether the ſaid William, at the time of the firſt revocation, was dead without heir male of his body, or leaving ſuch iſſue, or was then alive. The tenants joined in demurrer, and in C. B. the pleas were held good, and judgment given for the tenants.

The demandant brought writ of error, and aſſigned the general error, and alſo the ſaid matters ſhewn for cauſe of the demurrer, and upon argument the whole Court held the pleas good, and as to the repugnancy of the ſaid pleas which was the chief point inſiſted upon, held that the ſaid pleas were conſiſtent; for both the pleas conſiſted of the ſame matter, though it was pleaded with divers views, and to divers intents, the reaſon whereof was, becauſe the tenants doubted whether the deed, being ſomething various in its limitations from the gift counted upon,

would be adjudged the ſame gift, and therefore got leave to plead double, to the end they might be ſafe, whether the deed was adjudged the ſame, or not the ſame, gift whereupon the demandant counted. Judgment affirmed. MS. Rep. Hill. 3 Geo. B. R. Huſſey v. Huſſey.

So in caſe upon ſeveral promiſes, viz non aſſumpſit and the ſtatute of limitations.

35. Double plea was allowed on a promiſe of marriage, viz. *non aſſumpſit and infancy.* Gibb. 175. pl. 23. Paſch. 3 Geo. 2. B. R. Holt v. Ward.

Gibb. 189. pl. 1. Hill. 4 Geo. 2. B. R. Decoſta v. Carteret.

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36. A motion was made for liberty to *rejoin double*, as being within the equity of the act, which allows pleading double. But the court ſaid, that they thought that this would be intirely inconvenient and out of the reaſon of the act, and therefore refuſed it. 2 Barnard. Rep. 6. Trin. 5 Geo. 2. Anon.

Caſes of Pract. in C. B. 154. S. C. accordingly.

37. A rule to plead double, viz. *non aſſumpſit* and a *general releaſe*, was diſcharged becauſe theſe pleas are *contradictory*. Notes in C. B. 228. Hill. 6 Geo. 2. Gibſon v. Cole.

Caſes of Pract. in C. B. 154. S. C. accordingly.

38. In *treſpaſs* for entering of plaintiff's cloſe and pulling down a weare. Defendant moved to plead double, viz. *liberum tenementum* and a *juſtification* of pulling down the weare *as a nuſance*, and a rule niſi was obtained; but was afterwards on hearing counſel on both ſides diſcharged by the Court, the matters prayed to be pleaded being inconſiſtent. Notes in C. B. 229. Trin. 6 & 7 Geo. 2. Halſey v. Feltham.

Caſes of Pract. in C. B. 154. S. C. accordingly.

39. Defendant obtained a rule niſi to plead double, *non aſſumpſit* and *non aſſumpſit infra ſex annos*. Plaintiff ſhewed for cauſe, that the rule to plead was expired before the motion to plead double was made; but Court held that defendant was *proper to move to plead double any time before judgment ſigned.* Notes in C. B. 229. Mich. 7 Geo. 2. King v. Boſwell.

Caſes of Pract. in C. B. 154. S. C. and the motion denied.

40. Action was brought *againſt an inn-keeper for detaining two horſes* of the plaintiff's. It was moved to plead double, viz. *not guilty*, and an *accord and ſatisfaction*, and would have compared it to non aſſumpſit, and non aſſumpſit infra ſex annos. The court denied to make any rule, the matters prayed to be pleaded being *contradictory*. Notes in C. B. 230. Hill. 7 Geo. 2. Durſley v. Cole.

41. A rule was made for plaintiff to ſhew cauſe why defendant ſhould not plead double, viz. *non aſſumpſit* and *non aſſumpſit infra ſex annos*. Plaintiff on ſhewing cauſe, produced an affidavit *that defendant had not appeared*, and conſequently not being in court was not proper to make the motion, and the rule was diſcharged. Notes in C. B. 233. Mich. 8 Geo. 2. Benn v. Geary.

Caſes of Pract. in C. B. 153. S. C. ſays that the motion was granted.——See the note at the next plea.

42. It was moved to plead double, *non aſſumpſit* and *plene adminiſtravit*, which was denied by the court, *no affidavit* being *produced that defendant had fully adminiſtered.* Notes in C. B. 234. Mich. 8 Geo. 2. Heathfield v. Allen.

43. On

43. On motion to plead double, *ſolvit ad diem* and *riens per deſcent*, it was objected that an *affidavit of the fact* as to riens per deſcent ought to be produced from the heir, as from an executor or adminiſtrator in a plene adminiſtravit, and the objection was held good. No rule. Notes in C. B. 234. Mich. 8 Geo. 2. The Burgeſſes of Wiſbech v. Frier.

Caſes of Pract. in C. B. 153. S. C. and ſays that the motion was granted.—Ibid. 154. The reporter adds a note that affidavit muſt be made by the executor or adminiſtrator that he hath fully adminiſtered, and by the heir that he has nothing by deſcent, before motion.

44. Defendant *non aſſumpſit infra ſex annos*, and *plaintiff demurred* to the plea; the matters in queſtion *being actions between merchant and merchant*; and *defendant* thereupon *moved to add to his former plea a general non aſſumpſit upon payment of coſts*; but this was *denied*. Notes in C. B. 234. Hill. 8 Geo. 2. Peirſon v. Ives.

45. Motion to plead double, viz. *non aſſumpſit*, and *ſeveral matters ſet off againſt plaintiff's demand* was denied per Cur. as *contradictory*. The general iſſue muſt be pleaded with notice to ſet off purſuant to the ſtatute. Notes in C. B. 236. Paſch. 8 Geo. 2. Jarratt v. Robinſon.

46. A motion to plead double, viz. *nil debet* and *nil habuit in tenementis* was refuſed. Per Cur. the latter may be given in evidence upon the former. Notes in C. B. 236. Trin. 8 & 9 Geo. 2. Marſhal v. Lawrence.

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Caſes of Pract. in C. B. 154. S. C. accordingly.

47. In a prohibition it was moved to plead double, viz. *that J. C. &c. named in the declaration at a meeting, &c. did not make up a true and juſt account* &c. *and that the account mentioned in the declaration was not examined, allowed, and approved by the veſtry*; and the ſame was granted on hearing counſel on both ſides. Caſes of Practice in C. B. 122. Mich. 9 Geo. 2. Coates v. Smith and Midgeley.

48. In treſpaſs it was moved for defendant for leave to plead doubly, viz. *non cul'* and *liberum tenementum* of the liberty of St. Catherine's, and obtained a rule to ſhew cauſe, which was afterwards made abſolute upon an affidavit of ſervice, no cauſe being ſhewn. Notes in C. B. 241. 10 Geo. 2. Stibbs v. Neeves.

Caſes of Pract. in C. B. 153. S. C. the motion was granted and not oppoſed.

49. In replevin the Court gave leave to plead doubly, viz. *that plaintiff in replevin had not property*, and a *juſtification as a diſtreſs for rent*. Notes in C. B. 244. Mich. 10 Geo. 2. Bird v. Spincks.

Caſes of Pract. in C. B. 153. S. C. accordingly.

50. *After* a judge's *order for time to plead, pleading an iſſuable plea*, defendant moved to plead double matter, and the queſtion was, whether a rule for that purpoſe ought to be granted or not? The Court took time to conſider, and after conferring with the judges of the other courts, gave defendant leave to plead doubly, pleading iſſuable pleas, and taking ſhort notice of trial. Notes in C. B. 244. Mich. 10 Geo. 2. Leighton v. Leighton.

Caſes of Pract. in C. B. 154. S. C. accordingly.

51. Defendant had *pleaded non aſſumpſit infra ſex annos*, and moved to add to that plea *non aſſumpſit generally*, which was denied. After defendant hath pleaded a ſingle plea, he cannot

Caſes of Pract. in C. B. 154. S. C. ac-

cordingly, after a ſingle plea of non aſſumpſit.

have leave to plead doubly. Notes in C. B. 245. Hill. 10 Geo. 2. Nevil v. Fiſher.

Caſes of Pract. in C. B. 154. S. C. accordingly.

52. In treſpaſs it was moved to plead doubly, *not guilty*, and a *juſtification*, which was denied as contradictory. Notes in C. B. 245. Hill. 10 Geo. 2. Barnett v. Greaves.

Caſes of Pract. in C. B. 154. S. C. accordingly.

53. Aſſumpſit. *Defendant paid* 10 *l. on the common rule*, and afterwards obtained a rule to plead double, *non aſſumpſit* and *non aſſumpſit infra ſex annos*. Plaintiff moved to ſet aſide the double plea with coſts, and had a rule to ſhew cauſe, which was made abſolute. Plaintiff by the rule to pay money into court is confined to plead the general iſſue, and no other plea. The motion afterwards to plead double is an impoſition on the court. Notes in C. B. 245, 246. Eaſt. 10 Geo. 2. Buck v. Warren, attorney, in caſe.

Caſes of Pract. in C. B. 153. S. C. accordingly.

54. It was moved to plead double, viz. *damage feaſant*, and under a *demiſe from defendant to plaintiff*. Ch. J. ſaid he thought them inconſiſtent; but as defendant obtained a rule to ſhew cauſe, and plaintiff did not oppoſe it, it muſt be abſolute. Notes in C. B. 246. Eaſt. 11 Geo. 2. Church v. Fendall.

Caſes of Pract. in C. B. 153. S. C. accordingly.

55. The Court gave defendant leave to plead doubly, viz. a *diſtreſs for damage-feaſant and for rent in arrear*. This is not ſtronger than not guilty and liberum tenementum, *ſolvit ad diem* and a *mutual debt*, which have been granted. Notes in C. B. 247. Trin. 11 & 12 Geo. 2. Baynes v. Lutwidge.

56. Defendant having obtained a *rule to plead* doubly *(non aſſumpſit & non aſſumpſit infra ſex annos)* plaintiff moved to diſcharge
[206] it, inſiſting that *defendant*, who *was a priſoner in the Fleet at the time of* his being charged with *the declaration before this rule obtained, was diſcharged at the ſeſſions of the peace, by the* compulſory clauſe in the *inſolvent debtors act* 10 *Geo. 2. and being at large could not regularly apply for the rule to plead doubly, without firſt entering a common appearance; which was not done*. The queſtion was never determined, but by conſent the plaintiff had leave to diſcontinue without coſts. Notes in C. B. 274. Trin. 11 & 12 Geo. 2. Cock v. Kerredge.

Caſes of Pract. in C. B. 153. S. C. accordingly.

57. Rule made abſolute to plead double, *non aſſumpſit*, and defendant's *diſcharge under the inſolvent debtors* act. 10 Geo. 2. Notes in C. B. 252. Eaſt. 12 Geo 2. Jones v. Body.

Caſes of Pract. in C. B. 153. S. C. accordingly.

58. A rule the ſame term in caſe of LISLE v. JENYNS, had been made to ſhew cauſe, and abſolute on affidavit of ſervice (no cauſe being ſhewn) to plead *non eſt factum*, and *defendant diſcharged* under the ſaid act. Notes in C. B. 252. Jones v. Body.

(C) Allowed in what Caſes, where there are ſeveral Defendants. And where the one pleads one Plea, and the other another.

1. IN *writ againſt Ro. and W. Ro. made default after default*, and *W. was received to plead ſole tenancy of parcel, and jointenancy of the reſidue.* Thel. Dig. 214. lib. 15. cap. 3. ſ. 3. cites Mich. 5 E. 3. 209. 229.

2. In a writ of error it was ſaid arguendo that where *præcipe* is brought *againſt two jointenants, parceners*, or ſuch like, *each may plead in bar by himſelf of his part*, and if *the one pleads a plea which goes to all*, and it is *found for him and the plea of the other is found againſt him*, yet *he ſhall loſe his moiety.* Br. Deux Plees, pl. 4. cites 9 H. 6. 46.

3. *But* quære, if *baſtardy* be *pleaded by the one in action anceſtrel, and another plea by the other*, and the *baſtardy is found for him who pleads it, and the other plea is found againſt the other*, if this ſhall not ſerve both; but it was ſaid that all is one, and that each may loſe his part; but quære, becauſe it was not adjudged. Ibid.

4. *But* if the *one pleads to the writ and the other to the action*, there the *plea to the writ ſhall be firſt tried*; for if it be found for him, all the writ ſhall abate, and this ſhall ſerve both. Ibid.

5. *But in treſpaſs in perſonal action againſt two*, and the *one pleads one plea, and the other another plea which goes to all*, there *this ſhall ſerve both*; quære in action real. Ibid.

6. *And in action* brought *againſt one* if he *pleads one plea to parcel, and the other plea to the reſt, which goes to all*, there *the plea which goes to all ſhall be accepted only* and not the other, be it in action real or perſonal, becauſe it is pleaded by one and the ſame perſon. Ibid.

7. Quære, where *two pleas are pleaded by two in præcipe quod* reddat *whether the one goes to all.* Ibid.

8. *Forger de faits againſt three*, the *one made default*, and *two appeared*, and the *one pleaded the death of the third, who did not come, at D. in another county before the writ purchaſed*, and the *other pleaded not guilty*, and *ven. fac. iſſued upon both*, and after the *plaintiff prayed two niſi prius's upon thoſe two iſſues, and triable in two counties.* Per Moyle he cannot have both, but if the [207] iſſue of the death be tried, then the other iſſue is void, though it be tried alſo. But per Priſot the plea of the death goes to the writ, therefore the other ſhall have thereof advantage, *quære of ſeveral pleas to the action*, and therefore here the one may make an end of all, and therefore this ſhall be firſt tried, and if it be found againſt the defendant, then the other plea ſhall be tried for the other, but if it be found for the defendant who pleaded the death, the writ ſhall abate in all, by which *niſi prius was granted only of the county where the death is alleged.* Br. Deux Plees, pl. 20. cites 37 H. 6. 37.

9. *In præcipe againſt two*, if the *one pleads baſtardy* and the *other releaſe of the demandant*, both ſhall be tried, and if the *baſtardy* be *found* the other iſſue is void becauſe the baſtardy goes to all; per Moyle. But Priſot denied it, for in plea of land every one may ſave or loſe his moiety, therefore if baſtardy be found for the one, and releaſe againſt the other, the demandant ſhall recover one moiety, and ſhall be barred of the other moiety only, and of no more. Ibid.

(D) Allowed in what Caſes, where one ſhall be ſaid to go to the whole.

1. IN præcipe quod reddat the *tenant as to parcel ſaid, that he had nothing unleſs as baron of his feme not named in the writ*; judgment of the writ, and as *to the reſt he pleaded nontenure*; per Birton, he has pleaded two pleas where the one, ſcil. the nontenure, goes to all, and prayed to be diſcharged of the one; and per Cur. he ſhall anſwer to both, and ſo he did, that is to ſay, to the one parcel that he is ſole tenant, and the feme has nothing, and to the reſt tenant as the writ ſuppoſes, priſt, &c. Br. Deux Plees, pl. 12. cites 21 E. 3. 28.

2. In dower the *tenant to parcel pleaded jointenancy*, and *to the reſt ne unques accouple* in lawful matrimony; and per Wich. he ſhall not have both, becauſe the one and the laſt plea goes to all; but Finch. contra, for if he has a joint-feoffee it is no reaſon that he ſhall render the entire damages, and alſo he cannot vouch without his companion; but Wich. contra. Br. Deux Plees, pl. 7. cites 40 E. 3. 31.

3. *And* that he cannot plead *releaſe to part, and another anſwer to the reſt*, for the releaſe goes to all; per Wich. Ibid.

4. *But* 43 E. 3. 39. it is adjudged that *a meſne tenant ſhall not plead one plea which goes to all, and another plea to the reſt*. Br. Deux Plees, pl. 7. cites 40 E. 3. 31.

5. *But* it was ſaid 9 H. 6. that *where two are impleaded in a real action, the one may plead a plea which goes to all for his part, and the other another plea to the reſt*, and each ſhall loſe or ſave his part according to the trial of the plea, &c. and ſee 15 E. 4. 25. a diverſity of thoſe matters between real actions and perſonal. Ibid.

6. In dower the *tenant pleaded that the demandant detained evidences where he is brother and heir to the baron*, and the *demandant ſaid that ſhe detained two deeds becauſe eſtate was made by them to her and her baron*, and *to the reſt that ſhe is enſient by her baron*; per Cand. the laſt plea goes to all, and yet ſhe had both. Br. Deux Plees, pl. 8. cites 41 E. 3. 11.

7. In formedon the *tenant pleaded nontenure to parcel, and* that the demandant is a *baſtard to the reſt*, and could not have both the pleas becauſe the laſt goes to all. Br. Deux Plees, pl. 9. cites 43 E. 3. 29.

8. Debt

8. Debt *of* 20 *l. againſt executors*, and *to* 10 *l. they pleaded acquittance of the plaintiff made to the teſtator*, and *to the reſt fully adminiſtered.* Perſey ſaid the laſt plea goes to all, but after he paſſed over. Br. Deux Plees, pl. 35. cites 48 E. 3. 18.

9. In ward the defendant *pleaded nontenure to the body, and* as *to the land, that the anceſtor did not die his tenant*, and had the one and the other by award, and yet the laſt might have been pleaded to both. Br. Deux Plees, pl. 10. cites 7 H. 4. 12.

10. And per Hank. in præcipe quod reddat the *tenant pleaded to one acre nontenure*, and *to the reſt releaſe of actions real and perſonal, and had both*, and yet the laſt goes to all; the reaſon ſeems to be inaſmuch as they are *pleaded to ſeveral parcels.* Ibid. Br. Replication, pl. 14. cites S. C.

11. Debt *upon an obligation of* 20 *l. to pay* 10 *l. at two days*, and the *defendant for the firſt day ſhewed acquittance*, and *for the laſt day that he has been always ready, and yet is, and brought the money into court*, and the *plaintiff to the acquittance demurred becauſe it had no ſeal, and to the other plea ſaid that he had not been always ready*, and was not ſuffered to have both by replication, becauſe if the condition be broken in part it is broke in all, and therefore he was compelled to hold to the one, and ſo he did, ſcil. that he has been always ready, &c. Br. Deux Plees, pl. 11. cites 14 H. 4. 30.

12. In ward the *defendant as to body ſaid, that the anceſtor of the infant held land of A. who held over of the demandant que eſtate he has in the ward, and* as *to the land that he and the anceſtor of the infant held jointly, and he ſurvived*, and it was determined that he ſhould hold him to the jointenancy, for this goes to all, by which he *ſaid that W. leaſed the ward of the body to the defendant, and vouched him to warranty*, and *as to the land pleaded jointenancy by fine* as above, and it was awarded that he ſhall have both, by reaſon of excuſing the damages and to put it upon the voucher. Br. Deux Plees, pl. 13. cites 7 H. 6. 14.

13. Debt *upon a leaſe for* 10 *years rendering rent*, and *for arrear of eight years*, &c. Fullthorp ſaid, *Green-acre is parcel* of the premiſes which was aſſeſſed to * 3 s. at the time of the demiſe, *into which the plaintiff entered three years after the leaſe, before which entry as parcel nothing arrear, and as to the reſt he owes him nothing, priſt*, where *one intire rent was reſerved for all*, and the opinion of the Court was, that the entry into parcel goes to all the writ. Br. Deux Plees, pl. 14. cites 7 H. 6. 26.

* Orig. (terre), but the other editions are 3 s.

14. In waſte the *defendant pleaded to part that the plaintiff had an elder brother who ſurvived the father and died, after whoſe death no waſt done*, and *to the reſt that the plaintiff had another coparcener in full life not named*; judgment of the writ, and by ſome the firſt plea goes to all, but by the beſt opinion the laſt plea goes to all clearly. Br. Deux Plees, pl. 3. cites 9 H. 6. 11.

15. *Forger de faits of land in four vills*, &c. the *defendant as to three vills ſaid that the plaintiff never any thing had*, and *to the reſt conveyed eſtate to himſelf, abſque hoc that he forged modo et forma.* Per Newton this laſt plea goes to all, but the Court was againſt him. Br. Deux Plees, pl. 29. cites 10 H. 6. 24.

16. *And* per Cur. if *in præcipe quod* reddat the *tenant pleads releaſe to parcel, and baſtardy in the demandant to the reſt*, this ſhall not be ſuffered; for the laſt plea goes there to all; note the diverſity. Ibid.

17. In *annuity*, the *defendant pleaded acquittance of two years*, and *to the reſt that he offered to the plaintiff a competent benefice which was the condition of the grant, and he refuſed*, and becauſe this plea goes to all, the firſt plea was ouſted; for debt ſhall lie of the arrears before. Br. Deux Plees, pl. 15. cites 19 H. 6. 54.

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19. *In treſpaſs of a villein in his ſervice being taken*, frank and *of frank-eſtate goes to all*, without anſwering to the ſervice; quære by others. Br. Deux Plees, pl. 16. cites 22 H. 6. 30.

Br. Repleader, pl. 22. cites S. C.

20. *And in treſpaſs de muliere abducta cum bonis viri*, never his feme is a good plea to all, per Fulthorp, but Aſcue contra; for he ſhall anſwer to the goods alſo. Ibid.

21. *Treſpaſs of trees cut and carried away*, the *defendant as to the trees pleaded gift of the plaintiff before the treſpaſs*, and *to the cutting and carrying away not guilty*; and per Littleton the laſt plea goes to all, but Priſot ſaid no; but in treſpaſs againſt two, if the one pleads releaſe, and the other another plea, there the releaſe goes to all if it be firſt tried. Br. Deux Plees, pl. 5. cites 33 H. 6. 12.

Br. Miſnoſmer, pl. 8. cites S. C.

22. If *baron and feme plead miſnoſmer of the feme*, it goes to all the writ if it be found, and yet the baron ſhall plead another plea for himſelf alſo; and ſo he did, quod nota, and ſo two pleas, and yet the one goes to all. Br. Deux Plees, pl. 6. cites 33 H. 6. 22.

23. In *dower*, the *tenant pleaded nontenure to parcel*, and *to the reſt that the demandant detained from him certain evidences which concerned the ſame land*, and had both; for the laſt plea goes but to this parcel of which the tenant takes the tenancy. Br. Deux Plees, pl. 36. cites 33 H. 6. 51.

24. *Treſpaſs in three acres* of land, the *defendant juſtified for the third part by one title*, and *in the other two parts by another title*, and well; for it may be that it is in ſeveralty, the third part from the two parts; for otherwiſe, the one plea goes to all. Br. Deux Plees, pl. 30. cites 37 H. 6. 39.

Br. Deux Plees, pl. 22. cites 39 H. 6. 21. S. C.

25. In *debt upon arrears of annuity granted pro concilio impenſo*, &c. againſt the ſucceſſor of an abbot, the *defendant, as to the arrears between ſuch a feaſt and ſuch a feaſt, ſaid, that the predeceſſor required counſel in ſuch a matter at D. and he there refuſed to give counſel; and to the arrears before, that he did not give counſel*, &c. and had both pleas; for though the annuity was determined by the refuſal, yet debt lies of the arrears before, and this action is debt, but in action of annuity, there the refuſal goes to all of this nature of action. Note the difference in annuity, and e contra in debt upon arrears of annuity. Br. Annuity, pl. 28. cites 39 H. 6. 22.

Br. Office, del, &c. pl. 23. cites S. C.

26. *Action of divers treſpaſſes*, the *defendant to ſome pleaded not guilty*, and *to the reſt arbitrement of all treſpaſſes*, and were at iſſue of this, and *found for the plaintiff*, and by ſome this laſt plea goes to all, and by ſeveral none ſhall have advantage of the laſt plea but the party, but any as amicus curiæ may ſhew to the Court that the one

one plea goes to all, and the Court ex officio ſhall diſcharge all but that; and after it was ſaid per Cur. that it is better for the plaintiff to releaſe part of his damages and to have judgment of the reſt; for where divers treſpaſſes are, and divers pleas pleaded, and found for the plaintiff, and the damages are ſevered, the plaintiff may releaſe his damages for part, and pray judgment for the reſt; and ſo is ſure. Br. Deux Plees, pl. 23. cites 5 E. 4. 124.

27. In *aſſiſe by B. and S.* the *defendant pleaded againſt B. that he is an alien born*, and *againſt S. that he had never ſuch office of which the aſſiſe is brought*, and *it was held that the laſt plea goes to all againſt both*; for if there be no ſuch office, no aſſiſe lies. Br. Deux Plees, pl. 24. citet 7 E. 4. 29.

28. A man *ſhall not have two pleas where the firſt goes to all.* Br. Deux Plees, pl. 25. cites 12 E. 4. 10. Br. Treſpaſs, pl. 329. cites S. C.

For more of Double Pleas in general, ſee other proper titles.

Dower. [210]

What it is, and the ſeveral Sorts and Incidents.

1. DOWER is propter onus matrimonii & ad ſuſtentationem uxoris & educationem liberorum cum fuerint procreati, ſi vir præmoriatur. Et hoc proprie dicitur dos mulieris ſecundum conſuetudinem Anglicanam. Co. Litt. 30. b.

At this day dower is not taken by the profeſſors of the common law, either for the *land which the wife brings with her in marriage* to her huſband, for then it is either called in frank-marriage or in marriage, *nor* for the *portion of money or* other *goods* or chattels which ſhe brings with her in marriage, for that is called her marriage portion. And yet *of ancient time, dos mulieris*, the dower or dowry of the woman was alſo applied to them; but it is now commonly taken for her *third part*, which ſhe hath *of her huſband's lands* or tenements. Co. Litt. 31.

2. Littleton divides dower into 5 parts, viz. Dower by the *common law*. By *cuſtom*. *Ad oſtium eccleſiæ*. *Ex aſſenſu patris*. And *de la pluis Beale*.

3. Three things *belong* to dower, viz. *Marriage*. *Seiſin*. *Death of the huſband*.

4. Concerning *ſeiſin*, it is *not neceſſary* that the ſame ſhould *continue* during the coverture; for albeit the huſband aliens the lands and tenements, or extinguiſhes the rents or commons, &c. yet the woman ſhall be endowed. Co. Litt. 32.

Fol. 677.

(A) *What Woman* ſhall be endowed.

Br. Dower, pl. 36. cites 12 H. 4. 1. ——Co. Litt. 40. a. S. P. cites 12 H. 4. 2. and 7 H. 6. 11, 12.

[1. IF a man marries a *woman of an hundred years of age*, yet ſhe ſhall have dower, though by poſſibility of nature ſhe cannot have iſſue. 12 H. 4. 2. b.]

Feme of the age of ſeven years ſhall not have dower. Br. Dower, pl. 36. cites 12 H. 4. 1. ——And if *ſhe is of nine years, and the baron is not of ſeven* years of age, ſhe ſhall not have dower; contra *if he is ſeven at the time of his death*. Br. Dower, pl. 88. cites Doct. and Stud. lib. 1. cap. 7. fol. 13. and Parva Na. Br. fol. 7. —— If ſhe be nine years old at her huſband's death, ſhe ſhall have dower. 2 Inſt. 234. ——See (E) infra.

[2. If the huſband *dies before his wife is of the age of 9 years*, ſhe ſhall not be endowed. Litt. 8. 12 H. 4. 3.]

[3. Rot. parliamenti 8 H. 5. numero 15. the commons prayed, that all manner of *women aliens* that ſhould be married to Engliſhmen by the royal licence, ſhould be endowed, &c.]

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This is printed as in the original.

(B) ANSWER.

[4] [*Let it be done as deſired* by the petition.]

[1 [5.] Rot. parliamenti, 9 H. 5. numero. A petition was delivered to the king in this parliament for Beatrice, who was the wife of Thomas, late Earl of Arundel, ſhewing, that whereas ſhe was *born in Portugal*, and took to huſband the ſaid Earl, who was ſeiſed in fee, and fee-tail, of divers caſtles, lands, &c. The heirs and tertenants now diſturbed her of her reaſonable dower, becauſe ſhe was born and begotten in the ſaid land of Portugal, that it would pleaſe him to declare and ordain by authority of parliament, that ſhe ſhould have her dower.]

(C) ANSWER.

[1. [6.] The king, of the aſſent of the lords in this parliament, hath declared openly, and *ordained* in the ſame parliament, *as ſhe hath deſired*.]

[2. [7.] In ſome caſes a woman ſhall be endowed, though there is a *divorce* between her and her huſband. 39 E. 3. 33. But quære.]

8. In 28 Eliz. in caſe of one Serle, it was argued by the juſtices of C. B. if the *iſſues of prieſts* were legitimate, and Popham attorney ſays, when he was ſerjeant, it was adjudged that the *wife of a prieſt* ſhould have *dower*. D. 185. pl. 65. Marg.

9. The policy of the *common law* may make a quoad, as in 22 El. D. 274. a *marriage infra annos nubiles* is *perfect* quoad dotem, but as to other purpoſes it is only inchoatum & imperfectum. 6 Rep. 40. b. Mich. 3 Jac. B. R. Mildmay's caſe.

10. If a freeman took a *nief* to wife, ſhe ſhould have been endowed; but the wife of an *ideot*, *non compos*, *outlawed*, or *attainted* of felony or treſpaſs, attainted of hereſy, præmunire, or the like, ſhall be endowed. Co. Litt. 31. a.

11. *But* if the huſband be attainted *of treaſon*, though it be for treaſon done after the title of dower, ſhe ſhall not be endowed. Co. Litt. 31. b.

12. If a *common perſon* takes an *alien to wife*, and dies, ſhe ſhall not be endowed; but if the king *marries an alien*, ſhe ſhall be endowed by the law of the crown. Edmond, the brother of King E. 1. married the queen of Navarre and died, and it was reſolved by all the judges, that ſhe ſhould be endowed of the third part of all the lands whereof her huſband was ſeiſed in fee. Co. Litt. 31. b.

13. It is neceſſary that the *marriage* do *continue*, for if that be *diſſolved* the dower ceaſeth, *ubi* nullum matrimonium ibi nulla dos; but this is to be underſtood when the huſband and wife are divorced *a vinculo matrimonii*, as in caſe of pre-contract, conſanguinity, affinity, &c. and *not a menſa & thoro* only, as for adultery. Co. Litt. 32. a.

14. If a Jew born in England take to wife a *Jew* born alſo in England, and the *huſband is converted to the Chriſtian faith*, and purchaſes lands, and infeoffs another, the wife ſhall not be endowed. Co. Litt. 31. b. 32. a.

15. If a *marriage de facto* be *voidable by divorce in reſpect of conſanguinity*, &c. whereby the marriage might have been diſſolved, and the parties freed a vinculo matrimonii, yet if the *huſband dies before any divorce* then for that it cannot now be avoided, this wife in facto ſhall be endowed, for this is legitimum matrimonium; and ſo in a writ of dower the biſhop ought to certify that they were legitimo matrimonio copulati, according to the words of the writ. Co. Litt. 32. a. and ſays, that herewith agrees 10 E. 3. 35. [212]

16. If a man takes a *wife of the age of ſeven years*, and after *aliens his land*, and after this alienation the wife attains to the age of nine years, and after the huſband dies, the wife ſhall be endowed; for although ſhe was not abſolutely dowable at the time of the marriage, yet ſhe was conditionally dowable, viz. if ſhe attained to the age of nine years before the death of her huſband; for ſo Littleton here ſays, ſo that ſhe paſs the age of nine years at the death of her huſband; for by his death the poſſibility of dower is conſummate. Co. Litt. 33. a.

17. If the wife be *paſt the age of nine years at the death of her huſband* ſhe ſhall be endowed, of what age ſoever the huſband be, although he were but four years old. Quia junior non poteſt dotem promereri neque virum ſuſtinere, nec obſtabit mulieri potenti minor ætas viri, wherein it is to be obſerved that though conſenſus non concubitus facit matrimonium, and that a woman cannot conſent before twelve, nor a man before fourteen, yet this inchoate and imperfect marriage (from the which either of the parties may diſagree) after the death of the huſband ſhall give dower to the wife, and therefore it is accounted in law after

after the death of the huſband legitimum matrimonium, a lawful marriage, quoad dotem. Co. Litt. 33. a.

18. The *wife of a man who is baniſhed* ſhall have dower in his life-time if ſhe has not a jointure; if ſhe has a jointure ſhe ſhall enjoy it in the life-time of her huſband. Baniſhment is by abjuration or by parliament. Jenk. 4. pl. 4. Weyland's caſe.

19. If a man take an *alien* to wife, and then ſells his land, and his wife is made a *denizen*, ſhe ſhall not be endowed by virtue of the denization; but it is otherwiſe if ſhe be *naturalized* by act of parliament. Co. Litt. 33. a.

(D) *Of what Things* ſhe ſhall be endowed.

Br. Dower, pl. 31. cites S. C. [1. SHE ſhall not be endowed of the *goods* of her huſband. 7 H. 4. 13. b. Vetus Nat. Brevium, 7. b.]

Br. Dower, pl. 31. cites S. C. but that the laws of England are contrary; and that the civil law does not give it of the land. [2. *But by the civil law ſhe ſhall* be endowed of the goods. 7 H. 4. 14.]

[3. She ſhall be endowed of *villeins regardant*. 2 H. 6. 11. b.]

S. P. and ſo of villein appendant, and the writ ſhall be de libero tenemento. [4. *So* ſhe ſhall be endowed of villeins *in groſs*, for this is an inheritance. 2 H. 6. 11. b. Vet. Nat. Br. 7. b.] Br. Dower, pl. 91. cites 2 H. 6. 11.——She ſhall be endowed of a villein, either the third day's work, or every third week or month. Co. Litt. 32. a.——Ibid. 164. b. S. P.——Ibid. 307. a. S. P. for in him a man may have an eſtate in fee, or fee tail, or for life or years.

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Co. Litt. 32. a. S. P. but of a common certain ſhe ſhall be endowed.—* Cro. C. 300. pl. 3. S. C. the demand was of dower in a meſſuage, land, meadow, paſture, and of common of paſture, pro omnibus averiis cum pertinentiis in G. and the judgment being after a verdict which finds that the huſband was ſeiſed, quod dower, &c. and by intendment it appeared upon the evidence that it was ſuch a common as went with the land whereof ſhe was dowable; and if it had been common in groſs without number, the judge before whom the trial paſſed would have directed it to be found againſt the defendant.——Jo. 315. pl. 2. Breewood v. Drake. S. C. adjudged. And a nota is added, that a precedent was ſhewn of 4 Jac. where a demand was of dower inter alia of common generally, and judgment given for the plaintiff. [5. She ſhall not be endowed of a *common ſans number*, becauſe then the land would be doubly charged. Co. 11. RICH. GODFRY, 45. PERKINS, f. 341. Vet. Nat. Br. 7. b. P. 9 Car. B. R. between * PREWETT AND DRAKE, per Curiam agreed in a writ of error upon a judgment in dower, but judgment affirmed, becauſe it ſhall not there be intended to be common ſans number, but appendant.]

Fol. 676. [6. She ſhall be endowed of the *office of Marſhalſea* de B. R. 21 E. 3. 57. b. admitted.]

Co Litt. 32. a. S. P. and ſo as to the profits ariſing from the cuſtody of the gaol of Weſtminſter-abbey, and ſays that therewith agrees reverend antiquity.——Theloal Dig. 67. lib. 8. cap. 5. ſ. 2. cites Trin. 21 E. 3. 35. S. P.——F. N. B. 8. (K) in the new notes there (b) cites S. C.

[7. The queen ſhall *not* be endowed *of the crown*. Liber Succeſſionis, 92. b.]

[8. A woman ſhall *not* be endowed of the *caſtles* of her huſband, which are de guerra. 1 E. 1. Rot. Patentium Membrana, 17. fol. 3. reſolved as it appears by a writ to the ſteward of Ireland, to reform ſuch endowments there. *Otherwiſe of the queen.* 2 E. 1. Rot. Pat. M. 3. Dorſo.]

A man *ſeiſed of half an acre of land made a ſcoffment*, and the *ſcoffee made there a caſtle*

er houſe, the *feme of the feoffor* brought dower and *recovered in value* by award, *but not the third part.* Br. Dower, pl. 81. cites 30 E. 1. ——— Co. Litt. 31. b. S. P. ——— But where they are not for the neceſſary defence of the realm, the wife may be endowed thereof. Co. Litt. 165. a. at the bottom. ——— 2 Inſt. 17. S. P. accordingly in the expoſition of the word caſtrum in the ſtatute of magna charta, cap. 7.

[9. A woman ſhall not be endowed *de homagiis* of her huſband, *quæ ſunt de guerra.* 1 E. 1. Rot. Pat. M. 17. reſolved.]

[10. The wife ſhall not be endowed of the *capital meſſuage.* The law of Scotland agrees with this. Skene Regiam Majeſtatem, 41. b. verſ. 62.]

Of the principal manſion or capital meſſuage a woman ſhall be endowed, ſi non ſit caput comitatus vel baroniæ, for the honour of the realm. Co. Litt. 31. b.

11. Writ of dower was maintained of the *profits of a market.* Thel. Dig. 68. lib. 8. cap. 7. ſ. 2. cites Hill. 12 E. 2. Dower, 157.

12. It was ſaid that a feme might bring writ of dower of *common of paſture*, with a certain number of beaſts. Thel. Dig. 67. lib. 8. cap. 5. ſ. 15. cites Trin. 4 E. 3. 146. and that ſo it is ſaid by Littleton, Paſch. 4 E. 4. 2. and ſays, ſee 12 E. 2. Dower, 161. accordingly.

F. N. B. 148. (C) S. P.

13. And of *ſtallage* ariſing from a fair, making the demand de tertia parte ſtallagii avenant, &c. and not of profits ariſing from the ſtallage, &c. Thel. Dig. 68. lib. 8. cap. 7. ſ. 2. cites Mich. 11 E. 3. Dower, 85.

Co. Litt 32. a. S. P. — F. N. B. 8. (K) in the new notes there (b) cites S. C. For the ſtallage is the profits.

14. Dower of the *profits of an office* was maintained without demanding of the office itſelf. Thel. Dig. 67. lib. 8. cap. 5. ſ. 3. cites 12 E. 3. Dower, 90.

As of the office of bailiff, parker, &c. without demanding the third part of the office of it, which cannot be, becauſe the office is intire. But quære of the office of tentury, F. N. B. 8. (K) in the new notes there (b) cites S. C.

15. A man ſhall not have aſſiſe of the *farm of a fair;* for it *is not in loco certo capiendo*, as in the ſtatute, and yet the feme was thereof endowed. Br. Aſſiſe, pl. 471. cites 14 E. 3. Fitzh. Sci. Fa. 122.

16. And dower was maintained of the *profits ariſing from* * *a fair and from a market*, and from the *court of the ſame market*, &c. But the demand was not of the third part of the fair or market. Thel. Dig. 68. lib. 8. cap. 7. ſ. 2. Mich. 15 E. 3. Dower, 81.

* Co. Litt. 32. a. S. P. — F. N. B. 8. (K) in the new notes there (b) cites S. C. ——— And Ibid. cites Lib. Intrat. 234. de tertia parte exituum & proficuorum de quolibet mercato quolibet die Martis & unius feriæ quolibet anno in feſto, &c.

17. Writ

S. P. 8 Mod. 355. Arg. cites S. C.

17. Writ of dower lies of a *garden*, *croft*, or *cottage*, by the opinion of the Court. So aſſiſe lies of it, but præcipe quod reddat does not lie of it. Br. Dower, pl. 92. cites 8 H. 6. 3.

* S. P. and yet the heir ſhall have it; for it is incident to the reverſion; for *the rent is no inheritance, and is determinable by the death of the leſſee.* Br. Dower, pl. 89. cites M. 1 E. 6.

18. A man *leaſed for * life rendering rent, and took feme and died*, the *feme ſhall not be endowed of this rent. Contra of a rent reſerved upon a gift in tail*; per June. Br. Dower, pl. 44. cites 7 H. 6. 3.

19. If A. holds lands of B. by homage, fealty, and 10s. rent, and B. dies, B.'s wife ſhall not be endowed *of the homage and fealty*, but ſhall have a *third part of the rent as a rent-ſeck.* Kelw. 126. a. b. pl. 87. Caſus incerti temporis.

20. A writ of right of dower lieth of that *thing* which is *appendant purtenant unto the ſaid land which a woman holdeth in dower.* As of ſo many loaves of bread, of ſo many flaggons of ale, &c. a day, or a week, &c. which ſhe claims to pertain to her tenement which ſhe holds in dower, &c. F. N. B. 8. (K) and 9. (A).

21. A wife ſhall be endowed of *advowſons*, *villeins*, *common of paſture or aprure*, and of other *profits or liberties* of which her huſband had any eſtate of inheritance; which eſtate the iſſue betwixt them by poſſibility may inherit, &c. F. N. B. 148. (C).

22. Dower may be of *rent-corn.* Per Curiam. Ow. 32. Paſch. 7 Eliz. in an anonymous caſe.

Gouldſb. 37. pl. 11. Brooke's caſe. S. C. & S. P. held accordingly. —— Ow. 4. Bragg v. Brooks. S. C. reſolved clearly.

23. Dower may be of a *third part of the manor.* But then it *muſt be claimed by the name of* the third part of the manor, and not of certain meſſuages, certain acres of land, and certain rents, for in the laſt caſe it is only a demand as of a thing in groſs, and a recovery in ſuch caſe is not of the third part of the manor. Godb. 135. pl. 156. Mich. 29 Eliz. C. B. Bragg's caſe.

† F. N. B. 149. (K) S. P. admitted. — F. N. B. 8. (K) in the new notes there (b) S. P. cites 45 E. 3. Fitzh. Dower, pl. 50. and that ſhe had thereby the freehold of the third part of the mill veſted in her.

24. A woman may be endowed of the third part of the profits of a † *mill*; and of the profits of keeping a park; and of the profits of a *dove-houſe*; and of a *piſchary*; and of the ‡ *third preſentation* to an advowſon; ſo of the *profits of courts*, fines, and heriots; and of *tithes.* Co. Litt. 32. a.

‡ F. N. B. 150. (G) S. P. cites 1 E. 1. Dower, 176. —— Ibid. 148. (C) S. P.

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25. Wives ſhall be endowed of *tithes* or other *eccleſiaſtical duties that came to the crown by the ſtatute* 27 *H.* 8. 31 H. 8. cap. 13. 37 H. 8. 4. and 1 E. 6. cap. 14. Co. Litt. 159. a.

26. Of *franchiſes parcel of an honour*, dower may be aſſigned, and they may be parcel and appendant to the honour, though they are not belonging to a manor which is of an inferior nature. Cro. J. 622. pl. 12. Mich. 18 Jac. B. R. in caſe of Howard v. Cavendiſh.

26. Of an *advowſon*, whether it be *in groſs or appendant*, the feme is dowable; per Cur. Cro. J. 621. in pl. 12. Mich. 18 Jac. B. R.

27. Of

27. Of a *rent-ſervice, rent-charge*, and *rent-ſeck*, ſhe ſhall be endowed; but of an *annuity that charges only the perſon*, and iſſues not out of any lands or tenements, ſhe ſhall not be endowed. Co. Litt. 32. a.

28. *But if the freehold* of the rents, common, &c. *were ſuſpended before the coverture, and ſo continue* during the coverture, ſhe ſhall not be endowed of them. If after the coverture the huſband does extinguiſh them by releaſe or otherwiſe, yet ſhe ſhall be endowed of them, for as to her dower they, in the eye of the law, have continuance. Co. Litt. 32. a.

29. The widow of the lord was decreed at the Rolls to be endowed of the third part of the *improved values of the copyhold*, but reverſed by Ld. Keeper as to that. Chan. Caſes, 247. Hill. 26 & 27 Car. 2. Holland v. Blandy.

30. Dower; the tenant pleads, that Sir Thomas Gerrard was *ſeiſed of the meſſuage* now in demand, *called B. in his demeſne as of fee*, and being ſo ſeiſed, *Jac. 1. by his letters patents under the great ſeal of England, created the ſaid Sir Thomas Gerrard baron of B. and ſo the meſſuage in demand became caput baroniæ*, and he prays judgment, if the demandant ought to be endowed thereof. The demandant demurred, and judgment was given for her in C. B. Tenant aſſigns for error, that the demandant ought not to have dower of this meſſuage, being caput baroniæ; that it would tend to the diſhonour of the dignity, to have the capital meſſuage divided and diſmembered, but it would be more for the honour of the realm that it be kept intire; and for authority cited Co. Litt. 31. b. Fitzh. Dower, 180. Bract. lib. 2. 170. b. Paſch. 4 H. 3. Rot. 7. But Serjeant Wright and Mr. Northy contra, of which opinion was the whole Court; for theſe authorities muſt be intended of feodal baronies, of which there are none at this day except Arundel; and this privilege was allowed to them, becauſe they ought upon neceſſity to defend the realm, to which they are bound by tenure; for the king at the creation of the barony gave to the baron lands and rents, to hold of him by the defence of the realm; but then this cannot be a feodal barony, for it was in the ſeiſin of the Gerrards before, and therefore was not given to the Gerrards by the king at the creation of the barony to hold of him; and Rokeby J. ſaid, that this was the reaſon of the judgment in C. B. Ld. Raym. Rep. 72. Hill. 7 W. 3. C. B. Gerrard v. Gerrard.

1 Salk. 253. pl. 3. S. C. and judgment affirmed in error in B. R. per tot. Cur. —Skinn. 592. pl. 6. Lady Gerrard's caſe, S. C. and judgment affirmed per tot. Cur.— 5 Mod. 64. Ld. Gerrard's caſe, S. C. and judgment affirmed in B. R.—— Comb. 352. S. C. and judgment affirmed in B. R.—— 3 Lev. 401. S. C. and judgment affirmed in B. R. upon which error was brought in domo procerum (which Levins ſays was the thing deſigned at firſt), but afterwards the parties agreed, as the reporter ſays he heard, without having the judgment of the Houſe of Peers.

31. Dower does not lie of a *tenement*, it being a word of an uncertain ſignification, and therefore the ſheriff cannot give ſeiſin of it; and ſo a judgment was reverſed. 2 Ld. Raym. Rep. 1384. Paſch. 11 Geo. B. R. Kerry v. Kent.

8 Mod 355. Kent v. Kerry, S. C. held accordingly, and ſo a judgment reverſed.

(E) Dower ad Oſtium Eccleſiæ.

Of what Things he may endow her.

[And How.]

[1. A Man cannot endow his wife ad oſtium eccleſiæ of his *capital houſe*, having other lands ſufficient for her dower.]

[2. With this agrees the law of Scotland. Skene Leges Burgorum, cap. 3.]

3. In ejectione cuſtodiæ by the beſt opinion, and in a manner per tot Cur. that if a man *endows his feme at the church-door of H. in the county of E. of land in the county of L.* this is a good aſſignment of the dower, though it was in another county than where the land lies, and *without deed*, but contra of aſſignment of dower ex aſſenſu patris, this ſhall be by deed; for otherwiſe the franktenement of the father cannot paſs, and aſſent does not lie in averment but in ſpecialty, and *in both theſe dowers franktenement paſſes without livery of ſeiſin*; quod nota. Br. Dower, pl. 7. cites 40 E. 3. 43.

4. If a man *marries a woman in a chamber*, dowment *ad oſtium cameræ* is not good. F. N. B. 150. (M.)

5. *The youngeſt ſon* cannot aſſign dower ex aſſenſu patris, becauſe he is not heir apparent. F. N. B. 150. (E).

If a man ſeiſed in fee ſimple, being within age, endows his wife at the monaſtery or church door, and dies, and his wife enters, in this caſe the heir of the huſband may ouſt her. Litt. ſ. 47.

6. *None may endow his feme ad oſtium eccleſiæ, unleſs he be of full age, at the time*, &c. and then *ſhe may enter after the death of her huſband*, and in this caſe franktenement paſſes without livery; but if the baron was within age at the time of dower, the heir may enter and ouſt the feme, and *contra* where one within age endows his feme *ex aſſenſu patris, the father then of full age*; this is a good dowment. Br. Dower, pl. 80. cites Litt. fol. 8, 9.

7. It ſeems that dowers made ex aſſenſu patris, or ad oſtium eccleſiæ, are good, though the wife be *within nine years of age*; for conſenſus tollit errorem. Co. Litt. 37. a.

8. Dowment ad oſtium eccleſiæ *is where a man of full age ſeiſed in fee-ſimple*, who ſhall be married to a woman, and when he *comes to the church-door* to be married, there, after aſſiance and troth plighted between them, he *endows the woman of his own land, or of the half, or other leſſer part* thereof, *and there openly does declare the quantity* and certainty of the land which ſhe ſhall have for her dower, in this caſe the wife, after the death of her huſband, may enter into the ſaid quantity of land of which her huſband endowed her, without other aſſignment of any. Litt. ſ. 39.

9. Dower is ever after marriage ſolemnized, and therefore this dower is *good without deed*; becauſe he cannot make a deed to his wife; for *no aſſignment of dower ad oſtium eccleſiæ can be made before marriage*;

marriage; for that before marriage the woman is not intitled to have dower. Co. Litt. 34. a.

* 10. An aſſignment of dower either ad *oſtium eccleſiæ, or ex aſſenſu patris,* may be made *of more than a third part.* But it was the ancient law, that no greater aſſignment could be made in thoſe caſes but of a third part, but leſs he might, as appears in Glanvill. Co. Litt. 36. a. F. N. B. 150. (M) S. P.

11. Dower *ad oſtium caſtri* ſive *meſuagii* is not good; but ought to be made ad oſtium eccleſiæ; non enim valet facta *in lecto mortali,* vel in *camera,* vel alibi ubi clandeſtina fuere conjugia. For the law requires that this and like matters be done *publicly and ſolemnly.* Co. Litt. 34. a.

12. If *tenant in tail endows his wife ad oſtium eccleſiæ,* this ſhall little or nothing at all avail the wife, becauſe after the deceaſe of her huſband, the iſſue in tail may enter upon her poſſeſſion, and ſo may he in the reverſion, if there be no iſſue in tail then alive. Litt. f. 46. The reaſon of this is for that tenant in tail is reſtrained by the ſaid ſtatute of 13 E. 1. de donis conditionalibus. Co. Litt. 38. a.

(F) Of what Eſtate ſhe ſhall be endowed.

[1. IF A. ſeiſed in fee of lands, *covenants to ſtand ſeiſed thereof to the uſe of himſelf and his heirs, till C. his middle ſon takes a wife, and after to the uſe of C. and his heirs,* and after A. dies, by which it *deſcends to B. the elder ſon of A. who has a wife, and dies,* and after *C. takes a wife,* it ſeems the wife of *B.* the elder ſon ſhall not be endowed of the ſaid eſtate of her huſband; becauſe *his eſtate is ended by an expreſs limitation,* and therefore the eſtate of the wife being derived out of it this cannot continue longer than the original eſtate. P. 10 Ja. B. between FLAVILL AND VENTRICE, dubitatur upon a ſpecial verdict; for upon argument the Court was divided, ſcilicet, Crawley and Vernon that ſhe ſhall not be endowed, and Hutton and Heath e contra. Intratur Trin. 8 Car. Rot. 1343.] S. C. cited by Twiſden J. Vent. 377. and ſaid that the ſame point came afterwards in queſtion in TAPE'S CASE of Norfolk, and it was adjudged to be the ancient uſe. 2 Sid. 66. cites S. C.

——If a feoffment be made to the uſe of J. S. and his heirs, until J. D. has done ſuch a thing, and then to the uſe of J. D. and his heirs, and afterwards the thing is done, and J. S. dies, his wife ſhall be endowed; per Anderſon. Le. 168. in pl. 233. Mich. 31 & 32 Eliz. C. B.

2. If *land* is *granted to a man and his heirs for the life of J. S.* his wife after his death ſhall not be endowed; Arg. Bulſt. 135. cites 22 E. 3. fol. 19. pl. 6.

3. In dower it was agreed that where the *baron before the coverture acknowledges by fine come ceo,* &c. and the *conuſee grants and renders to the baron for life,* the *remainder to W. in tail,* the *remainder to the baron in fee,* and *he takes feme the now demandant and dies;* and becauſe the fee is only expectant, and not executed in his life by reaſon of the *meſne remainder,* therefore ſhe is not dowable. Br. Dower, pl. 6. cites 40 E. 3. 15.

4. Memorandum that in *feoffments to make eſtate over or to reinfeoff the feoffor,* this ſhall be made *to a man ſole,* or to a chaplain

who has no feme; for if it be to a man who has a feme, and ſhe ſurvives, ſhe will or may have *dower*. Br. Aſſurances, pl. 3.

F. N. B. 150. (C) S. P.

* 5. If there be *lord, meſne, and tenant*, and the tenant holds of the meſne by fealty and 3s. rent, and the meſne takes a wife, and the *tenant brings a writ of meſne againſt the meſne and forejudges him*, and the meſne dies, the *wife of that meſne ſhall have dower* of the rent by which the tenant held, and ſhall not be attendant unto the tenant; cauſa patet. Perk. ſ. 432.

6. If there be *lord and tenant by fealty and* 12*d.* and the *tenant leaſes the tenancy for life* unto a ſtranger, and the lord takes a wife, and the *tenant dies without heir*, and afterwards the *lord dies before the leſſee for life*, the *lord's wife ſhall not have dower of the tenancy; but* ſhe ſhall be endowed *of the rent of the ſeigniory*, &c. Perk. ſ. 339.

7. If *grantee of a rent-charge in fee takes a wife*, and the *grantor leaſes the land* out of which the rent is iſſuing *unto a ſtranger for life;* and the *grantee of the rent purchaſes the reverſion* of the ſame land, and the *tenant for life attorns*, and the *grantee of the rent dies, living the tenant for life*, his *wife ſhall be endowed of the rent, but not of the land*, becauſe the freehold and inheritance were not in the huſband ſimul & ſemel during the coverture, &c. Perk. ſ. 340.

8. If a man make a *gift in tail reſerving rent to him and his heirs*, and afterwards the *donor has a wife*, and the *tenant in tail dies without iſſue*, the wife of the donor ſhall not be endowed of the rent, becauſe the *rent is extinct*, for it was reſerved upon the eſtate tail, which is ended. F. N. B. 149. (G).

The determination of the eſtate of the baron is by the act of God, and the feme ſhal be endowed. Br. Dower, pl. 86. cites Old Nat. Brev. fol. 144.——Co. Litt. 31. b. S. P.——3 Rep. 84. b. S. P. in a nota by the reporter, and cites 24 E. 3. 28. b.——10 Rep. 96. a. S. C. cited per Cur.——Perk. ſ. 317. S. P. cites Mich. 44 E. 3. 31.

9. *But* although that the *tenant in tail dies without iſſue*, yet his wife ſhall be endowed, becauſe *the land continues, and is not determined as the rent is.* F. N. B. 149. (G).

Of an *eſtate tail* in lands *determined* a woman ſhall be endowed in the like manner and form as a man ſhall be tenant by the curteſy, mutatis mutandis. Co. Litt. 31. b.

S. C. cited by Holt Ch. J. in delivering the opinion of the Court. 7 Mod. 24. Trin. 1 Ann. B. R.

10. *Tenant in tail bargained and ſold land to H. and his heirs*, H. has an eſtate deſcendable and determinable upon the death of the tenant in tail, and his *wife ſhall be endowed determinable on the death of tenant in tail.* 10 Rep. 96. a. 98. a. Mich. 10 Jac. reſolved in Seymour's caſe.

[219] (G) *Of what Eſtates* the Wife ſhall have Dower.

S. P. per Thorp J. for *it is only incident to the reverſion for term of life, and by the incidency the heir ſhall have it, but* the father nor the heir *ſhall not have eſtate of inheritance in it.* Br. Dower, pl. 60. cites 26 Aſſ. 38.

[1. IF a man *leaſes for life rendering rent*, his wife ſhall *not* be endowed *of this rent*; for this is but an eſtate for life in the rent, though it deſcends to the heir. 7 H. 6. 3. b. 17 E. 3. 12. 28 Aſſ. 3. adjudged.]

[2. If

[2. If *leſſee to him and the heirs of his body*, or *to him and his heirs for the life of J. S.* dies, his wife ſhall not be endowed, becauſe this is but an eſtate for life. 18 E. 3. 44. b. 22 E. 3. 19. b.]

[3. If *leſſee for life leaſes for the life of another*, his wife ſhall not be endowed; for he gains this fee in an *inſtant*. 3 H. 4. 6.] *So* if *tenant for life makes a feoffment in fee*, and dies, the feme of him ſhall not have dower; for though the baron gave fee-ſimple by alienation, yet he never was ſeiſed in fee ſo as ſhe might have dower; quod non negatur. Br. Dower, pl. 30. cites S. C.

[4. If the *baron and another* are *jointly ſeiſed in fee*, and the *baron makes feoffment of his moiety*, his wife ſhall not be endowed of this, for the baron had an eſtate dowable, ſcilicet, a ſole eſtate but for *an inſtant*. 14 H. 4. 13. b.] Co. Litt. 31. b. S. P.— F.N.B. 150. (K) S. P. cites 34 E. 1. Dower, 179. pl. 1. S. P.

——— Jenk. 105.

[5. If *tenant in ſpecial tail takes a ſecond wife that is not dowable of the tail, and* after *makes feoffment in fee*, and dies, his wife ſhall not be endowed becauſe he gains the fee but in *an inſtant*. Co. 8. WHIT. 43. b. will prove this; for there it is that if the baron be within age at the feoffment, * his collateral heir ſhall not avoid it, becauſe he is not inheritable of the right, for ſuch right ſo gained does not deſcend.] Huſband and wife, *tenants in ſpecial tail*, * Fol. 677. *had iſſue a ſon*, the *wife dies*, then the *huſband made a feoffment to the uſe of himſelf for life, remainder to the uſe of his ſon in tail, with a letter of attorney to make livery*, but *before that was made he married a ſecond wife, and then livery was made* according to the uſes in the feoffment, then the huſband died; and the queſtion was, whether this ſecond wife was dowable; and adjudged that ſhe was not, becauſe before the feoffment made, the huſband was ſuch a tenant in ſpecial tail, that the iſſue by his ſecond wife could not inherit, and by the feoffment before, and livery after the coverture, he did not gain any new eſtate or ſeiſin of which the wife might be endowed; for what was done by that feoffment was immediately drawn out again by virtue of the ſpecial entail. Cro. J. 615. pl. 5. Paſch. 18 Jac. in Scace. Ameots v. Catherick.

[6. If there be *leſſee for life* the *reverſion to the huſband in fee*, and the *leſſee leaſes* the land *to the huſband for the life of the huſband*, and after the *huſband dies*, and the *leſſee dies*, the wife ſhall not be endowed thereof; becauſe there was a *poſſibility of a reverſion* during the coverture as to the freehold. 1 E. 3. 16. per Touth.]

[7. If the baron be *tenant in ſpecial tail*, the *remainder to his own right heirs*, and *takes a ſecond wife*, and then *becomes tenant after poſſibility*, and dies, his wife ſhall be endowed. 46 E. 3. 24. b. 22 E. 3. 3.]

[8. *So* if the *remainder* had been limited to him in *general tail*. 50 E. 3. 5. adjudged. 7 H. 4. 25. b.] [220] If the *firſt feme dies without iſſue*, the ſecond feme ſhall be endowed; for the *remainder in tail veſts in the baron*, by reaſon that the baron was only tenant for life in effect after the death of his feme without iſſue. Br. Dower, pl. 25. cites 50 E. 3. 4.

[9. The huſband *ought to have a fee or tail and freehold in poſſeſſion*, otherwiſe the wife is not dowable. 46 E. 3. 16.]

[10. If the *baron hath* an *eſtate for life*, *remainder to B. in tail*, remainder *to the right heirs of the baron*, and *dies during the life of B.* the wife ſhall not be endowed; for it is *not a fee in poſſeſſion*. 40 E. 3. 15. b. 46 E. 3. 16. b.] So where the eſtate was to the baron for life, remainder to firſt ſon in tail, and ſo to the ſecond, remainder to the heirs of the body of the baron, it was reſolved that the eſtate

eſtate tail was not executed for the poſſibility of the meſne eſtate that might interpoſe, and therefore it was always diſjoined during the life of the baron, ſo that of that eſtate his wife could not be endowed. Cro. E. 315, 316. pl. 10. Hill. 36 Eliz. B. R. Cordal's caſe.

[11. *But* if *tenant for life ſurrenders to the remainder-man in tail or fee*, his wife ſhall be endowed; for the *eſtates are united.* 44 E. 3. 31. b.]

[12. The *ſame* law if the *tenant for life grants his eſtate upon condition*, if the *condition* be *not broke.* 44 E. 3. 31. b. 45 E. 3. 13. b. adjudged.]

[13. If *leſſee for life leaſes* the land *to the leſſor and the heirs of his body for the life of the leſſee*, and after the *leſſor dies, living the leſſee*, the wife of the leſſor ſhall be endowed, for he had *the fee and freehold* in him. 18 E. 3. 45. adjudged.]

S. P. as if tenant in tail bargains and ſells by deed indented and inrolled to another and his heirs, the wife of the bargainee ſhall be endowed as long as the tenant in tail lives; reſolved. 10 Rep. 96. a. Mich. 10 Jac. B. R. Seymour's caſe. ——— See (H) pl. 1. S. C.

[14. If the huſband *hath a fee and freehold defeaſible*, yet his wife ſhall be *endowed till* it is *defeated.* 45 E. 3. 13. b.]

See (H) pl. 2. S. C.

[15. If *baron and feme leſſees for life ſurrender to him in reverſion*, this is defeaſible by the feme after the death of the baron, yet in the mean time if he in the *reverſion dies*, his wife ſhall be endowed. 45 E. 3. 13. b.]

The wife of the father ſhall not be endowed of the third part. F. N. B 149. (H).

[16. If the *grandfather dies ſeiſed*, and the *ſon endows the grandmother, who dies*, yet the *wife of the father ſhall not be endowed.* 45 E. 3. 32. For by relation the father had but the reverſion. 43 E. 3. 13. 18 E. 3. 44. b. M. 11 E. 1. B. Rot. 46. adjudged, dos de dote peti non debet.] ——— If there be a grandfather, father, and ſon, and grandfather is ſeiſed of three acres of land in fee, and takes wife and dies, this land deſcends to the father, who dies either before or after entry, now is the wife of the father dowable. The father dies, and the wife of the grandfather is endowed of one acre and dies, the wife of the father ſhall be endowed of the two acres reſidue; for the dower of the grandfather is paramount the title of the wife of the father, and the ſeiſin of the father, which deſcended to him (be it in law or actual), is defeated, and now upon the matter, the father had but a reverſion expectant upon a freehold, and in that caſe dos de dote peti non debet; though the wife of the grandfather dies living the father's wife; but there is a diverſity between a deſcent and a purchaſe. Co. Litt. 31. a. ——— 4 Rep. 122. a. b. S. P. cites 5 E. 3. tit. Voucher, 249. the caſe of Paris v. Paris, S. P. and is the caſe whence this is taken. ——— Perk. ſ. 315. S. P. becauſe a woman ſhall not be endowed of a reverſion expectant upon a freehold, and the poſſeſſion of the freehold by the endowment is veſted in the grandmother by a title before the title of the father unto the freehold; but if the grandfather had enfeoffed the father of the ſame land during the marriage betwixt the father and his wife, in that caſe, after the death of the grandmother, the wife of the father ſhould have dower of the ſame land of which the grandmother was endowed, becauſe the poſſeſſion of the father which gave title to his wife to have dower, was in the life of the grandfather, at which time the plaintiff could not demand the dower, ſo that by the endowment of the grandmother * the poſſeſſion of the father is not avoided, for the grandmother had right unto the poſſeſſion but from the time of the death of the grandfather, &c. ——— Co. Litt. 31. a. b. S. P. ——— 4 Rep. 122. a. b. cites 5 E. 3. tit. Voucher, 249. Paris v. Paris, S. P. & S. C.

* [221]

4 Rep. 122. a. b. cites Paris v. Paris. 5 E. 3. tit. Voucher, 249. S. P.

17. There is another diverſity, as *where the wife of the father is firſt endowed, and where the wife of the grandfather;* for in the ſame caſe, after the deceaſe of his grandfather and father, the ſon enters and endows his mother of a third part, againſt whom the grandmother recovers a third part and dies; the mother ſhall enter again into the land recovered by the grandmother, becauſe ſhe had in it an eſtate for term of her life, and the eſtate for

for the life of the grandmother is leſs in the eye of the law, as to her, than her own life. Co. Litt. 31. b.

18. *The heir took feme* and entered, *and endowed his mother*, and after *aliened the reverſion*, and then *the tenant in dower died*, and after *the heir who endowed her died*, and yet the feme of the heir was not endowed of this land allotted in dower, and ſo ſee that the *endowment* cuts off and *deſtroys the ſeiſin of the heir*; quod nota. Br. Deſcent, pl. 19. cites 19 E. 2.

19. T. was ſeiſed and had *iſſue Robert the eldeſt, and Richard the youngeſt*, and died, and *Robert entered* and took feme, *and had iſſue Alice*. The feme died, and he *took another feme and died, the feme privement enſeint with a ſon*, and the *lord ſeiſed the ward* of the land, and *of Alice*, for the nonage of Alice, and leaſed the ward to T. who *endowed the feme* of Robert, and after the *feme is delivered of W. a ſon*, by which the *lord re-ſeiſed the ward of W.* and *W. lived* 10 *years, and died without iſſue*, by which H. the plaintiff entered as heir of Richard the youngeſt ſon of J. and Alice ouſted him, and he brought aſſiſe, and prayed the diſcretion of the juſtices; and becauſe W. to whom Alice was of half blood was ſeiſed, it was awarded that Henry ſhould recover; and ſo note that the *ſeiſin of the guardian* makes the heir of the infant of the intire blood to be heir, and the ſiſter of half blood was barred of the land, but by the opinion of the Court, the *dower* of the feme *ſhall revert to* Alice, becauſe W. was not ſeiſed of it; quære. Br. Deſcent, pl. 19. cites 8 Aſſ. 6.

20. If the *iſſue* be *remitted to a ſpecial tail*, the feme of the father, who is not his mother, ſhall not be endowed. 2 Roll, Remitter (K), pl. 4. cites 44 E. 3. 26. b.

21. In dower; *baron and feme tenants in tail had iſſue two ſons*, and the *baron died*. The *feme leaſed to the eldeſt ſon for years, and after releaſed to him and his heirs with warranty*; he *took feme and died without iſſue*, and after *the mother died*, and the youngeſt ſon entered, and the feme of the eldeſt ſon brought writ of *dower*, and recovered by judgment, and therefore it ſeems that a releaſe with warranty is a diſcontinuance; nevertheleſs, this judgment was contrary to the opinion of ſeveral. Br. Diſcont. de Poſſeſſion, pl. 7. cites 24 E. 3. 28.

S. P. but Brooke ſays, *it ſeems that the releaſe with warranty of the tenant in tail is only a grant of his eſtate*, and though ſhe gave fee, yet the

younger ſon is remitted to the tail, which is elder than the title of the feme now demandant. Br. Dower, pl. 50. cites S. C.

22. If *two exchange, and* afterwards *one aliens*, and the other vouches him being impleaded, he ſhall recover in value the land given in exchange, and ſo it ſhall relate before the recovery. 2 Roll, Voucher (R. b), pl. 4. cites Perk. ſ. and ſays, the *feme of the alienee* ſhall not be endowed.

Perk. ſ. 309. cites 4 E. 3. 52. Trin. 15 E. 3. Dower, 128. —— A woman ſhall

not be endowed both of the land given in *exchange*, and of the land taken in exchange, yet the huſband was ſeiſed of both; but ſhe may have her election and be endowed of which ſhe will. Co. Litt. 31. b.

23. In dower; the *tenant ſaid that B. baron of the demandant, was ſeiſed*, &c. *and infeoffed W. who regave to the baron and his firſt feme, and to the heirs of their two bodies, who had iſſue this* [222]

tenant, and the firſt feme died, and the *baron took the demandant to feme and died*; judgment if dower; the *feme ſaid, that before B. her baron had any thing, C. was ſeiſed, &c. and gave to the father of the ſaid B. in tail, and* that the *father of B. died, and ſo is the tenant remitted as heir to the firſt tail, which is general tail*, of which ſhe is dowable, and yet becauſe her *baron during the coverture had nothing but by the ſecond tail*, of which ſhe is not dowable, therefore the opinion of the Court was againſt her. Br. Dower, pl. 18. cites 40 E. 3. 24.

24. And there it is ſaid, that if *donee in tail takes feme*, and *dies without iſſue*, ſo that the *land reverts*, yet the feme ſhall be endowed. Br. Dower, pl. 18. cites 40 E. 3. 24.

25. And it was ſaid in the caſe ſupra, that *the heir in tail may claim in by the one tail or the other*. Br. Dower, pl. 18. cites 40 E. 3. 24.

26. In dower, the *tenant ſaid that the land was given to the baron of the demandant, and to his firſt feme in tail*, the *remainder to W. in tail*, the *remainder to the baron in fee*, and the *firſt feme died without iſſue*, and the *baron died, living him in remainder in tail*; judgment, &c. and a good plea; by which the demandant averred, that her baron ſurvived him in remainder, who died without iſſue, and ſo ſeiſie que dower la poit. Br. Dower, pl. 19. cites 46 E. 3. 16.

Br. Eſtoppel, pl. 30. cites S. C.

27. *Quod ei deforceat*; the caſe was, that *a man was ſeiſed in general tail by fine*, and *made feoffment, and retook in ſpecial tail to him and his firſt feme*, and *had iſſue*. The *feme died*, and he *took another feme and died*; the *king ſeiſed by tenure in capite*, and *endowed the feme*; the *iſſue came and ſhewed the ſpecial tail, and had ſcire facias* againſt the feme, *and recovered* againſt him *by default*, and *ſhe took another baron*, and *ſhe and the ſecond baron brought quod ei deforceat* againſt the heir, and *he pleaded the ſpecial tail*, and *ſhe would have remitted the heir by the elder tail, and ſo concluded him to ſay but her baron was always ſeiſed in general tail*; & non allocatur; for by Thorp clearly, *the baron was not remitted*, and then he was not ſeiſed of ſuch eſtate of which the feme may be endowed; for of ſuch ſpecial eſtate his iſſue is not inheritable, nor his feme dowable, by which ſhe averred continuance of poſſeſſion by the firſt tail, and ſo to iſſue; quod nota. Br. Dower, pl. 9. cites 41 E. 3. 30.

28. In dower it was *found by verdict that W. infeoffed R. upon condition of payment and nonpayment of the part of W. by one day*, and *W. died*, and his *feme took another baron*, and *the ſecond baron tendered the money to R. and he received it and died*, and the *feme of R. brought dower and recovered*; for he who paid was not privy to the condition. Br. Dower, pl. 11. cites 42 E. 3. 1.

29. Scire facias to execute a fine was *ſued by the heir of S.* becauſe the *fine was levied to A. for life*, the *remainder to J. in tail*, the *remainder to S. in fee*, and that *all are dead, and J.* [*is dead*] *without iſſue*, and the tenant ſaid that *A. ſurrendered his eſtate to J. and after S. died, and J.* [*died*] *without iſſue*, and that *A. entered as brother and heir to S.* whoſe eſtate he has; judgment if execu-

tion;

tion; and the other ſaid that A. by his entry after the death of S. had only his firſt eſtate for life, which is a great error, for it is a ſurrender, and then *after the deaths of J. and S.--A. is in in fee, and* then *the fine executed of the fee*, and never ſhall be executed again; and per Finch. becauſe the *eſtate for life merged in the ſeiſin of J. and he in tail*, and not for life of A. the feme of J. ſhall be endowed. Br. Sci. Fa. pl. 21. cites 42 E. 3. 9.

30. Dower *of the ſeiſin of N. her baron againſt the heir of her baron*, who *ſhewed how the land was intailed by fine to his father baron of the demandant and his feme mother of the tenant in ſpecial tail*, and that after his *father and mother diſcontinued the tail by fine to a ſtranger, and retook eſtate by grant and render in general tail, and had iſſue the tenant*, and the *firſt feme mother of the tenant died*, and the *baron took the demandant to feme*, and after died, and ſo he is in by the one tail and the other, and adjudged in his elder right by *remitter*; judgment ſi actio; and the opinion of the Court was clearly that the feme ſhall be barred; quod nota; by which ſhe paſſed over to the other anſwer. Br. Dower, pl. 14. cites 44 E. 3. 26. [223]

31. A man *leaſed to A. for life*, the *remainder to B. in fee*, and after the *tenant for life leaſed to the ſaid B. for* term of *B.'s life*, and *B. died* and his feme was barred of dower, and ſo ſee that *B.* was not ſeiſed in fee, nor it was not a ſurrender; for if A. ſurvived B. then A. ſhall re-have the land. Br. Eſtates, pl. 67. cites H. 13 R. 2. Br. Forfeiture de Terres, pl. 91. cites S. C.

32. Dower of the dowment of J. M. late her baron; the *tenant ſaid that the land was tailed in remainder by fine to J. M. his father, baron of the demandant, and to his heirs of the body of E. his firſt feme begotten, and that J. M. and E. had iſſue this tenant, and E. died, and J. M. married the ſaid demandant*, and died; judgment if dower; and by the beſt opinion ſhe ſhall not have dower. Br. Dower, pl. 36. cites 12 H. 4. 1.

33. The feme ſhall not be endowed of lands or tenements which her baron *held jointly* with another at the time of his death. But where he held in common it is otherwiſe. Litt. ſ. 45. The reaſon of the diverſity is, for that the jointenant which ſurvives claims the land by the feoffment and by ſurvivorſhip, which is above the title of dower, and may plead the feoffment made to himſelf without naming of his companion that died. But tenants in common have ſeveral freeholds and inheritances, and their moieties ſhall deſcend to their ſeveral heirs, and therefore their wives ſhall be endowed. Co. Litt. 37. b.

34. *Where the eſtate which the huſband has during the marriage is ended*, there the wife ſhall loſe her dower. As if tenant in tail diſcontinues in fee, and afterwards takes a wife and diſſeiſes the diſcontinuee, or the diſcontinuee does infeoff him, and afterwards the tenant in tail dies ſeiſed, his heir is remitted, and the wife ſhall loſe her dower, becauſe the heir is in of another eſtate of inheritance than the huſband had during the coverture. F. N. B. 149. (F).

35. If a *man has title of action to recover any land*, and afterwards he *enters and diſſeiſes the tenant* of the land *and dies ſeiſed*, and his *heir enters*, the *heir is remitted* unto the title which his anceſtor

had, and the huſband's wife ſhall loſe her dower; for that eſtate which the huſband had is determined, for that was an eſtate in fee by wrong, and the heir has the eſtate in fee which his anceſtor had by right. F. N. B. 149. (F).

36. If there be *two jointenants* of certain lands *in fee*, and the *one aliens* that which belongs to him to another in fee, who takes a wife and after dies; in this caſe the wife for her dower ſhall have the third part of the moiety which her huſband purchaſed, to hold in common (as her part amounts) with the heir of her huſband, and with the other jointenants which did not alien. For that in this caſe her dower cannot be aſſigned by metes and bounds. Litt. ſ. 44.

Cro. E. 248. pl. 9. S. C. and a former judgment affirmed.

37. A. deviſed lands to *B. and the heirs of his body*, and adds, *Item, I will that after B.'s death my land ſhall remain to C. the ſon of B.* B. died, and adjudged that the wife of B. ſhall have dower; for that B. had an eſtate tail. Mo. 593. pl. 801. Hill. 35 Eliz. Atkins v. Atkins.

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38. *A. leſſee for life*, the *remainder to B. in fee. A. ſurrenders upon condition to B. and enters for the condition broken.* B. dies, and his wife brought dower againſt A. and iſſue is joined upon *ne unques ſeiſie que dower*, &c. that ſhall be found againſt A. Noy, 66. Paſch. 37 Eliz. Oſmond and his wife.

And. 102. in pl. 227. S. P. —— Le. 16.

39. There is no tenancy in dower of a *copyhold* but by an eſpecial *cuſtom*. Arg. Cro. E. 391. pl. 14. Paſch. 37 Eliz. B. R. in caſe of Clun v. Peaſe and Turner.

Cham v. Dover, pl. 19. Paſch. 26 Eliz. B. R. Copyholder in by the cuſtom is paramount the title of dower, and the ſeiſin of the lord, ſo that ſhe ſhall not be endowed though he keeps the lands in his hands for a time after the marriage, and then grants them again by copy. Per Wray Ch. J. —— Per Doderidge J. 2 Bulſt. 337. S. P. and per Coke Ch. J. Ibid.

2 And. 147. in Corbet's caſe. S. P. —But before the ſtatute

40. *Since* the ſtatute 27 *H.* 8. the feme ſhall have dower of an *uſe*. 2 And. 75. Mich. 39 & 40 Eliz. in caſe of Cromwell v. Andrews.

ſhe was not dowable of land conveyed to uſes. 4 Rep. 1. b. —— No dower or tenancy by the curteſy of an uſe. Arg. Hard. 492. cites Perk. 69. 89. Lane, 104. Doctor and Stud. 98.

For the law requires *ſole ſeiſin* to entitle the wife to dower.

41. If there be two *jointenants in fee*, and *one makes a feoffment* in fee, his wife ſhall not be endowed. Co. Litt. 31. b.

Jenk. 105. pl. 1. —— And the ſole ſeiſin which was in the jointenant that made the feoffment was in law *only for an inſtant*. Jenk. 105. pl. 1. —— Co. Litt. 31. b.

For the ſeiſin of the conuſee was *ſeiſin for an inſtant* only. Jenk. 105. pl. 1.

42. *So* if the *conuſee of a fine* does *grant and render* the land *to the conuſor*, the wife of the conuſee ſhall not be endowed. Co. Litt. 31. b.

But if the donee in tail dies without iſſue, the wife of the donor ſhall

43. *But* if the huſband makes a *gift in tail, reſerving a rent* to him and to his heirs, and after the donor takes wife and dies, the wife ſhall be endowed of this *rent, becauſe* it is a rent *in fee*, and by poſſibility may continue for ever. Co. Litt. 32. a.

not be endowed of the rent becauſe it is extinct, the eſtate-tail on which it was reſerved being ended.

But

But the donee's wife ſhall be endowed; for the land continues, and is not determined as the rent is. F. N. B. 149. (G).——The donee's wife ſhall be endowed. Perk. ſ. 317.

44. Tenant in tail, in *conſideration of marriage intended between A. his ſon, and M. daughter of B. covenanted to ſtand ſeiſed* to the uſe of himſelf, &c. till the marriage, and after to himſelf for life, and then to the uſe of A. and M. and the heirs of their bodies, and ſuffered a recovery to the ſame uſes. The father dies. A. dies without iſſue. If after ſuch covenant the father had married, his wife would have been endowed; but if the conſideration had been *for the eſtabliſhing the land in his name and blood*, then an uſe had been raiſed, and it would have been otherwiſe. Brownl. 193. Mich. 2 Jac. Freſhwater v. Rois.

But had he limited the uſe *to himſelf for his life*, by which means he could not limit any remainder over, in ſuch caſe the wife ſhould not be endowed. Arg. Godb. 442. cites 35 Eliz. 2 Rep. 52. Blithman's case.——But in this ſame caſe, and for the ſame reaſon, it was adjudged that ſuch wife ſhould be endowed. And. 291. Blytheman v. Blithman.——2 Rep. 52. cites S. C. accordingly.——Cro. E. 279. pl. 8. S. C. & S. P. reſolved accordingly.——Mo. 345. S. C. as adjudged accordingly.——Yelv. 51. S. C. and S. P. agreed by all the juſtices.——Noy, 46. Heigham v. Bedingfield. S. P. agreed.

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45. No dower ſhall be of *lands bargained and ſold* if the huſband *dies before inrolment*. Ow. 150. Paſch. 5 Jac. in the Court of Wards. Sir Henry Dimmock's caſe.

So if a man *after bargain and ſale by him takes wife and dies*, and afterwards the deed is *inrolled* within ſix months, the wife ſhall not have dower. Cro. C. 569. pl. 6. Hill. 15 Car. B. R. Parker v. Biecke.

46. If A. *bargains and ſells* lands to B. and his heirs by deed indented and inrolled, with *proviſo* if ſuch act be done, that the bargain and ſale ſhall *be void*, and afterwards A. takes wife, and after the proviſo is broken *A. dies before entry*, and adjudged that the wife ſhall not be endowed; for though the eſtate of the bargainee veſts by the ſtatute of 27 H. 8. by execution of the eſtate of the land to the uſe raiſed by the bargain and ſale, yet inaſmuch as the baron did not re-enter, he had not any eſtate in the land whereof the feme may be endowed; cited per Cur. as ſo adjudged. 6 Rep. 34. a. Trin. 7 Jac. B. R. in Fitz-Williams's caſe.

47. *A. tenant in tail, remainder to B. in tail. A. bargains and ſells the lands to J. S. by deed indented and enrolled.* J. S. has an eſtate deſcendible to him and his heirs determinable on the death of A. and his wife ſhall be endowed; but ſuch *dower ſhall be determinable by the death of A.* Reſolved. 10 Rep. 96. a. Mich. 10 Jac. Seymor's caſe.

48. The *dutchy of Cornwall* by an act of parliament made the 11 E. 3. is eſtabliſhed to the king's eldeſt ſon, habendum ſibi & ipſius & hæredum ſuorum regnum Angliæ filiis primogenitis in regno Angliæ hæreditario ſucceſſuris; reſolved by all the judges of England, that this is an eſtate of fee-ſimple in the prince, and his wife is dowable of it by force of this act. But ſuch a charter granted by the king to a ſubject is a void grant. Jenk. 280. pl. 5.

49. *Tenant in tail makes leaſe for years, and* then *releaſes to leſſee and his heirs.* The wife of this leſſee is dowable of this eſtate, and

So if he makes a *feoffment* or

bargain and ſale, for the tenant in tail

and this dower ſhall continue till the entry of the iſſue in tail. Jenk. 274. pl. 96.

has more than an eſtate for life in him, he has an inheritance, and conſequently ſuch bargainee has a *deſcendible eſtate*, and does not determine by the death of tenant in tail, but only by the entry of the iſſue. 11 Mod. 20. Trin. B. R. in caſe of Machil v. Clerk.

50. If *tenant for life makes a leaſe* by or without deed *to him in the remainder or reverſion in tail or in fee, for the term of the life of him in the reverſion or remainder*, and after he in the *remainder takes wife and dies*, his wife ſhall not be endowed, for tenant for life ſhall enjoy the land again, for a forfeiture it cannot be, for he in the remainder was party, and a ſurrender it cannot be, for his whole eſtate was not given. Co. Litt. 42. a.

S. C. cited Show. Parl. Caſes, 72.—A bill was to be relieved againſt the defendant's dower, her huſband being only a *truſtee*; and it appearing that the huſband was but a truſtee, the defendant was barred of her dower contrary to the opinion of Naſh v. Preſton, 1 Cro. 191. and ſo it was ſaid is the conſtant cuſtom of the court now. 2 Freem. Rep. 43. pl. 48. Mich. 1678. Noel v. Jevon.

51. J. S. *tenant in fee-ſimple by indenture inrolled, bargained and ſold* the lands *to B. for* 120 *l. in conſideration that B. ſhall redemiſe to him and his wife for their lives, rendering a pepper-corn, and with a condition that if J. S. paid the* 120 *l. at the end of* 20 *years, then the bargain and ſale to be void; B. redemiſed it* accordingly and died; *B.'s wife brought a writ of dower*, and held good, becauſe by the bargain and ſale the land was veſted in her huſband, and thereby the wife intitled to dower; and when he redemiſes it according to the agreement, yet thoſe to whom the redemiſe was made ſhall hold it ſubject to dower; and it was his folly not to join another with the bargainee, as is the ancient courſe on mortgages; and when ſhe is dowable by act or rule in law a court of equity ſhall not bar her to claim her dower; for it is againſt the rule of law, where no fraud or covin * is a court of equity will not relieve; and this was certified by Jones and Crooke J. upon a conference with the other juſtices at Serjeant's-Inn to the Chancery, that the wife of B. was to have dower, and that a court of equity ought not to preclude her thereof. Cro. C. 190. pl. 11. Paſch. 6 Car. Naſh v. Preſton.

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52. If *rent* be granted *to A. and his heirs* to commence *after the death of B.* and grantee dies before B. yet his wife ſhall be endowed. Arg. 2 Sid. 110. Mich. 1658.

S. C. cited by the Maſter of the Rolls, who ſaid it was 15 Car. 2. fol. 794. and that the truſt was created by the huſband. 2 Wms.'s Rep. 640. Hill. 1732. in caſe of Sutton v. Sutton, and ſaid that where a truſt of inheritance is *created by the huſband himſelf*, he took it to be ſettled that the wife ſhall not have dower, even againſt the heir, nor againſt a deviſee, the caſes in reaſon being the ſame. Ibid. 640.——If a man before marriage conveys an eſtate to truſtees and their heirs, ſo as to put the legal eſtate out of him, though the *truſt is limited to him and his heirs*, the wife ſhall not be endowed of this eſtate. Chan. Prec. 336. Paſch. 1712. Bottomly v. Fairfax.——S. C. cited and approved by the Maſter of the Rolls. 2 Wms.'s Rep. 640, 641. Hill. 1732. in the caſe of Sutton v. Sutton.——S. C. cited by Ld. C. Talbot, Caſes in Equ. in Ld. Talbot's Time, 139. Mich. 9 Geo. 2. and ſays that if a woman ſhould be endowed of a truſt, the received practice of inſerting to bar dower would be of no ſignification.——The *wife of ceſtuy que truſt* is not intitled to dower; per Ld. Talbot. 3 Wms.'s Rep. 229. pl. 53. Hill. 1733. Chaplin v. Chaplin.——No man will ſay that ever any woman was endowed in equity of a truſt-eſtate. Arg. Parl. Caſes, 72. in caſe of the Counteſs of Radnor v. Vandebendy.——Per Ld. Sommers, Chan. Prec. 65. S. C.

53. No dower out of an eſtate in *truſt*. Bill diſmiſſed. 16 Car. 2. fol. 749. Chan. Rep. 254. 2. Colt v. Colt.

54. The huſband *purchaſed* lands of tenant for life, and *took a collateral ſecurity of him for a conveyance of the fee* by his ſon and heir, the remainder-man in fee, when of age, but the huſband died before ſuch conveyance was made; the wife is not intitled to dower. Fin. Rep. 368. Trin. 30 Car. 2. Exton v. St. John.

55. In dower againſt the heir of her huſband, the tenant pleaded, that *A. was ſeiſed, and deviſed the tenements to the huſband and to two more equally to be divided*, and ſo demands judgment of the writ, ſuppoſing that ſhe could not ſue *dower before partition* againſt tenants in common; but upon demurrer adjudged that the writ well lies. 3 Lev. 84. Mich. 34 Car. 2. C. B. Sutton v. Rolfe.

56. After a decree for a perſonal duty a *ſequeſtration* iſſues, and then the defendant marries and dies; this ſhall not bind the feme who comes in for her dower; per North K. Vern. 118. pl. 106. Hill. 1682. Anon.

Ibid. 166. S. P. cited as in the caſe of Rockley v. Burdett.

57. Eſtate to *A. for life*, remainder to B. *and his heirs for the life of A.* remainder to the *heirs of the body of A.* remainder over. The wife of A. ſhall not be endowed, for the eſtate for the life of A. *does not merge*. Adjudged ſuddenly on the firſt argument, though it was urged that the remainder to B. was only for preſerving the remainder during A.'s life againſt any forfeiture, but that in the mean time the eſtate was executed in A. 3 Lev. 437. Hill. 7 W. 3. C. B. Duncomb v. Duncomb.

58. A tenant for life, *remainder for years*, remainder to A. in tail. A.'s wife ſhall be endowed, otherwiſe if the *remainder* had been *for life*. 1 Salk. 254. Hill. 9 W. 3. C. B. Bates's caſe.

Lutw. 719. S. C. accordingly.— Ld. Raym. Rep. 326, 327. Bates v. Bates, S. C. adjudged accordingly; but had the intervening term been an eſtate for life it had been otherwiſe according to Perk. 336. the only authority in the books for that purpoſe.

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59. A. *deviſed lands to his executors till debts paid, remainder to B. in tail*, B. marries and dies before the debts are paid. Per Cur. the eſtate in the executors is only a * chattel intereſt, and will not hinder B.'s wife of dower, and that intereſt determines at law when the truſt is ſatisfied; but her dower cannot *commence in poſſeſſion*, nor damages be recovered for detaining it, but from the time of the debts being paid. 2 Vern. 403. pl. 373. Mich. 1700. Hilchins v. Hilchins.

2 Freem. Rep. 311. Hitchins v. Hitchins, S. C. and a ſatisfied mortgage being kept on foot and ſet up to keep the widow out of poſſeſſion, was decreed to be ſet aſide and not to ſtand in her way, and the Court thought the caſe of Radnor v. Vandebendie a hard caſe. —— Chan. Prec. 133. S. C.

* 9 Mod. 152. in caſe of Charles v. Andrews.

60. The queſtion was, if *aſſignees of commiſſioners of bankrupt* by *taking an aſſignment of a mortgage term prior to the title of dower* ſhall protect their eſtate from dower?

It was inſiſted that creditors and aſſignees of commiſſioners of bankrupt ſtand only in the place of the bankrupt, and ſince ſuch an aſſignment to the bankrupt himſelf or his heir would not protect the eſtate from title of dower in the hands of the heir, neither will it protect the eſtate in the hands of the creditors of the

the bankrupt or the aſſignee of the commiſſioners, and this differs the preſent caſe from the caſe of Lady Radnor and Vandebendy in Dom. Proc. where it was held that ſuch a prior term ſhould protect the eſtate from dower in the hands of a purchaſer, —— nota differentiam. Decree that the plaintiff be let into her dower, keeping down the intereſt of a third part of the mortgage. M. S. Rep. 156. Paſch. 10 Geo. Canc. Squire v. Compton.

61. All *eſtates tail* are eſtates of inheritance, to which dower is incident, and muſt be within the ſtatute de donis. 3 Wms.'s Rep. 263. Paſch. 1734. Low v. Burron.

62. A limitation *of eſtate pur auter vie to A. and the heirs of his body* makes no eſtate tail in A. and there can be no dower of it, it being no inheritance, but only a deſcendible freehold. 3 Wms.'s Rep. 263. pl. 65. Paſch. 1734. in caſe of Low v. Burron.

For though the objection is, that there can be no remainder of that whereof there is no reverſion,

63. If a *rent de novo* be granted *in tail without any remainder over*, and tenant in tail takes wife and dies without iſſue, the wife ſhall not be endowed, becauſe the thing out of which the dower is to ariſe is not in being; ſecus if the rent were granted in tail, *remainder over*. 3 Wms.'s Rep. 230. Hill. 1733. in caſe of Chaplin v. Chaplin.

yet the intent of the party gives the rent de novo firſt a being for the whole, and then the leſſer eſtates are carved out of it. By Holt Ch. J. 3 Wms.'s Rep. 230. at the bottom of the page in a note of the reporter, cites Salk. 577. Weeks v. Peach.

64. An eſtate was conveyed *to J. S. and his heirs, to the uſe of him and his heirs in truſt, to permit A. and B. to receive the rents and profits during their lives, and the life of the ſurvivor of them*, with power to A. to charge it with 400 l. and ſubject to ſuch power *J. S. to ſtand ſeiſed to the uſe of the ſurvivor of them. A. died* in 1713. *B.* died in 1723, and by his will *deviſed this eſtate to C. and his heirs, who long before had taken M. to wife.* C. mortgaged the eſtate. The queſtion was, if M. would upon the death of C. be intitled to dower ſo as to affect the mortgagee? Ld. C. Talbot decreed that M. would not be intitled to dower of this truſt eſtate. Caſes in Equ. in Ld. Talbot's Time, 138. Mich. 1735. 9 Geo. 2. Attorney-General v. Scott.

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(G. 2) Of what Seiſin.

1. IN *aſſiſe J. N. was ſeiſed in fee, and had iſſue two ſons, R. and T. and died. R. entered and had iſſue a daughter*, and *his feme died*, and *he took another feme and died, ſhe privement enſeint with a ſon.* The *daughter of R. entered*, and the *lord ſeiſed the ward, and endowed the mother of R. who was the feme of J. N. the grandfather.* The *ſon of the ſecond feme of R. is born*, and the *lord ſeiſes the ward of him*, and *he dies without iſſue within age*, and the *ſon of T. the uncle entered upon the daughter of R. into two parts*, and *ſhe ouſted him*, and *he recovered the two parts by aſſiſe*; and ſo ſee that by the *ſeiſin of the guardian* by the ward of the ſon, the

two

two parts ſhall go to the heir of this ſon, and not to the daughter of R. who was of the half blood; but the opinion of the Court was, that the *dower ſhall go to the daughter of R.* for this is in reverſion, and ſhe may claim it as heir of her father or grandfather; *for the tenant in dower is in by her baron, and not by him who endowed her*, and the *daughter of the eldeſt ſon is heir to the grandfather*. Br. Dower, pl. 87. cites 8 Aſſ. 6.

2. In aſſiſe, the *tenant of the king died ſeiſed of lands held of the king*, &c. and *the heir was in ward*, and the *feme ſued for dower, and writ iſſued to the ſheriff of N. to deliver her* 10 *marks per annum for dower in land and rent*, and *he delivered to her* 5 *marks land, and* 5 *marks rent iſſuing out of the land of which ſhe was dowable*, and *ſhe was ſeiſed and diſſeiſed of the rent*, and *brought aſſiſe and recovered*; for it is a good endowment, and yet her *baron was never ſeiſed of the rent*. Br. Dower, pl. 61. cites 26 Aſſ. 41.

3. *The ſame* law *of ſuch aſſignment of the heir if the feme accepts it*. Br. Dower, pl. 61. cites 26 Aſſ. 41.

4. *Contra* it is ſaid elſewhere, *if* it was *aſſigned out of land of which the feme is not dowable*. Br. Dower, pl. 61. cites 26 Aſſ. 41.

5. *Dower* was brought by a feme, and it does not appear what the iſſue was; but it ſeems that *the iſſue* was *ne unques ſeiſie que dower* la poiet; the *jury ſaid, that W. borrowed* 40 *l. of R. baron of the demandant, which W. enfeoffed R. upon condition, that if he repaid the* 40 *l. by ſuch a day, that he ſhould re-enter, and at the day W. did not pay but died, and the feme of W. married B. and by accord between R. baron of the plaintiff, and B. and his feme, B. paid the money to R. by which B. and his feme had the land, and this feme demandant demanded dower*, and prayed the diſcretion of the juſtices, &c. by which the demandant recovered her dower; the reaſon ſeems to be, inaſmuch as by the nonpayment at the day the baron of the demandant was ſeiſed ſimpliciter and without condition, and then the acceptance by R. after cannot prejudice his feme of her dower. Br. Verdict, pl. 85. cites 42 E. 3. 1.

6. In *dower*, the *tenant ſaid, that the baron of the demandant had nothing but by diſſeiſin made to him*; judgment ſi actio; and the *feme ſaid, that the father of her baron had two ſons, and leaſed the land to the eldeſt and his feme for their lives, and the youngeſt took the demandant to feme, and the eldeſt ſon died, and his feme took the tenant to baron, and the father of the two ſons died, and the reverſion deſcended to her baron, and after the feme of the eldeſt ſon died, and the tenant held himſelf in, and our baron ouſted him, and prayed ſeiſin*, &c. Quære if ſhe ought not to *traverſe the ſeiſin alleged in the baron*, and it ſeems that ſhe ſhould; for if the baron of the demandant [229] had not entered after the death of the feme of the eldeſt ſon, ſhe ſhould not have dower; for the baron of the feme of the eldeſt ſon had franktenement in jure uxoris, which is not defeated without entry, as it ſeems; quære; and quære if there ſhall not be ſeiſin in him without entry. Br. Dower, pl. 29. cites 2 H. 4. 22.

7. In dower, the *baron purchaſed rent*, and *died before the day of payment*, yet the feme ſhall be endowed. Br. Dower, pl. 35. cites 11 H. 4. 88.

8. If a man *grants a rent to J. S. in fee*, and he *dies before ſeiſin of it*, the ſeme ſhall be endowed; per Heidon; quod non negatur. Br. Dower, pl. 71. cites 5 E. 4. 2.

F. N. B. 149. (D) S. P. and in the new edition cites 7 E. 3. 66. 21 E. 3. 31. and 3 H. 7. 103. and ibid. Marg. cites 3 H. 7. 5. and 21 E. 3. 21.

9. A ſeme ſhall be endowed of *ſeiſin* and poſſeſſion *in law* without ſeiſin in fact; as where the father of the baron died ſeiſed, and baron after died before entry; quod nota; for otherwiſe it is of tenant by the curteſy; and the reaſon ſeems to be, *inaſmuch as the baron may enter in jure uxoris, but* the *ſeme cannot compel her baron to enter into his own land.* Br. Dower, pl. 75. cites 21 E. 4. 60.

——Perk. f. 457. and 464. S. P.

10. In dower, where there were *grandfather, father, and ſon*, and the *grandfather held of the king*, the *father took ſeme.* The *grandfather died.* The *father had iſſue and died before office found, and before any entry;* and after an *office was found for the king, that the grandfather was ſeiſed and died ſeiſed, and held of the king, and that he had iſſue, who had iſſue him who now is heir and within age*, by which the *king ſeiſed and committed the ward durante minore ætate*, and the *ſeme of the father, ſon of the grandfather, brought writ of dower againſt the committee*, and the committee demurred in law upon the matter. Br. Dower, pl. 66. cites 1 H. 7. 17.

11. *But* in anno 4 H. 7. 1. the caſe is put, that the *father entered and died before any office*, and therefore by all the juſtices the ſeme is dowable. Br. Dower, pl. 66.

12. Where a *ſtranger abates* upon tenant of the king, and the *heir has a ſeme and does not enter*, the ſeme ſhall not have dower upon this poſſeſſion, per Wood; and he vouched 21 E. 4. 60. which Fiſher and Davers agreed; for after patent made to the committee, the committee takes the profits, and not the king, though livery be ſued out of the king's hands. Br. Dower, pl. 66. cites 1 H. 7. 17.

13. *But* per Huſſey, if the *tenant of the king dies ſeiſed*, and *his heir has ſeme*, and after *office is found for the king*, there is no doubt but the *ſeme ſhall be endowed for the poſſeſſion in fact which was before in her baron by his entry before the office; for* it was agreed per tot. Cur. that the *heir by his entry is no intruder* before office be found for the king. Br. Dower, pl. 66. cites 1 H. 7. 17.

14. *And* if a *rent deſcends to the baron, who dies before the day of payment*, yet the ſeme ſhall be endowed. Br. Dower, pl. 66. cites 1 H. 7. 17.

15. *For* ſuch *ſeiſin upon which præcipe quod reddat lies is as ſufficient to have dower* as thoſe which are ſeiſins in law, of which aſſiſe lies not; for ſuch ſeiſin of which aſſiſe lies, is not always requiſite where dowment ſhall be, but ſeiſin in law ſuffices. Br. Dower, pl. 66. cites 1 H. 7. 17.

16. *And* per Brian, where the *king has ward*, and the *ward dies within age*, his *heir has a ſeme*, and the *baron dies before it comes to him*, there the ſeme ſhall not have dower. Br. Dower, pl. 66. cites 1 H. 7. 17.

17. Where

17. Where the *heir of the king's tenant has a feme*, and *office is found for the king, and after the heir enters and intrudes*, and *dies*, yet the feme ſhall have dower by reaſon of the poſſeſſion which he had before the office; per Davers; for by him the *ſtatute de prærogativa* 13. *quod nullum accreſcat ei liberum tenementum is intended where office is found, and after he takes feme, intrudes and dies*; but divers good ſtudents denied it. But Brian and Huſſey agreed with Davers. Br. Dower, pl. 66. cites 1 H. 7. 17.

18. *And if he had not entered, yet ſhe had been dowable*: for there was *ſeiſin in law in the baron, and he was not an intruder*, becauſe office was not found for the king, and it lies as well againſt the committee of the king as againſt another guardian. Br. Dower, pl. 66. cites 4 H. 7. 1.

19. Of an *inſtantaneous ſeiſin* gotten by diſſeiſin ſhe may be endowed. See Jo. 317. cites 34 Eliz. C. B. Mathew Taylor's caſe.

Of a ſeiſin for an inſtant a woman ſhall *not* be endowed, *as* if *ceſtuy que uſe after* the ſtatute of 1 *R.* 3. *and before* the ſtatute of 27 *H.* 8. had *made a feoffment* in fee, his wife ſhould not be endowed. Co. Litt. 31. b. ——— Of an inſtantaneous ſeiſin *by fine and render* no dower ſhall be. Cited per Tanfield J. as adjudged. Cro. J. 615. ——— Co. Litt. 31. b. S. P. ——— *Baron and feme tenants in ſpecial tail.* The feme dies leaving iſſue. The baron makes feoffment to the uſe of himſelf for life, and after to B. his ſon in tail, and *marries a ſecond wife*, and then makes livery. Reſolved, that ſhe is not dowable, for before the feoffment ſhe was not, he being ſuch tenant in tail that the iſſue by her could not inherit, and the inſtantaneous ſeiſin by the livery will not intitle her. Cro. J. 615. pl. 5. Paſch. 18 Jac. in Scacc. Amcots v. Catherich.

20. *Father tenant for life*, the *remainder to his ſon in tail*, the *remainder to the right heirs of the father*. After the father and ſon at a certain time were *attainted of felony, and executed likewiſe* at one time, the ſon not having any iſſue of his body. If now the father ſhall be ſaid to be ſeiſed of an eſtate in fee, that dower, &c. was the matter. And there becauſe it was proved by witneſſes that *the father moved his feet after the death of the ſon*; it was found by the jury ſeiſie que dower, &c. and upon that the wife of the father had judgment to recover. Note, after error was brought, and the error aſſigned in the proceſs. See Trin. 38 Eliz. Rot. 876. Noy, 64. Broughton v. Randal.

Cro. E. 502, 503. S. C. upon a different point, but in a note added at the end it is ſtated thus, viz. the title of the feme to recover dower was, that the father and ſon were joint-tenants to them and the heirs of the ſon; and they were both hanged in one cart; but becauſe the ſon (as was depoſed by witneſſes) ſurvived, as appeared by ſome tokens, viz. his ſhaking his legs, his feme thereupon demanded dower, and upon iſſue ne unques ſeiſie que dower this iſſue was found for the demandant. ——— Mo. 528. pl. 698. S. C. but S. P. does not appear.

21. Dower may be of a *poſſeſſion in law*. Jo. 361. Trin. 11 Car. B. R. in caſe of Reeve v. Maiſter.

A woman ſhall be endowed of a ſeiſin in law, as *where lands* and tenements *deſcend to the huſband before entry* he has but a ſeiſin in law, and yet the wife ſhall be endowed, albeit it be not reduced to an actual poſſeſſion; for it lies not in the power of the wife to bring it to be an actual ſeiſin, as the huſband may do of his wife's land, when he is to be tenant by curteſy. Co. Litt. 31. a. ——— Litt. ſ. 448. S. P.

(G. 3) In what Caſes Dower may be out of Dower.

So if ſhe receives part of the money for which the land was ſold. Br. Cuſtoms, pl. 53. cites 20 E. 3. and Fitzh. Preſcription, 30.

1. IN dower, a cuſtom was pleaded that *if the baron aliens the land, and expends the monies between him and his feme*, that ſhe ſhall be barred of dower, and adjudged a good cuſtom. Br. Cuſtoms, pl. 78. cites 3 E. 3.

Dower of 20 acres of land belonging to T. B. her baron, the tenant ſaid that P. B. father of T. B. her baron, was ſeiſed of the premiſes among other lands and tenements, and died, and T. B. aſſigned to her the land in demand in dower, in allowance of all the lands of which her baron was ſeiſed; and ſo was ſhe in of elder dower to her reſerved; judgment, &c. The demandant ſaid that the ſame P. B. was ſeiſed of the manor of B. and 20 acres of which dower is demanded and died, and the tenant entered into the manor of B. and enfeoffed the ſaid T. B. before the aſſignment of dower made by T. B. to the tenant, by which the 20 acres were not parcel of the manor, and that P. B. was never ſeiſed of other land, but of the manor and of 20 acres, and prayed dower. Cand. ſaid that now it appears that the demandant ought to have demanded but only the third part of the two parts of the land of which dower is demanded. Per Godred, you are in of all the land which belonged to your baron, which is againſt common right, and therefore we ought to have the third part of the whole. And ſo the queſtion is becauſe the tenant is dowable againſt common right of the whole, if the demandant ſhall have the third part of the whole, or the third part of two parts only; and adjornatur. Br. Dower, pl. 52. cites 4 H. 6. 25.

2. *Feme of the father is endowed*, and the *grandmother brought writ of dower againſt her*, and *ſhe vouched the heir by reverſion*, and the *demandant recovered againſt the tenant, and ſhe over againſt the heir, the third part of the two parts reſidue*, and *not in value*, and well. *And* if the *feme of the grandfather dies*, the *feme of the father may enter*; for the grandmother was attendant to him by tender; and from hence it ſeems that the heir may enter then into the ſecond dower; for ſhe ſhall not have both. Br. Dower, pl. 79. cites M. 5 E. 3. and Fitzh. Voucher, 249.

3. Where *heir takes feme and enters and endows his mother*, and *aliens the reverſion*, and the *mother dies*, and after the *heir dies*, the *feme of the heir ſhall not have dower of the land of which the mother was endowed.* For the ſeiſin of the heir who was her baron was determined by the endowment, and the feme in by her baron and not by the heir; for if the heir had charged ſhe ſhould hold diſcharged, quod nota. Br. Seiſin, pl. 18. cites 8 Aſſ. 6.

4. In dower, the *tenant in dower leaſed her eſtate to the heir, rendering rent for term of his life*, and the *heir died*, and *his feme was endowed by award*; for this is a ſurrender notwithſtanding the eldeſt endowment, and ſo the heir in in fee, though the firſt tenant in dower who leaſed was alive. Br. Dower, pl. 17. cites 45 E. 3. 13.

5. If a man makes a *feoffment with warranty* and dies, and the *feme of the feoffor brings writ of dower againſt the feme of the feoffee*, and *ſhe vouches the heir of the feoffor*, and *pending the action the feme of the feeffee brings writ of dower of the whole land and not of two parts, ſhe* cannot recover dower till the firſt dower be determined. Br. Dower, pl. 80. cites Litt. fol. 11.

6. The

6. The cuſtom of a manor was for the widow to be *endowed of a moiety* of the copyholds of which her huſband died ſeiſed; the huſband died, and his wife was endowed of 100 l. per ann. and 100 l. per ann. deſcended to his heir, who afterwards died, leaving a widow. This ſecond widow ſhall be endowed of a *moiety of the* * *moiety*, and ſo ſhall have 50 l. per ann. adjudged. Raym. 58. Mich. 14 Car. 2. B. R. Baker v. Berisford. Lev. 154. S. C. but S. P. does dot appear. —Sid. 76. pl. 9. S. C. but S. P. does not appear.—— 2 Sid. 1. that the ſecond widow was intitled to a moiety. ——Keb. 356. pl. 46. S. C. & S. P. per tot. Cur. præter Mallet.

S. C. & S. P. but no reſolution.——Ibid. 9. S. C. and it was held by Glyn Ch. J.

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7. *The rule* of dos de dote peti non debet *is thus to be underſtood*, where the grandfather dies ſeiſed of three acres, and the father enters and endows the grandfather's wife of one acre and dies, the father's wife ſhall be endowed only of the third part of the other two acres; for inaſmuch as the grandfather died ſeiſed there was no meſne ſeiſin in judgment of law betwixt him and his wife. But if the father had claimed the ſaid three acres by purchaſe from the grandfather, his wife ſhould after the death of the grandfather's wife, be endowed of the third part of that acre whereof the grandfather's wife was endowed; or in the firſt caſe, if the ſon after the death of the grandfather and father had endowed his mother firſt, and then the grandmother had recovered a third part againſt her, the mother after her death might have entered again; for her eſtate in the part ſo recovered was defeated by the grandmother's life. Hawk. Co. Litt. 44. Co. Litt. 31. a. b.

(H) Of what Eſtates *for a collateral Reſpect* ſhe ſhall be endowed.

[1. IF the *baron had a fee and freehold* though it be *defeaſible*, yet his wife ſhall be *endowed till* it is *defeated*. 45 E. 3. 13. b.] See (G), pl. 14. S. C. and the notes there.

[2. *As* if the *baron and feme leſſees for life ſurrender to* him in *reverſion*, this is *defeaſible* by the feme; yet in the mean time if he in reverſion dies, his wife ſhall be endowed. 45 E. 3. 13. b. 18 E. 3. 45.] (G), pl. 15. S. C.

[3. If a *diſſeiſor dies ſeiſed*, and after the *diſſeiſee abates*, the wife of the diſſeiſor ſhall have *dower* againſt him, ſo long as the deſcent is in force. 17 E. 3. 24. admitted by the iſſue.]

[4. If A. *endows his wife ad oſtium eccleſiæ, and* after *makes a feoffment* of the land *to B. who makes a feoffment* thereof *to C.* the *wife of B.* ſhall be *endowed againſt C. till the wife of A. recovers her dower*. Temp. E. 1. 66. b. admitted.]

[5. *But* in this caſe, *after* the endowment of the wife of B. *if the wife of A. brings* a writ of *dower againſt the wife of B. and ſhe vouches C. to* * *warranty*, this *endowment of the wife of A. ad oſtium eccleſiæ ſhall be a good counter-plea of the warranty*, quia dos de dote peti non debet. Temp. E. 1. 66. b. adjudged.] * Fol. 678.

[6. If *A. ſeiſed of the manor of D. takes B. to wife*, and after *aliens to C. who takes E. to wife, and after* aliens *to F. and dies*, and after *E. is endowed*, and after *B. is aſſigned dower of a third part* of the manor, *and* ſhe *brings a precipe thereof againſt the wife of C.* ſcilicet E. *who vouches to warranty F.* who *counterpleads it* by this matter, *and ſays that the wife of C.* cannot be endowed eo quod *non poteſt habere dotem de dote*, et ſic per conſiderationem curiæ adjudicatum fuit, quod eſſet inconveniens, ideo F. ſit quietus de warrantia et B. recuperet ſeiſinam et defendens in miſericordia. M. 11 E. 4. B. Rot. 46.]

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S. P. and ſhe ſhall have the third part of the reverſion by metes and bounds. Co. Litt. 32. a. —— Where a man *ſeiſed in fee leaſed for years rendering rent, and* after *takes a feme and dies*, the feme ſhall have dower, but ſhall not have execution during the term of years; for the rent is incident to the reverſion, and is no inheritance, but is determinable by the death of the leſſee, and therefore ſhe cannot be endowed of the rent. Br. Dower, pl. 80. cites M. 1 E. 6. ——In ſome caſes of lands and tenements which are deviſable, and which the heir of the huſband ſhall inherit, yet the wife ſhall not be endowed, as if the huſband make a *leaſe for life* of certain lands, *reſerving a rent* to him and his heirs, and he takes wife and dies, the wife ſhall not be endowed, neither of the reverſion (albeit it is within theſe words tenements), becauſe there was no ſeiſin in deed or in law of the freehold, nor of the rent, becauſe the huſband had but a particular eſtate therein and no fee-ſimple. Co. Litt. 32. a.

But if the huſband make a *leaſe for years reſerving a rent*, and takes wife, and the huſband dies, the wife ſhall be endowed of the third part of the reverſion by metes and bounds, together with the third part of the rent, and execution ſhall not ceaſe during the years. If the huſband make a *gift in tail*, reſerving a rent to him and his heirs, and after the donor takes a wife and dies, the wife ſhall not be endowed of this rent, becauſe it is a rent in fee, and by poſſibility may continue for ever. Co. Litt. 32. a.

In dower it was agreed clearly, that if the tenant ſhews, that before the huſband any thing had, A. was ſeiſed of the ſame land in fee, and let that for years rendering rent, and granted the reverſion to the huſband of the plaintiff, who died ſeiſed of the ſaid reverſion, and ſo demanded judgment if the demandant ſhall have dower, &c. This is no plea in bar of dower, but proves ſhe had title of dower, but this ſaves the leaſe for years, and ſhe ſhall have judgment only of the reverſion, and of the rent; and alſo ſhe does ſave to the tenant damages, and the demandant ſhall be endowed of the reverſion. Win. 80. Paſch. 22 Jac. C. B. Anon.

Co. Litt. 32. a. S. P.

[8. But if *no rent* be reſerved upon the leaſe for years, then the execution ſhall ceaſe till the term expires. Trin. 7 Jac. B. per Curiam.]

Fitzh. Dower, pl. 143. cites Paſch. 5 E. 2. where there were differences of opinions, and therefore bid the parties ſue a bill in parliament, which they did, where it was ordered that the demandant ſhould recover her dower againſt the grantor, viz. tertiam partem prædicti redditus percipiend' according to the form of the ſaid grant, when the heir ſhall come to his full age; and ſo the queſtion was determined. ——Jenk. 4. pl. 6. S. C. reſolved in parliament. ——Vent. 96. Mich. 22 Car. 2. B. R. per Cur. S. P. obiter, ſhe ſhall have judgment, but ceſſet executio.

9. A *rent de novo* was granted *to a man and his heirs*, with a *proviſo that if the grantee died, his heirs being within age*, that *then the rent ſhould ceaſe during his minority*, and he died, his heir being within age, and the wife of the grantee brought a writ of dower againſt the tertenant, and held it lay, and that the demandant ſhould have *execution againſt the heir when he came of full age.* 1 Rep. 87. a. in a nota of the reporter cites 5 E. 2.

10. Where

10. Where *father and ſon* are; the *father dies*, the *ſon takes feme and enters, and endows his mother, and* after *grants the reverſion*, and the *mother dies*, and the *ſon dies*, the feme cannot have dower; and Brooke ſays it ſeems to be good law; for it is ſaid elſewhere that where the heir enters and endows his mother, and ſhe dies, and J. N. abates, he ſhall not have aſſiſe, but mortdanceſtor or intruſion; for the *firſt poſſeſſion is defeated by the dower*. Br. Dower, pl. 87. cites 19 E. 2.

11. If a *man leaſes land for term of* 10 *years upon condition that if leſſee pays* 100 *l. at the end of the term, that he ſhall have fee*, and if not, that he ſhall have but a term; if he pays 100l. at the end of the term, he by this has fee for all the term, and the feme ſhall be endowed; quære inde; for this word tunc has no relation to give fee niſi de tempore ſolutionis, as it ſeems. Br. Dower, pl. 45. cites 7 H. 6. 11. [234]

12. If lands *are given to the baron and feme and to the heirs of their two bodies, or to their heirs*, and after the *baron dies*, now if the *feme* will waive and *refuſe the joint-eſtate*, ſhe may bring writ of dower, and by this, in judgment of law, the baron ſhall be ſaid ſole ſeiſed ab initio; for otherwiſe ſhe cannot be endowed, and yet in truth the baron and feme were jointenants during the coverture. 3 Rep. 27. b. per Cur. Mich. 33 & 34 Eliz. B. R. in caſe of Butler v. Baker.

13. If *a man gives in tail to baron and feme*, and after grants *the reverſion* of thoſe lands to *J. S.* and then the *baron dies*, and the *feme waives*, and diſagrees to the eſtate tail, and claims her dower; now as to her there is a nullity of eſtate ab initio, and to ſuch intent the law holds it as an eſtate made to the baron only; per Cur. 3 Rep. 28. b. Mich. 33 & 34 Eliz. in caſe of Butler v. Baker.

14. In a writ of dower the tenant pleads ne unques ſeiſie que dower, and in truth the huſband of the demandant had an *eſtate by diſſeiſin which was avoided by the entry of the diſſeiſee*, and who had a title paramount; it was agreed clearly that this is no title by which ſhe may have dower. Win. 77. Paſch. 22 Jac. C. B. Berkſhire (Counteſs of) v. Sir Peter Vanlore.

15. If there are *two jointenants in fee*, and *one of them makes a feoffment in fee*, his wife ſhall not be endowed. Co. Litt. 31. b. *So* if the conuſee *of a fine grant and render to the conuſee*, &c. the wife of the conuſee cannot be endowed. Co. Litt. 31. a.

16. Tenant in dower ſhall not have *execution of a reverſion after a term on which no rent was reſerved*; for in ſuch caſe it would be in vain to have execution before the term be ended; per tot. Cur. and judgment accordingly. Comyns's Rep. 185. Mich. 8 Ann. C. B. Bodmyn (Lady) v. Child (Sir Richard).

(I) Of what Eſtate for a Collateral Reſpect ſhe ſhall be endowed.

For *Collateral Qualities.*

[Conditions, &c.]

Br. Dower, pl. 62. cites S. C. and ſtates it as here in pl. 1. and ſays that per Cur. the feme recovered, quod nota; and that it ſeems the feoffment is void as to the wife, and good only as to the ſon, and therefore ſhe is dowable againſt him; and ſo it appears in Littleton in his [tit.] Eſtates upon Condition. [But nothing more is at that plea in Brooke.]

[1. IF a man makes a *feoffment to the huſband upon condition* that *he ſhall enfeoff his wife and ſon*, and *he makes a feoffment accordingly and dies*, the wife ſhall be endowed of this; for *the feoffment* to her by her huſband *was void*, but it appears *the intent* of the firſt feoffor *was that ſhe ſhould have an eſtate in the land*, and inaſmuch as ſhe could not have the eſtate according to his intention, ſhe ſhall have the eſtate which the law gives her. 28 Aſſ. 4. Curia. Brooke, Dower, 62.]

[235] [2. So it ſeems if a *feoffment* be made *to a huſband* upon condition *to infeoff* J. S. and *he does it accordingly, and dies*, the wife ſhall be endowed; for his intent does not appear to exclude the wife of her dower; and if this had appeared, yet it ſeems it would not have ſtood with law. It ſeems as if this was the reaſon of the caſe in 28 Aſſ. 4. Brooke, Dower, 62.]

3. In dower, the *tenant ſaid that tenant by the curteſy granted his eſtate to him in reverſion (who was baron to the feme now demandant), rendering rent, and for default of payment to re-enter;* he in *reverſion married the demandant*, and *for the rent-arrear the tenant by the curteſy entered;* he in *reverſion died*, and his feme was barred of dower by the re-entry; for ſurrender may well be upon condition. Br. Dower, pl. 74. cites 14 E. 4. 6.

4. If a man be *tenant in fee-tail general*, and makes a *feoffment in fee*, and *takes back an eſtate to him and his wife, and to the heirs of their two bodies*, and they *have iſſue*, and the wife dies, and the *huſband takes another wife* and dies, the wife ſhall not be endowed; for during the coverture he was ſeiſed of an eſtate tail ſpecial, and yet the iſſue, which the ſecond wife may have, by poſſibility may inherit. Co. Litt. 31. b.

5. The ſame law it is, if he had *taken back an eſtate in fee-ſimple*, and after had taken wife, and had iſſue by her, yet ſhe ſhall not be endowed; for that the fee-ſimple is vaniſhed by the *remitter*, and her iſſue has the land by force of the intail; but in that caſe the tenant cannot plead that the huſband was never ſeiſed of ſuch an eſtate, whereof the demandant might be endowed, but he muſt plead the ſpecial matter. Co. Litt. 31. b.

(K) At what *Time* ſhe ſhall be endowed.

[1. IF the *huſband enters into religion*, though it is a civil death, inaſmuch as he is dead as to the world, for his heirs ſhall have his land, and a writ of mortdanceſtor, yet his *wife ſhall not be endowed during his natural life, becauſe* he entered into religion with her conſent, otherwiſe *ſhe might deraign him; and ſo by her own aſſent* ſhe in a manner vows chaſtity as well as her huſband. 32 E. 1. Dower, 176.]

Perk. f. 307. S. P. the French edition, cites Mich. 31 E. 1. Dower, 176. —F. N. B. 150. (F) S. P.——

Co. Litt. 33. b.——Co. Litt. 132. b. S. P. ——Jenk. 4. pl. 4. S. P.

2. The death of baron was ſuggeſted, becauſe *of his abſence ſeven years*, and upon circumſtantial proof (none being offered to the contrary) ſhe recovered. D. 185. a. pl. 65. Paſch. 2 Eliz. Thorn v. Rolf.

And. 20. pl. 42. S.C. —Mo. 14, 15. pl. 35. S. C. but the point of abſence is not particularly mentioned in either And. or Mo.——Bendl. 89. pl. 131. S. C. & S. P. and ſhe recovered her dower.

3. Proof by 4 of the death of baron, and at the eſſoign day proof by 12 de vita viri, all agreeing in the ſame points. *Qui melius probat, melius habet.* D. 185. a. pl. 65. Paſch. 2 Eliz. in caſe of Thorn v. Rolf, cites cui in vita, Mich. 2 E. 2.

Fitzh. Trial, pl. 46. cites S. C.—— Winch. 82. Over v. Tucker. Paſch. 22 Jac. C. B. S. P.

(L) By what Act or Thing a Woman may *delay herſelf* of her Dower.

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Fol. 679.

Detainment of Charters, or of the Heir.

What Charters or Heir.

[1. DEtaining of *charters concerning the ſame land* of which ſhe demands dower, is a good plea in delay of her dower. 14 H. 4. 13. b. 14 H. 6. 4. 21 E. 3. 8. b.]

Perk. f. 355, 356. S. P. ——The charters ought to concern the land whereof dower is demanded, and not other lands deſcended to the heir. 9 Rep. 17. a. the firſt reſolution in Bedingfield's caſe.

[2. [*So*] detaining of a *fine* concerning the land, &c. is a good plea in delay of dower, though the fine may be had again in the treaſury. 1 E. 3. 12. b.]

[3. Detaining the *heir* is a good plea in delay of dower brought againſt the guardian in chivalry. 17 E. 3. 58. b.]

Hob. 199. S. P. admitted per Cur. ——See (M), pl. 2. and the notes there.

[4. [*So*] if a woman be *endowed ad oſtium eccleſiæ*, and after the death of the baron ſhe *brings a writ of dower againſt the guardian*

Co. Litt. 39. a. S. P. and ſo of eloign-

ing the body of the ward; becauſe his marriage appertains to him; and if the heir comes in as vouchee, he ſhall plead the ſame plea; but he ſhall not plead detainment of charters, becauſe ſuch as concern the inheritance of the heir belong not to the guardian.

in chivalry of the heir of her huſband, it is a good plea in delay of this dower, that the demandant detains the heir from him. 11 H. 3. Rot. 6. inter idoneam BURDETT AND WILLIELMUM BURDETT, admitted per iſſue, and agreed by plea. 11 H. 3. Dower, 187. the ſame caſe, as it ſeems, but in BURDETT'S CASE it is not expreſſed what dower this was, but ſhe claims it as land of which ſhe was nominatim dotata by her huſband.]

[5. The *ſame* in a writ of dower *ex aſſenſu patris*, or matris. 11 H. 3. Dower, 186.]

The plea of detainment of charters is *not good for more lands than the charters concern.* D. 230. a. pl. 52. Trin. 6 Eliz. Anon. cites 22 H. 6.

6. In dower, the *tenant ſaid that the demandant detained from him certain charters concerning his franktenement, and in caſe ſhe would deliver them, he is ready to render dower, and at all times has been ready;* and it was agreed, that this *detainer is no plea, but of charters concerning the inheritance, and not of lands purchaſed;* and ſo it ſeems there, that *if it concerns the inheritance, though it be other land than of which the dower is demanded,* yet it is a good plea; and there the defendant was *compelled to ſhew what charters ſhe detained.* Br. Dower, pl. 47. cites 22 H. 6. 16.

S. C. cited per Cur. 9 Rep. 17. b. 18. a. that upon delivery of the charters ſhe ſhall have her judgment immediately.

7. Dower *of four acres;* as *to one acre the tenant vouched to warranty,* and as *to the reſt that the demandant detained evidences from him concerning the ſame land,* and *ſhewed one ſpecially, by which T. enfeoffed J. W. and R. his father, habend' to them and to the heirs of R. and if ſhe would deliver them, he is ready to render dower;* Pool ſaid his plea* goes to all; for if ſhe detains charters which concern any part of the land in demand, it is a good bar to the whole dower, and the *detinue ſhall be of land deſcended to the tenant, and not of the land purchaſed;* per Newton, the plea does not go to all. Br. Dower, pl. 48. cites 22 H. 6. 42.

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8. In dower, the *tenant ſaid that the demandant detained certain charters concerning this land,* &c. *and if ſhe will render,* &c. *then ready to render dower,* &c. The *demandant produced* the deed, and prayed dower, and the deed was read, ſo that the Court perceived it was the ſame deed, by which the demandant recovered. Br. Dower, pl. 53. cites 9 E. 4. 47.

9. Dower againſt the *heir,* who *ſaid that the demandant detained from him a bag ſealed, with certain evidences concerning the ſame land,* and *if ſhe will deliver it, &c. he is ready to render dower,* and a good plea, per tot. Cur. except Engleſield, *without ſhewing the certainty of the evidences; quære, if it had not been in a bag ſealed.* Br. Dower, pl. 1. cites 18 H. 8. 1.

10. In dower, if the tenant pleads that the demandant detains evidence, the *demandant delivering in the evidence may have judgment immediately;* but if ſhe *denies the detainer* of the evidence, *and that be found againſt her, ſhe ſhall loſe her dower;* per Cur. obiter. Hob. 199. Mich. 15 Jac. in caſe of Brickhead v. York (Archbiſhop).

11. *So* in the caſe of dower brought againſt *a guardian in chivalry who pleads the detainer of the heir his ward.* Ibid.

(M) Detinue of *Charters.* [Or *Heir.*]

Who may plead it. [And how.]

[1. IF a *wife* be *with child*, the *heir for the time being cannot plead detinue of charters*; for ſhe may keep them for the infant. 41 E. 3. 11. b.]

In dower, the *tenant ſaid that ſhe detained certain evi-*

dences concerning his inheritance, and declared what, and that he has been at all times ready to render dower if ſhe had delivered them. The *feme, as to two of the deeds, intitled herſelf by gift to her and her baron, and to the reſt, where the tenant intitles himſelf as brother and heir of the baron, ſhe ſaid that ſhe is enſeint by her baron, and keeps the deeds to the uſe of the ſame infant who ſhall be heir,* if God give him birth; judgment, &c. and *iſſue was taken that ſhe was not enſeint the day of his death,* and *not if* ſhe was *enſeint by her baron the day, &c.* Br. Dower, pl. 8. cites S. C.——Br. Iſſues Joines, pl. 6. cites S. C. & S. P. accordingly.

[2. In a writ of dower againſt the *guardian in chivalry*, he may plead in delay of dower, that the plaintiff detains the *heir* from him. 17 E. 3. 58. b. admitted.]

S. P. but he ſhall ſhew his name, viz. J. ſon and heir of W. T. Br. Dower, pl. 47. cites 22 H. 6. 16.——S. P. and ſhall ſhew whether male or female, or otherwiſe eloignment by the demandant is no plea. Br. Dower, pl. 67. cites 2 H. 7. 6.——S. P. but he cannot plead detainment of charters; for he cannot conclude his plea thus, viz. "And if the "demandant will deliver to him the charters, &c." for the charters which concern the inheritance of the heir ſhall not be delivered to the guardian. 9 Rep. 19. reſolved in Bedingfield's caſe, and cites it ſo adjudged in 10 E. 3. 49. a.

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[3. In a writ of dower, if the *tenant vouches the heir in ward*, the *guardian may plead* in delay of dower, that ſhe detains the *heir* from him, though the guardian could not have rendered to her dower before this time; for he may render it now. 17 E. 3. 58. b. Curia.]

S. C. cited per Cur. 9 Rep. 18. b. in Bedingfield's caſe.

4. A man having *a charter which concerns four acres of ſocage land*, he *deviſed three to his youngeſt ſon, and four to his wife for life*, the *remainder to a ſtranger*, and died. The *wife* entered in the acre, and *happened upon the charter*, and brought a dower of three acres againſt the youngeſt ſon, who pleaded detinue of charters in bar, and that *if ſhe would deliver, he was ready to render dower*; but in the concluſion he ſaid, *yet ready to render*, leaving out the condition, *if*, &c. which is a confeſſion; and adjudged for the complainant. D. 230. pl. 52. Trin. 6 Eliz. Anon.

5. No *ſtranger*, though he is tenant of the land, and has the evidences conveyed to him, can in a writ of dower plead detainment of charters, but this plea lies only in privity, viz. for the heir of the baron. 9 Rep. 18. a. Hill. 28 Eliz. the third reſolution in Bedingfield's caſe.

A feoffee cannot plead detainment of charters; agreed per Cur. Cro. E. 367. pl. 2. Hill. 37 Eliz. B. R. in caſe of Stokes v. Anneſby.

6. Detainment of charters is not pleadable by *tenant by reſceipt*, who has a reverſion after tenant for life, becauſe he cannot render her demand, and is a ſtranger, and therefore ſeiſin was

awarded to the demandant. 9 Rep. 18. b. 19. a. per Cur. cites 8 E. 3. 55. a. [pl. 3.]

7. The *heir in ſeveral caſes ſtands in the degree of a ſtranger*, and ſhall not have this plea. 9 Rep. 18. a. Hill. 28 Eliz. in Bedingfield's caſe.

8. *As* if the heir hath the lands *by purchaſe*. 9 Rep. 18. a.

9. If the *heir* has *delivered the charters to the woman*, he ſhall not plead the detainment of them, for he has them with his conſent. 9 Rep. 18. a.

10. So if the *heir* is *not immediately vouched* by the tenant, but the tenant vouches one who vouches the heir. 9 Rep. 18. a.

11. So if the *heir coming in as vouchee, has no land in the ſame county*. 9 Rep. 18. a.

(N) [Detinue of Charters in Bar of Dower.]

How to be *pleaded*.

Dower *againſt the heir*, who *ſaid that he was ready to render dower*

[1. IF detinue of charters is pleaded in delay of dower, he that pleads it ought to *allege what charters* they are ſo certainly as in a declaration of detinue for them. 14 H. 6. 4. 1 E. 3. 12. b.]

if ſhe would render to him certain charters concerning his inheritance, which ſhe detained from him; per Cur. you *ſhall ſhew what in certain*, and this is reaſonable, *by reaſon of the verdict to the jury, and that it appear to the Court to whom they belong*; for if they belong to the defendant by purchaſe, and not by inheritance, he is put to writ of detinue; but if they are in a *box ſealed*, &c. he ſhall not declare it certain. Br. Dower, pl. 67. cites 2 H. 7. 6.——9 Rep. 18. a. S. P. reſolved in Bedingfield's caſe, ſo that a certain iſſue may be taken, and cites 22 H. 6. 16. a. 2 H. 7. 6. a. 14 H. 6. 4. a. and 18 H. 8. 1. a.

* *The certainty* of the charters *ought to be alleged, unleſs* they are *in a cheſt, box, or bag ſealed*, &c. D. 230. a. pl. 52. Trin. 6 Eliz.

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2. Dower *againſt two femes, who ſaid that the feme demandant was feme of their father, and that all the land of the baron deſcended to them as heir*, &c. *and partition was made between them, ſo that certain land was allotted to the one, and certain to the other, and for the one he ſaid, that the demandant detained a certain box full of muniments touching the inheritance of the feme tenant, and if ſhe will deliver the box ſhe is ready to render dower, and at all times has been*, and demanded judgment if ſhe may demand dower before the delivery of the box; and *for the other daughter* it was *ſaid, that the demandant detained the ſame box and two indentures, and that in the one it is contained, that A. enfeoffed the father of this feme of the tenements to her aſſigned in partition, and in the other indenture it is contained, as the father of the tenant granted to B. a rent-charge, that if the father performed certain conditions, that the rent ſhould ceaſe, and that the box and thoſe indentures came to the hands of the demandant after the death of her huſband*, and demanded judgment if before the delivery of thoſe ſhe may demand dower; and the *demandant as to the box ſaid that ſhe is ready, and at all times has been*; by which, as to this it was adjudged, that the demandant recover dower,

dower, and no party amerced; and ſo as to her who firſt pleaded the detinue of the box; and to the other ſhe *ſaid, that as to the firſt indenture ſhe never took it*, and the other e contra; and *as to the other indenture ſhe ſaid that ſhe had delivered it to the other parcener;* and it was awarded that ſhe deliver the box to her who rendered the dower for her part, and *as to the delivery to the one parcener of the indenture which concerned the purparty of the other, ſhe demurred*, &c. et adjornatur, therefore quære. Br. Dower, pl. 41. cites 21 E. 3. 8.

3. In dower, the *tenant ſaid that actio non;* for *his father was poſſeſſed of a cheſt and charters, and of two fines in ſpecial, and divers other charters which concerned the land which is deſcended to him from his father, which come to the demandant, and he is, and at all times has been, ready to render dower in caſe ſhe would deliver the cheſt and charters;* and the *demandant ſaid, as to all the charters except the two fines, ſhe has been always ready to deliver them, and offered them to the Court, and to the two fines, that they came not to her hands;* per Martin J. *where the cheſt is open, you ought to declare every charter ſpecially*, and the ſame in detinue of a cheſt open with charters, quod Curia conceſſit, quod nota bene. Br. Dower, pl. 57. cites 14 H. 6. 4.

4. He that pleads detainment of charters ought to plead *that he has been always ready to render dower, and yet is* if the demandant would deliver to him the charters. 9 Rep. 18. a. 19. b. Hill. 28 Eliz. in Bedingfield's caſe.

5. *Detainer of charters* is no plea after imparlance; for per Cur. he that pleads this plea muſt plead that from the time of the death of his anceſtor *paratus fuit & adhuc paratus exiſtit* to aſſign her dower if ſhe would deliver the charters. 1 Salk. 252. pl. 2. Paſch. 3 W. & M. in B. R. Burdon v. Burdon.

Cumb. 183. S. C.—— Show. 271. and judgment affirmed in B. R.——

Comb. 183. S. C. the plea goes only in abatement, and judgment affirmed niſi, &c.

(O) *What Act of the Baron* may *bar* the Wife of her Dower. [240]

[1. IF *land be mortgaged to the baron*, and the *condition is broke*, and afterwards *upon the agreement the mortgagor hath the lands again by payment*, yet the wife of the mortgagee ſhall be endowed after the heir of the baron hath recovered, and ſo it ſeems before; but this is a quære. 41 E. 3. 1. b.]

2. If a man *takes an alien to wife, and afterwards he aliens his lands*, and afterwards *ſhe is made a denizen*, ſhe ſhall not be endowed; for ſhe was abſolutely diſabled by the law, and by her birth not capable of dower, but her capacity and ability began only by her denization. 13 Rep. 23. Hill. 27 Eliz. in Chancery in Menavill's caſe.

Co. Litt. 32. a. S. P.— But otherwiſe if ſhe were naturalized by act of parliament. Ibid.

3. If a man ſeiſed of lands in fee *takes a wife of eight years of age, and aliens his lands*, and afterwards the *wife attains to the age of nine years*, and afterwards the huſband dies, the wife ſhall be endowed;

Co. Litt. 33. a. S. P.

endowed; for although at the time of the alienation the wife was not dowable, yet for as much as the marriage, and ſeiſin in fee, was before the alienation, and the title of dower is not conſummate until the death of her huſband, ſo as now there was marriage, ſeiſin in fee, age of nine years during the coverture, and the death of the huſband, for that cauſe ſhe ſhall be endowed; for it is not requiſite that the marriage, ſeiſin, and age, concur together all at one time, but it is ſufficient if they happen during coverture. 13 Rep. 22, 23. Hill. 27 Eliz. in Chancery in Menavill's caſe.

4. Though the *huſband aliens* the lands or tenements, or extinguiſhes the rents or commons, &c. yet the woman ſhall be endowed. Co. Litt. 32. a.

Fol. 680.

(P) *What Act of the Feme will bar* her of her Dower.

Elopement.

* Br. Dower, pl. 12. cites S. C.—— Co. Litt. 32. a. b. S. P. —F. N. B. 150. (H) S. P.——

[1. IF ſhe elopes from her huſband with another man, *and continues in adultery with him without being reconciled* to her huſband before the death of her huſband, ſhe ſhall loſe her dower. * 43 E. 3. 19. 19 E. 4. 30. Perkins, ſ. 354. 47 E. 3. 27. Vide Statutum Roberti Primi, cap. 13. apud Scotos according. Weſt. 2. cap. † 38. according.]

† This ſeems miſprinted for 34.

Co. Litt. 32. a. b. S. P.—2 Inſt. 436. S. P.

[2. The *ſame* law if ſhe elopes with the adulterer and is not reconciled, *though ſhe does not ſtay with the adulterer*. Perkins, ſ. 354.]

Co. Litt. 32. a. b. S. P.

[3. The *ſame* law *if* ſhe be *reconciled* to her huſband *by the coercion of holy church*. Perkins, ſ. 354. and not of her good-will.]

[241] F. N. B. 150. (H) if ſhe remains with the adulterer ſhe ſhall loſe her dower; but if ſhe remains in adultery upon the huſband's lands or tenements, ſhe ſhall have dower; becauſe the ſame is not an elopement.——Co. Litt. 32. b. ——2 Inſt. 436. S. P. and ſo if afterwards the adulterer turns her away, yet ſhe ſhall be ſaid morari cum adultero within this act.

[4. *So if* the wife elopes with her good-will, and *ſtays with the adulterer againſt her will*, ſhe ſhall loſe her dower. Perkins, ſ. 354.]

See the notes at pl. 17.

[5. *So if* ſhe be *raviſhed, and ſtays with the adulterer* during the life of the huſband *willingly without reconcilement*, ſhe ſhall loſe her dower. 43 E. 3. 19. b.]

Br. Dower, pl. 12. cites S. C.—— Perk. ſ. 354. S. P. ——— See tit. Rape, pl. 4. and the notes.

[6. *But if* the wife be *raviſhed, and ſtays* with the adulterer *againſt her will*, ſhe ſhall not loſe her dower. 43 E. 3. 19. b.]

See pl. 18. and the notes there.

[7. *So if* after elopement the wife be *reconciled* to her huſband *of his free will* without coercion of holy church, ſhe ſhall have dower. Perkins, ſ. 354. D. 1, 2. Ma. 107. 23.]

S. C. cited 2 Inſt. 435, 436. with the deed at

[8. If a *man grants his wife with her goods to another*, by force of which the *wife lives with the grantee afterwards all the life of her huſband*, this ſhall loſe her dower, becauſe ſhe lived in adultery

tery with the grantee, notwithſtanding the grant of the baron. 30 E. 1. Libro Parliamentorum, fol. 96. WILLIELMUS PAYNELL and MARGERY his wife's caſe. Adjudged in parliament.]

large de verbo in verbum, which Ld. Coke ſays he cites for the ſtrangeneſs thereof.

[9. If the *friends of the huſband eſloin him from his wife*, ſo that the *wife does not know what is become of him*, and the *friends of the huſband publiſh that the huſband is dead, and* after they *procure the wife to releaſe all* marriages and *intereſts*, which ſhe can have in him as her huſband, *and* after the wife *by the perſuaſion of the friends of the huſband marries with another that dies, and ſhe takes another huſband*, to whom notice is given that the firſt is living, but no notice was given thereof to the wife, though the wife lives in adultery, and though the huſband was not out of the realm or beyond ſea, ſo that the wife ought to take notice that he was living, yet inaſmuch as ſhe *non reliquit virum ſponte*, as the ſtatute ſays, but by the perſuaſion of the friends of the huſband that he was dead, and it does not appear that ſhe ever knew that he was living, this is not any ſuch elopement as to bar her of her dower. Mich. 12 Ja. between GREEN AND HARVY. Per Curiam.]

[10. If the wife *elopes from her huſband, and after lives with her huſband years and days till the death of her huſband, with the good-will and aſſent of the huſband* without coercion of holy church, this ſhall not bar her of her dower, though it is not averred that ſhe was reconciled to her huſband. 19 E. 3. Elopement, 94.]

To prove a reconcilement it was given in evidence that they lay together ſeveral nights in ſeveral places after the departure and ſeparation, and demeaned themſelves as huſband and wife. It was objected that they never dwelt together in the ſame houſe, but lived aſunder; and that ſhe continued in adultery with one or another all along during her huſband's life, ſed non allocatur; for there might be ſeveral elopements and ſeveral reconciliations, and the tenant at his peril ought to take iſſue upon one. D. 106. b. 107. pl. 22, 23. Haworth v. Lady Powis.

But though ſhe does cohabit and is reconciled, yet if it be by the coercion of the church ſhe ſhall loſe her dower. 2 Inſt. 436.

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[11. If a woman *elopes into another county, and lives in adultery in a manor that is of the joint purchaſe of the baron and feme, without being reconciled*, yet this ſhall not bar her of her dower, becauſe the baron is to ſee that none ſuch live within his land. 8 E. 2. Dower, 153. adjudged.]

But if a man ſeiſed of two manors in fee, taketh a wife, and when the huſband is dwelling at one manor, the wife goes unto the other manor, and when ſhe is there ſhe liveth in adultery, it is ſaid, that by doing ſo ſhe ſhall not loſe her dower, becauſe it cannot be intended a running away from her huſband, when the law cannot intend that ſhe can dwell upon the manor of her huſband without the agreement of her huſband, tamen quære. Perk. ſ. 355.

If the wife doth elope from her huſband's houſe of habitation, and commit adultery in any other the lands or manors of her huſband, this, without the free reconciliation of her huſband, is within the purview of this ſtatute. 2 Inſt. 436.

It was ſaid by Daniel that an *elopement* is not bar of dower *ad oſtium eccleſiæ*. Noy, 108.

[12. The *ſame* law, though the *wife lives in an houſe of the free tenant of the manor*. 8 E. 2. Dower, 153. adjudged.]

2 Inſt. 436. S.P. contra, though Ld. Coke ſays, it has been held otherwiſe.

[13. If the wife be *divorced for adultery*, (which does not diſſolve the bond of marriage by the canon law, nor of our church

Noy, 108. Trin. 2 Jac. C.B. Powell

church in this * realm, but is only *a menſa & thoro,)* † yet this ſhall bar her of her dower.]

* Fol. 681.

v. Weeks reſolved e contra, becauſe it is not † a vinculo matrimonii. — Godb. 145. pl. 182. 2 Jac. C. B. adjudged that ſhe ſhall have her dower. Lady Stowell's caſe, and ſeems to be S. C.

Co. Litt. 33. b. contra.

[14. With this agrees the law of *Scotland. Skene Regiam Majeſtatem*, 43. b. Verſ. 5.]

[15. With this agrees the civil law. *Reynolds of Divorces*, 86.]

[16. So the canon law is according. *Reynolds of Divorces*, 86.]

If ſhe goes willingly with or to the adulterer, this is

17. 13 *E.* 1. *W.* 2. *cap.* 34. *If a woman willingly leaves her huſband, and goes away and continues with her advowterer, ſhe ſhall be barred for ever of action to demand her dower;*

a departure and a tarrying, though ſhe remains not continually with the adulterer ſhe ſhall *loſe her dower*. Co. Litt. 32. b. in principio.

In this caſe of elopement, and remaining with the adulterer, &c. the wife could not be barred of her dower by the common law, though a divorce were ſued and had for the ſaid adultery. 2 Inſt. 435.

Although the words of this branch be in the conjunctive, yet if the woman be taken away not ſponte, but againſt her will, and after conſents and remains with the adulterer, without being reconciled, &c. ſhe ſhall loſe her dower; for the cauſe of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in adultery without reconciliation, that is the bar of the dower. 2 Inſt. 435.

If the wife goes away with the huſband's agreement, and conſent with A. B. if after A. B. commit adultery with her, and ſhe remains with him without reconciliation, ſhe ſhall be barred of her dower by this branch. 2 Inſt. 435.

But the huſband may give licence to a man to carry his wife to his houſe, and this ſhall be a good bar in action brought de muliere abducta cum bonis viri. 2 Inſt. 436.

Note, that cohabitation is not

18. *Unleſs her huſband willingly, and without coercion of the church, reconciles her, and ſuffers her to dwell with him.*

ſufficient without reconciliation made by the huſband ſponte, ſo as cohabitation only in the ſame houſe with the huſband avails her not; a fortiori though ſhe remain with the avowterer in any of the lands or manors of her huſband, yet ſhe ſhall be barred of her dower by this branch, without the huſband's free reconciliation, although it has been otherwiſe holden; and the reaſon that they yielded is, becauſe it is no elopement; whereas it appears before that the words of reliquerit & abierit are not of the ſubſtance of the bar of dower, but the adultery, and the remaining with the adulterer, as is aboveſaid; and although ſhe and the adulterer remain within any of the lands or manors of the huſband, yet (the words being ſi uxor ſponte reliquerit & abierit) ſhe has * left and gone from her huſband in that caſe, which is a perſonal offence. See the firſt part of the Inſtitutes, ſect. 36. for bars of dower, whereunto you may add a caſe in Tr. 9 E. 2. fol. 65. in libro meo, that if a woman ſay ſhe is conceived with child by her huſband whilſt he lived, and in truth is not, whereby the next heir is diſturbed, ſhe ſhall loſe her dower, if ſhe acknowledge the ſame before the juſtices. 2 Inſt. 436.

* [243]

19. In dower defendant pleaded elopement in the wife; wife *replied* that her huſband had *bargained and ſold her* to the adulterer; and held bad. 12 Mod. 232. Mich. 10 W. 3. Coot v. Berty.

20. *Articles to ſettle lands in jointure*, are in nature of an actual jointure, which is not forfeited by an elopement like dower. 3 Wms.'s Rep. 276. Paſch. 1734. in caſe of Sidney againſt Sidney.

(P. 2) Barred or not. By Act of After-Husband.

1. A Wife is intitled to dower of the lands of her first husband; her *second husband accepts for* this *dower less than her third part*; after the death of this second husband *she may waive* it, and have her full third part. Jenk. 79. pl. 56.

(P. 3) Delayed or suspended. In what Cases.

1. IN dower *rent* was granted by fine, *with condition that when any heir is within age, the rent shall cease during the nonage*, and the *feme recovered dower during nonage, & cesset executio till the full age of the heir*, nota. Br. Judgment, pl. 41. cites 24 E. 3. 61.

2. In dower it was agreed per Cur. that where the *tenant vouches the heir in ward of the king in the same county where the writ is brought*, the demandant *shall not recover till the warranty be determined*. Br. Dower, pl. 2. cites 3 H. 6. 17.

3. The *heir of the husband makes a lease* for years of the land *to the wife after the husband's death*, now during this lease dower is suspended. *But not* so *if she has taken another baron, and during the coverture the heir of such baron makes to him and the feme such lease* for years, and second baron dies; if she waves this lease dower is not suspended. Jenk. 73. pl. 38.

4. A. an *husband seised* of land held of the king *by knight's service* dies, his heir within age and in ward to the king; the king by patent *grants to the widow* of A. *the wardship of the body and land* of the heir during his minority; this patent suspends the widow's dower during the nonage, for her dower and such a patent are inconsistent. Jenk. 73. pl. 38.

5. A. *seised of lands in fee makes a lease* for years rendering rent, *and takes wife*; after the death of A. the wife shall have judgment to have the third part of this land for her dower, and *shall have* a *third part of the rent*; but cessabit executio for the possession of the land during the lease. Jenk. 73. pl. 38.

6. *Contra if he* had *vouched* him, *and prayed that he should be summoned in another county*; for there the demandant *shall* recover immediately; quod nota diversity. Br. Dower, pl. 2. cites 3 H. 6. 17. [244]

7. Dower is demandable against an *infant*, and he shall not have his age. Cro. J. 111. pl. 8. Hill. 3 Jac. B. R. Smith v. Smith. Roll. Rep. Arg. 326. S. P. But if great *default be in the wife*, age shall be allowed, as if she *does not bring action in a long time* after the title accrued, there if the infant be in by descent, after her title accrued, *age lies*. Arg. in case of Harvey v. Wyatt, cites Fleta, lib. 6. cap. 43. and Bract. 252. and Britt. cap. 111. fol. 217.

(Q.) What *Act of the Baron* ſhall *bar the Feme* of her Dower.

Recoveries at the Common Law.

[And other Alienations by him.]

[1. AT the *common law if* the *baron was once ſo ſeiſed that the wife was entitled to dower, if* he after aliened the land, and *a recovery was after had in a real action upon another poſſeſſion*, yet *his wife ſhould have had dower*. 47 E. 3. 13. b. 14 H. 4. 33. admitted per iſſue.]

2. If a *man recovers in value againſt the huſband by a warranty auncеſtrel;* yet the wife ſhall be endowed, becauſe the ſame is by force of the warranty made, and not by reaſon of eigne title to the land. F. N. B. 150. (D).

It appears by the preamble of this ſtatute, that if a recovery had been in a real action

3. *Weſt.* 2. *cap.* 4. 13 *E.* 1. *The wife ſhall be endowable as well where land was recovered againſt her huſband by default as by covin; ſo that although the land was loſt by the huſband's default, yet that ſhall be no good allegation for the tenant, but he muſt then proceed and ſhew his right, otherwiſe the wife ſhall recover.*

againſt the huſband, and the huſband did render the land to the demandant, that notwithſtanding this recovery the wife ſhould recover her dower. But if the huſband had loſt by default, it was a queſtion and a doubt, whether in that caſe ſhe ſhould recover or no; and ſome judges would give judgment for the woman, and ſome were in a contrary opinion. Here is to be noted, that a recovery by reddition of the huſband is not of ſo great account in law as a recovery againſt the huſband by default; but therein before this act this diverſity was holden for law, that if in a writ of dower the tenant did plead the recovery in bar, the demandant might reply, que ceo fuit per fraud, ou per colluſion, ou per gree le baron, as Britton ſays, who wrote before this ſtatute; but if it were by default without covin, then the greater opinion was, that it barred the feme. 2 Inſt. 349.

But the reddition of the huſband was holden for clear law, as it was adjudged the year before the making of this act, ſo that the wife was ready to maintain the title of her huſband. 2 Inſt. 349.

All this is to be underſtood, where he that recovers has no right, for where he that recovered either by reddition or default had right, there neither the common law nor this ſtatute extended thereunto. 2 Inſt. 350.

If the recovery be had by verdict, the feme ſhall not falſify in the point tried, but ſhe may ſay, that he might have pleaded a better plea, or confeſs and avoid the recovery. 2 Inſt. 350.

4. In dower, the *tenant vouched himſelf to ſave the tail*, upon which *he entered into the warranty, and ſaid, that at another time his father brought writ of right againſt the baron, who vouched himſelf to ſave the tail*, upon which the *father of the tenant ſaid, that the baron had nothing of the gift of him whom he ſuppoſed gave, and upon* [245] *this they were at iſſue, and found for the father of this tenant, then demandant, that the donor did not give, &c. upon which the father of this tenant recovered* judgment. Haſtings ſaid, you have not denied the ſeiſin of our baron, nor have you averred that your father had ſuch title as you allege, and ſo recovered upon dilatory, and prayed dower. Parſhe ſaid, your baron and his heirs ſhall be bound by the recovery, and put to attaint. And *by the common law every recovery binds the feme unleſs it was upon render, and the ſtatute does not aid againſt any recovery but recovery by default*, in which

which caſe the title, which was not tried againſt the baron, ſhall be tried at the ſuit of the feme; but recovery by action, tried againſt the baron, is not aided by any law, and prayed that ſhe be barred; and adjornatur. But by the book, Perkins, fol. 73, 74. the feme may falſify recovery had againſt her baron by action tried. But Brooke ſays, this is not law in the ſame point which was tried, &c. And the like was held Mich. 47 E. 3. fol. 13. that the *recovery againſt the baron by action tried remained at the common law*, and therefore the feme ſhall not falſify. And by 36 H. 6. Fitzh. Faux. Recov. 15. *a feme may falſify recovery by action tried againſt her baron in another point, but not in the point* which was *tried*. Br. Dower, pl. 24. cites 49 E. 3. 23.

5. Where *land is recovered againſt the feme tenant in dower upon plea, which does not diſaffirm the poſſeſſion of the baron*, as where ſhe *pleads that nothing paſſed by the deed in ſcire facias upon fine againſt him who pleaded a feoffment of her baron by deed, which paſſed againſt him*, by which the other recovered againſt him; in this caſe the feme is not reſtored to the writ of dower; but this matter pleaded in writ of dower is a good bar. Br. Dower, pl. 26. cites 50 E. 3. 7. Br. Reſtore, &c. pl. 10. cites S. C.

6. *And* per Wiche. where the *baron loſes by dilatory, as* upon *nontenure* or *miſnoſmer of the vill*, &c. ſhe may falſify in writ of dower. Br. Dower, pl. 26. cites 50 E. 3. 7. S. P. for this does not diſaffirm the poſſeſſion of the baron;

but *contra* it ſeems *upon recovery upon dilatory againſt the feme herſelf being in dower*; note a diverſity. Br. Reſtore, &c. pl. 1. cites S. C.

7. The *huſband levied a fine* of his land and died. The *wife within five years after his death brought writ of dower, but did not purſue her writ till ſix years were paſt.* Manwood and Harper J. held this to be no bar; but Dyer e contra. 3 Le. 50. pl. 71. Trin. 15 Eliz. C. B. Anon. Dal. 107. pl. 58. Crave v. Broughton. S. C. held accordingly. —Mo. 53. pl. 154. Paſch. 5 Eliz. Anon. S. P. Dyer thought that ſhe was barred becauſe ſhe had title at the time of the fine levied by the intermarriage, though it could not be executed till after the death of the baron; and the reporter ſays, that a precedent was ſhewn anno 6 H. 8. where all the matter was pleaded. ——Dal. 52. pl. 21. S. C. in totidem verbis.—— D. 224. a. pl. 28. Damport v. Wright. S. P. and ſeems to be S. C.——Ibid. Marg. ſays it was ſo adjudged Mich. 31 & 32 Eliz. C. B. and that it was alſo agreed Paſch. 34 Eliz. per Cur.——She is barred by fine and nonclaim in five years after her huſband's death. 2 Rep. 93. a. cites it as adjudged 4 H. 8.——S. P. Arg. 2 Roll. Rep. 69. cites 15 Eliz. Paine's caſe.——S. P. if ſhe be of full age, ſound memory, out of priſon, and within the four ſeas. Gouldſb. 148. pl. 71. Hill. 43 Eliz. Anon.——And bringing a writ of dower within the five years is no bar to ſuch fine unleſs the return of the writ be pleaded. 2 Le. 221. pl. 296. Hill. 30 Eliz. C. B. Fitzhugh's caſe.——If ſhe brings a writ within the five years *againſt one not tenant* of the land, that is not any *claim* within the ſtatute, but if ſhe bring a writ *againſt four that are tenants*, and *two die*, and ſhe brings a writ againſt the others, by *Journey's Accounts*, this is a good claim within the ſtatute, though the ſecond writ was after the time limited; per Hobert Ch. J. Win. 66. Anne Summer's caſe.——But quære here if the *two that died were not tenants*. Ibid.

8. 4 & 5 *W. & M.* 16. *This act ſhall not extend to bar any widow of any mortgagor from her dower, who did not legally join with her huſband in ſuch mortgage, or otherwiſe lawfully exclude herſelf.*

(Q. 2.) Barred. By Acts of Baron and Feme.

1. IN dower, the *tenant ſaid, that he himſelf levied a fine to the feme, now demandant, and to her baron come ceo que*, &c. *and that the ſame feme and her baron granted and rendered it again to the tenant with warranty of the feme*, and the *feme ſaid, that ſhe had nothing but as feme*, and therefore was admitted no bar; quod *miror*, by reaſon of the render and warranty of the feme herſelf, tit. Dower in Fitzh. 160. and 165. M. 19 E. 2. and 145. M. 6 E. 2. Fine upon conuſance de droit come ceo que, &c. by the baron and feme; quod mirum! for this is a gift by colluſion. But *otherwiſe* it is *of a fine ſur releaſe;* for the *title of the feme does not take place till the baron is dead*, and ſo a releaſe of later time, and therefore ſhe may confeſs and avoid the fine. Br. Dower, pl. 77. cites 13 E. 2.

2. *Jointure* was made after the coverture, the *huſband and wife levied a fine ſur conuſance de droit*, &c. *of the jointure*, it ſeems clear, if it be *as that which the conuſee had of the gift of the huſband*, that is no bar in dower; and the election is not given to the wife till after the death of the huſband, according to the ſtat. 27 H. 8. c. 10. D. 358. b. pl. 49. Trin. 19 Eliz. Anon.

3. Feme barred of her dower by joining in a * *common recovery* with her baron. Pl. C. 115. 20 Eliz. Eare v. Snow.

* S. P. though ſhe has no recompence. Pig. of Recov. 66. cites Pl. C. 514. and 2 Rep. 74. 78. and ſays, he has heard ſome learned men queſtion this, becauſe ſhe has *no eſtate then in eſſe*, but he ſays, with ſubmiſſion, the ſame may be ſaid againſt a fine, and the common recovery eſtops her as party, and the recovery diſaffirms her huſband's titles to the lands of which ſhe was dowable.——So by a *fine* though the *uſes* were *declared by the huſband only*. Ow. 6. Trin. 28 Eliz. C. B. Hamington v. Rider.

4. If *a woman* has title of dower, and by *covin cauſes the tenant of the land to be diſſeiſed by a ſtranger, againſt whom ſhe brings a writ of dower*, and the feme recovers, yet this is void, and ſhe is not remitted. 3 Rep. 78. a. Hill. 44 Eliz. in Canc. in Fermor's caſe.

5. If *baron and feme levy a fine*, the feme is barred of her dower; per Coke Ch. J. in a nota ſays, that it is ſo without queſtion now. 10 Rep. 49. b. Mich. 10 Jac. in Lampet's caſe.

6. Fine levied by feme covert *to confirm a leaſe* is no bar of her thirds after the *leaſe ſatisfied* by the profits. Chan. Rep. 132. 15 Car. 1. Naylor v. Baldwin.

7. Feme joined with her huſband in a *fine* in order *to make a mortgage, but which never was made*. He died, and ſhe brought dower, and got judgment by default, and the heir could not be relieved; for though it was a bar at law, it was not ſo in equity. Ch. Prec. 34. Mich. 1691. cites it as Dauby's caſe.

(Q. 3) Bar. By what Eſtate, Grant, &c.

1. NOTE that the *lady of M. was in Chancery to be endowed* of the land of her baron, where the heir is in ward of the king; and becauſe the *ward of the land and body of the heir was committed to her before by patent of the king, in which no exception of dower was made*, therefore ſhe was ouſted of dower during the nonage. Br. Dower, pl. 27. cites 2 H. 4. 7. and 11 H. 4. accordingly, in the caſe of the Lady Arundel, as it is ſaid there.

2. A *man granted a rent of* 10*l. to a feme percipiend' de terris ſuis pro tota dote ſua de terris ſuis, and after he married her, and* then *died*, and after *ſhe accepted the rent, and then brought writ of dower*; quære if the acceptance of the rent be a bar in dower, as dowment ad oſtium eccleſiæ, or ex aſſenſu patris; for the acceptance is recompence. *Quære.* Br. Dower, pl. 97. cites 20 E. 4. 3.

3. *Entry* into part of the land *after the laſt continuance* by the demandant, will *abate the writ* of dower; and it is no juſtification to ſay that her huſband and ſhe dwelt there till his death, and that the heir entered, and ſhe and the heir dwelt there together till now, and that ſhe *claimed at the will of the heir*, and not otherwiſe; but it was held not good for the *quarantine*; for ſhe ſhould ſhew the death certain, and the time of the 40 days, and after, by reaſon of the opinion of the Court, ſhe waived the plea, and traverſed the entry. D. 76. b. pl. 32, 33. Mich. 6 E. 6. Kettleby v. Kettleby.

4. But in *ſcire facias* to have execution of dower recovered, ſuch entry was no plea. Ibid. cites 45 E. 3.

4. A *feoffment* was made *by the baron to the uſe of himſelf for life, and after to the feme for life for her dower, upon condition to perform his laſt will.* She entered and agreed thereto, and afterwards brought dower. It was reſolved, that an acceptance of a collateral recompence was no bar to the feme of her dower. 4 Rep. 1. Mich. 14 & 15 Eliz. Vernon's caſe.

5. *Feme ſole leſſee marries the leſſor*, and the *leſſor dies within the term*, and the wife enters, this ſhall not conclude her dower after the leaſe is expired; Arg. Ow. 154. per Shuttleworth. Trin. 29 Eliz. in caſe of Goodridge v. Warburton, cites 11 H. 4.

6. A widow recovered dower, and upon *writ to the ſheriff to put her in poſſeſſion*, he *returned that he had delivered* 84 *acres mentioned in the writ.* She brought *ſcire facias againſt the tenant, ſuggeſting that* 60 *acres of the ſaid* 84 *were the lands of a ſtranger not compriſed in the record*, and ſo intended to have a new diviſion. The tenant pleaded, that the other 24 acres were parcel of the land recovered, and that ſhe had entered and accepted the ſame. Adjudged a good bar by her acceptance and *entry into the* 24 *acres*, though leſs in quantity than the third part of all in the record. Mo. 679. pl. 928. Mich. 44 & 45 Eliz. C. B. Anon.

7. Dower *ad oſtium eccleſiæ, or ex aſſenſu patris*, being *aſſented unto*, is a bar of dower at the common law; but a jointure was no bar of her dower at the common law. Co. Litt. 36. a. b.

8. An *aſſignment of other land whereof ſhe is not dowable*, or of a *rent* iſſuing out of the ſame, is no bar of dower. Co. Litt. 34. b.

9. An eſtate made by way of jointure to the wife *for life, or lives of one or many others, or* to her *for* 100 *years, or* 1000 *years,*
[248] *if ſhe live ſo long, or without ſuch limitation*, is no bar of her dower, though they be expreſsly made in ſatisfaction of her dower. Co. Litt. 36. b.

10. If an *eſtate* be made *to others in fee-ſimple, or for her life, upon truſt, ſo as the eſtate remains in them*, albeit it be for her benefit, and by her conſent, and by expreſs words to be in full ſatisfaction of her dower, yet this is no bar of her dower. Co. Litt. 36. b.

11. A *deviſe by will* cannot be averred to be in ſatisfaction of her dower, unleſs it be ſo *expreſſed* in the will. Co. Litt. 36. b.

12. A. *purchaſed in his own and his ſon's name* (who ſurvived A.), the *vendor was only tenant for life, but gave ſecurity that his heir ſhould convey the fee* when of age. A. died before the conveyance was executed, ſo that he never was ſeiſed in fee. Decreed her title to it to be diſcharged, and an *account of the profits*, &c. ſhe having enjoyed it 12 years; but though ſhe had enjoyed a jointure for ſeveral years of lands *evicted* from her, yet the Court would not impeach her title as to *other lands*. Fin. R. 368. Trin. 30 Car. 2. Exton & al' v. St. John & al'.

Ibid. 359. Marg. is a note, that it was afterwards diſmiſſed, and that the decree of diſmiſſion was afterwards affirmed upon an appeal to the

13. *A term and an old ſtatute was kept on foot to protect a purchaſe, and attend the inheritance.* The widow recovered dower at law, but was prevented from taking out execution by reaſon of the term and ſtatute whereupon ſhe brought her bill to be let into poſſeſſion of her thirds. The Court inclined to relieve the plaintiff, in regard of the equitable circumſtances of a great portion and the purchaſe at an under value, and referred to the maſter to examine, and ſtate the caſe to the Court. Vern. 356. pl. 353. Hill. 1685. Bodmyn v. Vandebendy.

Houſe of Lords, and cites Caſes in Parliament, 69. ——2 Chan. Caſes, 172. S. C. but no decree. ——S. P. by Ld. Somers, Ch. Prec. 66. pl. 60. Mich. 1696. decreed. Radnor (Lady) v. Rotheram, and affirmed in Dom. Proc. —— But if there had been any *agreement to have had the benefit of it*, it would have done it. Cited per Ld. Somers. Ch. Prec. 66. as the caſe of Barker v. Fouke. ——Ch. Prec. 69. July 1671. Pheaſant v. Pheaſant, S. P. (though not againſt a purchaſer) in which the wife had recovered at law the third part of a pepper-corn, being the rent reſerved upon the term aſſigned, upon which ſhe brought her bill in equity, and after ſeveral arguments before Ld. K. Bridgman, and Hale, and Vaughan Ch. Juſtices, the caſe was amicably compoſed, and ſo no judgment was given. ——S. C. Chan. Caſes, 181. ——S. C. cited Vern. 358.

Ibid. in a nota there, ſays, that this cauſe being heard before Ld. Keeper Wright, 19 Nov 1702. he reverſed the decree. ——2 Vern. 365. pl. 327.

15. The defendant's *huſband* had *deviſed* to her *ſeveral parts of his eſtate, altogether of better value than her dower*, and had deviſed that the profits of all the reſt of his eſtate for years ſhould be applied for payment of debts and legacies, *but did not mention that he intended it in ſatisfaction of her dower*. The defendant ſued at law and recovered at law, though they did plead the will, and averred that it was in ſatisfaction of dower; but the Court there was of opinion, that no ſuch averment could have been admitted, unleſs it had been ſo declared in the will. The plaintiff being

being heir at law, preferred his bill to be relieved, and he was relieved; for although it is not declared in the will to be in satisfaction of dower, yet here is that which is tantamount; for where he appoints the profits of all the reſt of his eſtate for other purpoſes, it is plain he never intended ſhe ſhould have her dower; and in caſe ſhe were admitted to her dower, thoſe purpoſes would be defeated, and what appears to be the plain intent of a will by conſtruction is all one as though it had been expreſſed. 2 Freem. Rep. 234, 235. pl. 306. Mich. 1699. Lawrence v. Lawrence.

S.C. decreed accordingly by Ld. C. Sommers, and reverſed by Ld. K. Wright.—Equ. Abr. 218, 219. pl. 2. S. C. accordingly, but adds, that the decree of reverſal was affirmed in the Houſe of Lords, 17 May, 1717.—S. C. cited per Cur. 9 Mod. 162. Trin. 11 Geo. in Canc. as ſo held in the Houſe of Lords, anno 1717, and adds, that it is true this Court has gone ſo far as to confine a widow to her election which to take, where a term for years was ſettled on her in jointure in bar of her dower, though * no chattel intereſt can bar her dower at law, or within the ſtatute; but in regard ſhe expreſsly conſented to accept ſuch an intereſt for her jointure, this Court would not admit her to have both.

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14. In ejectment, the plaintiff made title by *recovery in dower*, and produced in evidence the record of the judgment, the Hab. Fac. Seiſinam, &c. The *defendant offered to prove a 99 years term ſubſiſting prior to this title*, but it was diſallowed; for if he had pleaded this in bar of the writ of dower, yet the plaintiff muſt have recovered with a *ceſſet executio*, and the defendant had a proper time to have pleaded it then, and has ſlipped his opportunity; beſides, a chattel intereſt was at common law bound by a recovery in a real action, ſo that the demandant had an immediate execution without regard to the ſubſiſting term. 1 Salk. 291. Mich. 8 Annæ, B. R. Lady Lindſey v. Lindſey.

15. *Deviſe* of lands *durante viduitate* is no bar of dower. MS. Tab. May 16th, 1717. Lawrence v. Lawrence.

16. *No chattel intereſt* can bar dower at law or within the ſtatute but where a term for years was ſettled in jointure in bar of dower, in regard that ſhe expreſsly conſented to accept ſuch an intereſt for her jointure. Chancery put her to her *election* whether to take dower or that jointure, but would not admit her to have both. Per Cur. 9 Mod. 152. Trin. 11 Geo. Charles v. Andrewes.

See 2 Vern. 403. Hilchins v. Hilchins.

17. *Tenant for life makes a leaſe to remainder-man for ſo many years as the remainder man ſhould live.* It was adjudged that his wife ſhould not be tenant in dower; for the poſſibility the tenant for life had that the eſtate *might revert* to him had barred her of all right of dower. Per Cur. 9 Mod. 151. cites 1 E. 3. 14, 15.

18. A *feme infant having a jointure made to her before marriage*, may elect to abide by it or not when of age, unleſs after her coming of age ſhe enters. Account was directed of the real eſtate, and after taking thereof ſhe to elect jointure or dower. MS. Rep. 14 May 1734. at the Rolls. Cray v. Willis.

(Q. 4) Bar. By what Satisfaction or Acceptance.

1. *RENT granted out of the very land recovered* in dower in recompence of all the dower may be pleaded in bar, but not if it was granted out of other land. D. 91. a. pl. 12. Mich. 1 Mar. Turney v. Sturges.

Mo. 59. pl. 167. Trin. 6 Eliz. Anon. S. P.

2. In dower *acceptance of* 20 *acres of corn during life* is a good bar, and ſo of rent, but otherwiſe of a *horſe*, and ſuch like which does *not ariſe out of the land.* D. 91. b. Marg. cites 6 Eliz.

3. If demandant in dower *accepted the land aſſigned by the ſheriff*, ſhe cannot in another term pray a *new execution.* Cro. E. 310. in caſe of Hanger v. Fry.

4. If ſhe *accepts of* 24 *acres for her thirds of* 84, *and enters into them*, ſhe is barred as to any more. Mo. 679. pl. 928. Mich. 44 & 45 Eliz. C. B. Anon.

So dower *in Wales* bars dower in England.

5. *Dower in Ireland* will be good in bar of dower in England. Arg. Cart. 187. Paſch. 19 Car. 2. C. B.

Jenk. 41. pl. 78. cites 17 E. 3. Fitzh. Voucher, 112. 26 E. 3. Paſch. 3.

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Per Sommers C. a collateral ſatisfaction may be a good bar

6. Acceptance of a *collateral ſatisfaction* for dower is no bar of dower. 1 Chan. Caſes, 182. by Ld. Keeper. Trin. 22 Car. 2. Pheaſant v. Pheaſant, and cites 4 Rep. 1. b. Vernon's caſe.

in equity, though not pleadable at law, and ſo decreed a legacy of *perſonal eſtate, and a deviſe of part of his real eſtate by the huſband to his wife during her widowhood, remainder to J. S. in tail*, to be a bar or ſatisfaction of her dower if ſhe accepted the deviſe, though not declared in the will. 2 Vern. 365. Lawrence v. Lawrence.——Reverſed per Wright K. Ibid.

7. *Nothing but a plain and expreſs intention of the parties* ſhall bar the right of dower; as where a ſettlement was made in conſideration of a portion in marriage; but it did not appear that the parties intended it ſhould be in bar of dower. 9 Mod. 152. cited per Cur. Trin. 11 Geo. in Canc. as ſo held anno 1717, in the Houſe of Lords. Lawrence v. Lawrence.

(Q. 5) Bar. By what Offence of the Baron.

1. IF the *baron be outlawed in treſpaſs after diſſeiſin, and after has charter of pardon*, his feme ſhall be endowed; contra after outlawry of felony. Br. Dower, pl. 82. cites 13 E. 3. and Fitzh. Utlarie, 49.

2. A man ſeiſed of land ſhall forfeit it by *felony*, and by the *attainder* of him the feme ſhall loſe her dower. Br. Forfeiture de Terres, 78. cites 21 E. 3. 49.

3. If a *man ſeiſed in fee commits felony*, and after *makes a feoffment* and *dies, and after is attainted*, the feme of him ſhall be endowed againſt the feoffee; contra againſt the lord by eſcheat. Br. Dower, pl. 80. cites Litt. fol 9. Per Yaviſor.

4. If

4. If the *baron* be *attainted of felony*, and *gets charter of pardon, and* after *dies*, yet the feme ſhall not have dower *of the land which he had before the pardon.* Br. Eſcheat, pl. 27. cites F. N. B. tit. Dower.

5. *Contra if the land which he gets after the pardon;* for the firſt land ſhall eſcheat. Br. Eſcheat, pl. 27. cites F. N. B. tit. Dower.

6. *So* it ſeems of *land which he purchaſes, or which deſcends to him meſne between the attainder and the pardon.* Br. Eſcheat, pl. 27. cites F. N. B. tit. Dower.

7. The huſband's being a *felo de ſe* is no bar to the feme of her dower; agreed by all the juſtices. Pl. C. 261. b. Mich. 4 & 5 Eliz. in caſe of Hales v. Petit, cites 3 E. 3. Fitzh. Corone, 362.

8. *Stat.* 1 *E.* 6. *cap.* 12. *ſ.* 12. *The wife ſhall be endowed although her huſband were attainted, convicted, or outlawed for treaſon or felony, ſaving the right of others.*

The feme of one attainted of murder or felony ſhould not

by the common law, before the ſtatute 1 E. 6. 12. have dower againſt the feoffee of her baron, though the *feoffment was made before the felony or murder done*; but otherwiſe ſince the ſtatute. Bendl. 56. pl. 91. Marg. Mich. 3 & 4 P. & M. Gate v. Wiſeman, cites Dal. 140. b. pl. 42. Hill. 3 P. & M. the S. C. the demandant was barred by the opinion of all the juſtices.——Le. 3. pl. 7. S. C. cited by Manwood Ch. B. as reſolved by all the juſtices of England.——Co. Litt. 41. a. cites S. C. reſolved, and reſolved there alſo that ſo it was at common law in caſe of felony, but as to felony the ſame is altered by ſtatute.——Le. 3. pl. 7. Mich. 25 & 26 Eliz. in the Exchequer, Mayney's caſe, S. P. in caſe of treaſon; and Manwood Ch. B. ſaid, that by reaſon of this attainder dower cannot accrue to the wife, for her title begins by the intermarriage, and ought to continue and be conſummated by the death of the huſband, which cannot be in this caſe; for the attainder of the huſband has interrupted it, as in the caſe of elopement; and this attainder is an univerſal eſtoppel, and doth not run in privity only betwixt the wife and him to whom the eſcheat belongs, but every ſtranger may bar her of her dower by reaſon thereof; * for by the attainder of her huſband the wife is diſabled to demand dower, as well as to demand his inheritance.

But if the *heir reverſe the attainder* by writ of error, then the wife ſhall be endowed, and though before the treaſon committed the baron had *levied a fine*, and five years had paſſed before the reverſal, yet ſhe ſhall have her dower, for during the attainder ſhe could not claim, and the action and right of dower accrued to her after reverſal of the attainder by reaſon of a title of record before the fine by the ſeiſin in fee and the marriage. 13 Rep. 19. Hill. 27 Eliz. in Canc. Ninian Menvill's caſe.——Mo. 639. S. C.——S. C. cited per Coke Ch. J. as reſolved; for ſhe had no means of reverſal. 2 Bulſt. 245.

A man *ſeiſed of land in general tail takes wife and after is attainted of felony*, before the ſaid ſtatute 1 E. 6. the iſſue ſhould have inherited, and yet the wife ſhould not have been endowed; for the ſtatute of W. 2. cap. 1. relieves the iſſue in tail, but not the wife in that caſe, but at this day, if the huſband be attainted of felony the wife ſhall be endowed, and yet the iſſue ſhall not inherit the lands which the father had in fee ſimple. Co. Litt. 40. b.

It was otherwiſe at the common law, Co. Litt. 41. a. for then ſhe ſhould not have recovered her dower ad oſtium eccleſiæ, or ex aſſenſu patris, any more than her reaſonable dower which the common law gave her.——But this did not extend to petty larceny. Ibid.

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9. *But note that this clauſe is* altered for treaſon † by 5 E. 6. *cap.* 11. *ſ.* 13. *and enacts, that in ſuch caſe ſhe ſhall loſe her dower ſo long as the attainder continues in force.*

† This extends to petty treaſon as well as high treaſon. Co. Litt. 37. a.

10. 18 *Eliz. cap.* 1. *which makes it treaſon to diminiſh, falſify, &c. the monies of this realm, provides that it ſhall not make the wife to loſe her dower.*

11. The wife of one attainted of *felony* or *treſpaſs*, or *hereſy*, or *præmunire*, &c. ſhall be endowed. Co. Litt. 31. a.

12. The wife of a man attainted of *high treaſon or petit treaſon*, ſhall not be received to demand dower, unleſs it be in certain caſes ſpecially provided for. But the wife of a perſon attainted of *miſpriſion of treaſon, murder, or felony*, is dowable ſince our author wrote, by the ſtatute in that caſe made and provided, which is more favourable to the woman than the common law was. Co. Litt. 392. b.

13. Tenant of a *copyhold for life* in which the *cuſtom was that the wife ſhould have her widow's eſtate*, and the huſband was attaint of felony and executed, and whether the wife in this caſe ſhall have the widow's eſtate, was the queſtion upon the demurrer; Winch being only preſent, ſeemed that ſhe ſhould not without a ſpecial cuſtom. Win. 27. Hill. 19 Jac. Allen v. Brach.

14. 21 *Jac.* 1. *cap.* 26. *ſ.* 2. *It is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any fine, recovery, deed inrolled, ſtatute, recognizance, bail or judgment in the name of any perſon not privy or conſenting thereto, howbeit this offence ſhall not take away dower.*

(Q. 6) Barred; by what Act or Offence of the Feme.

1. IF *feme, tenant of the king, takes a grant of the ward of the heir during his nonage, and does not accept her dower*, this is a bar in dower pro tempore, &c. Br. Executions, pl. 57. cites 24 E. 3. 39.

[252] Co. Litt. 33. a. S. P. 2. If a man be ſeiſed of lands in fee, and takes a wife, and afterwards the *feme is attainted of felony*, and after the *huſband aliens*, and afterwards the *feme is pardoned*, and then huſband dies, the feme ſhall be endowed. 13 Rep. 23. Hill. 27 Eliz. in Canc. in Ninian Menvill's caſe.

3. The ſtatute of 11 & 12 W. 3. [cap. 4. ſ. 4.] enacts, That no papiſt [or perſon making profeſſion of the popiſh religion] ſhall purchaſe any manors, lands, or terms, [hereditaments], &c. It was ſaid by the lord chancellor, that in this caſe a purchaſe muſt be made by the act of the party in the way of grant or conveyance, or at leaſt by will, but in caſe of one dying inteſtate it is the act of the law. 3 Wms.'s Rep. 48, 49. Trin. 1730. in caſe of Davers v. Dewes, whence the reporter infers, that for the ſame reaſon it ſhould ſeem that a *papiſt is capable of taking as tenant* by the curteſy, or *in dower*.

(R) What *Act in Law* will *bar* the Wife of her Dower.

Divorce.

[1. IF the divorce be *cauſa precontractus*, the wife ſhall not have dower. 47 Ed. 3. pl. 78.] Co. Litt. 32. a. S. P.

[2. *So* if it be cauſa *conſanguinitatis*. 47 E. 3. pl. 78.] Co. Litt. 32. a. S. P.

[3. *So* if it be cauſa *affinitatis*. 47 E. 3. pl. 78.] Co. Litt. 32. a. S. P.

[4. *So* if it be cauſa *frigiditatis*. 47 E. 3. pl. 78.] Co. Litt. 32. a. S. P.

[5. *But* if it be cauſa *profeſſionis* the wife ſhall be endowed. 47 E. 3. pl. 78.]

[6. *If* a woman be *endowed ad oſtium eccleſiæ, yet ſi matrimonium in vita contrahentium* accuſatum & *diſſolutum ſit quacunque ratione, deſinit eſſe dos, cum deficiat matrimonium*, & deſinit dotis exactio. Bracton, lib. 2. fol. 92. ſ. 4. and lib. 4. fol. 304.] But it is ſaid, that if the aſſignment of dower *ad oſtium eccleſiæ* be *ſpecified*, viz. *that notwithſtanding any divorce* ſhall happen, yet ſhe ſhall hold it for her life, that this is good. Co. Litt. 32. a. ad finem.

7. Divorce *a menſa & thoro* only, as for adultery, ſeems to be no bar of dower. Co. Litt. 32. a. Adjudged no bar. Co. Litt. 33. b.

(S) *In what Caſes Aſſignment* of Dower is neceſſary.

[1. IF a woman *recovers dower of land, ſhe cannot enter before execution is ſued.* 40 E. 3. 22. 45 E. 3. 5. b.]

[2. The *ſame* law is where the recovery is *of a rent.* 40 E. 3. 22. yet there it is certain enough.]

3. In dower, the *tenant pleaded recovery by himſelf againſt the baron in aſſiſe*, and the *demandant ſaid that the baron was ſeiſed after coverture, and infeoffed the tenant, and after diſſeiſed him and recovered by aſſiſe*; judgment if dower, and ſo confeſſed and avoided him. Br. Confeſs and Avoid, pl. 12. cites 14 H. 4. 33. [253]

5. If there be *lord and a woman tenant by fealty, and 3 s. rent*, and *they intermarry*, and the *lord dies*, the wife ſhall have 12 d. of the rent for her dower of the ſeigniory by way of retainer, &c. without any manner of aſſignment made by any perſon, &c. Perk. ſ. 417.

6. If a man *endows his wife ad oſtium eccleſiæ*, he then openly declares the quantity and certainty of the land which ſhe ſhall have for her dower; and in ſuch caſe the wife, after the death of the huſband, *may enter* into the land of which ſhe was endowed, *without other aſſignment.* Litt. ſ. 39.

7. If a woman brings a writ of *dower of 6 l. rent charge*, and ſhe has judgment to recover the third part, although it be certain Co. Litt. 37. a. b. S. P. where the

writ of dower is of 3 s. rent.— Perk. f. 416. S. P. accordingly.

that ſhe ſhall have 40 s. yet ſhe *cannot diſtrain for* 40 *s. before the ſheriff deliver the ſame unto her*; for whereſoever the writ demands land, rent, or other things in certain, there the demandant after the judgment may enter or diſtrain before any ſeiſin delivered unto him by the ſheriff upon a writ of habere facias ſeiſinam; but in *dower*, where *the writ demands nothing in certain*, there the demandant after judgment cannot enter or diſtrain until execution ſued, by which execution the ſheriff is by the king's writ to deliver a third part in certainty to the demandant. Co. Litt. 34. b.

Co. Litt. 37. b. S. P.

8. So when the *wife of one tenant in common demands a third part of a moiety*, yet after judgment ſhe cannot enter until the ſheriff deliver to her the third part, although the delivery of the ſheriff ſhall reduce it to no more certainty than it was. Co. Litt. 34. b.

9. Where it *appears in certain what lands* or tenements the *wife ſhall have* for her dower, *as in caſe of an endowment ad oſtium eccleſiæ, or ex aſſenſu patris*, the wife may enter without aſſignment of any; but where the certainty appears not, as to be endowed of the third part to have in ſeveralty, or the moiety, according to the cuſtom to hold in ſeveralty, dower muſt be aſſigned to her after the death of the huſband, becauſe it does not appear before aſſignment what part of the lands or tenements ſhe ſhall have for her dower. Litt. ſ. 43. and Co. Litt. 37. a.

[254] (T) *What Perſons may aſſign* Dower of Common Right.]

[And againſt whom a Writ of Dower lies for a Collateral Reſpect.]

[1. AN *infant* may aſſign dower in pais, becauſe he is compellable by writ.]

Before the guardian in chivalry enter, the heir within age may aſſign dower, for the guardian may waive the wardſhip; but there needs neither livery of ſeiſin, nor writing to any aſſignment of dower, becauſe it is due of common right. Co. Litt. 35. a.

[2. [*But*] an infant *in ward cannot* aſſign dower *of the land in ward*, for the prejudice that may come to the lord thereby. 9 H. 6. 6. b.]

Co. Litt. 39. a. S. P. of the lands and tenements which he hath in ward.——Ibid. 35. a. S. P. ——Anno 9 H. 3. Dower, 197. A *man of the age of* 18 *years* took a wife, and *by aſſent of his guardian endowed her ad oſtium eccleſiæ*, and it was adjudged a good endowment, although the huſband died before the age of 21 years. Co. Litt. 34. a.

[3. *Guardian in chivalry* may endow her. 9 H. 6. 6. b. 24. b.]

Co. Litt. 35. b. S. P.

[4. And a *writ of dower lies againſt guardian in chivalry*. 47 Aſſ. 5. per Finchden.]

If a man be poſſeſſed of the wardſhip of certain land, either joinrly with his wife, or in the right of his wife, yet the writ of dower lies againſt the huſband only. Co. Litt. 38. b.

[5. If a *huſband hath a ward in the right of his wife as guardian in chivalry*, a *writ* of dower *lies againſt the huſband, without naming the wife*. 47 Aſſ. 5. per Finchden.]

[6. A

[6. A *writ* of dower *does not lie againſt guardian in ſocage.* 29 Aſſ. 68.] Fol. 682.

[7. A *guardian in ſocage cannot aſſign* dower. 29 Aſſ. 68. But quære.] Co. Litt. 35. a. S. P. for no aſſignment can be made but by ſuch as have a freehold, or againſt whom a writ of dower does lie. Co. Litt. 35. a.

8. The king committed the wardſhip during the nonage of the infant; and whether the *committee* might aſſign dower ſo as to bind himſelf. Kelw. * 112. dubitatur. Though the king does commit the cuſtody of the land to another, yet he may aſſign dower to the wife in Chancery, and ſhe ſhall have a writ to the eſcheator to deliver the land to her. F. N. B. 263. (D). ——— Ibid. in the new notes there (b) cites Kelw. 133. that it ſeems the committee cannot aſſign dower; but ſays quære tamen, if it be not good till the heir ſues his livery.

* This is at fol. 133. b. pl. 112. caſus incerti temporis.

9. If a *woman guardian in ſocage bring a writ of dower* againſt the heir, it is *no plea* for the heir *to ſay, that ſhe is guardian in ſocage* and may endow herſelf, &c. Perk. ſ. 452.

10. *And if* a woman guardian in ſocage bring a writ of dower *againſt the feoffee of the huſband with warranty*, the *feoffee cannot* ſhew the ſpecial matter, and *pray* that the Court would award *that ſhe may endow herſelf* of the faireſt part, &c. becauſe that the feoffee may vouch the heir. But the guardian in knights ſervice may ſo do, &c. Perk. ſ. 453. [255]

11. As concerning dower at the common law, there muſt be an aſſignment *either by the ſheriff by the king's writ, or* elſe *by the heir or tenant of the land by conſent* or agreement between them. Co. Litt. 34. b.

12. An endowment *ex aſſenſu matris* is as good as ex aſſenſu patris; becauſe there is an appearance of a conſtant and perpetual heir. Co. Litt. 35. b.

13. It is held in the 2 H. 3. Dower, 199. that if the *heir apparent be within age*, yet the endowment *aſſenſu patris is good.* Note, that Littleton in the caſe of dower ad oſtium eccleſiæ doth put the huſband of full age; but here of the dower ex aſſenſu patris he ſpeaks generally. Co. Litt. 35. b.

14. The *lord*, of whom the land is held *in chivalry*, is not poſſeſſed as a guardian againſt whom a writ of dower lies until he enters; of the wardſhip of the body he is poſſeſſed before ſeiſure, becauſe it is tranſitory. But he *is not poſſeſſed of the lands until he enters.* Becauſe it is permanent, and *therefore if he does not enter, the heir within age may aſſign dower.* Co. Litt. 38. a. b.

(U) [Aſſignment.]

Of what Things it may be.

[Or what ſhe ſhall be intitled to.]

[1. IF the wife *recovers dower of a rent, ſhe ſhall not have the rent incurred before judgment, nor after judgment before execution.* 40 E. 3. 22.]

2. If the huſband ſows the ground and dies, the property of the corn is in the executors, but ſubject to this condition, that if the heir aſſigns to her the land ſown for her dower ſhe ſhall have the corn; for ſhe ſhall be in de optima poſſeſſione above the title of the executors. 2 Inſt. 81.

(U. 2) In what Caſes ſhe has Election to be endowed of one Thing, or another, or of both.

1. SOmetimes the wife may chuſe to be endowed *of one land, or* of *other land*, &c. or of *ſeigniory, or* of a *tenancy*, &c. or *of land, or* of a *rent-charge, or* of a *rent-ſeck* iſſuing thereout, &c. But in ſuch caſes ſhe ſhall not have dower of both, if not that it be in ſpecial caſes, &c. Perk. ſ. 318.

Fitzh. Dower, pl. 130. Mich. 23 E. 3. S. P. by Wilby.—F. N. B. 145. (N). S. P. ſhe ſhall not have dower of both.——Co. Litt. 31. b. S. P.

2. If a man ſeiſed of one acre of land in fee takes a wife and *exchanges* the ſame acre of land *with a ſtranger*, for another acre of * land, and the *exchange is executed*, and the huſband dies. Now it is at the liberty of the wife to have dower of the acre which the huſband put in exchange, or of the acre which the huſband took in exchange; but ſhe ſhall not have dower of both acres. Perk. ſ. 319.

* [256]

3. If there be *lord and tenant by fealty, and* 12 *d. rent*, and the *lord takes a wife and purchaſes the tenancy in fee* and dies, in this caſe it ſhall be at the liberty of the wife to be *endowed of the ſeigniory or of the tenancy*, &c. Perk. ſ. 320.

4. *So* ſhall it be if a man *ſeiſed of a rent-charge in fee* takes a wife, and *purchaſes* the *land in fee* whereout the rent is iſſuing and dies, it ſhall be at the liberty of the wife to be endowed of the land, or of the rent, &c. Perk. ſ. 320.

5. If there be *lord and tenant by fealty, and the lord takes a wife*, and the *tenancy eſcheats* unto the lord, and he enters and dies, in this caſe it ſhall not be at the liberty of the wife to have dower of the ſeigniory, or of the tenancy; but *ſhe ſhall be forced to take her dower of the tenancy*, and the reaſon is, becauſe that the ſeigniory is determined during the coverture, by act of law, and it

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is to no diſadvantage unto the wife to be endowed of the tenancy, for if ſhe be put out of poſſeſſion of part thereof by a more ancient title, the ſeigniory ſhall be revived for ſo much, and if all the tenancy be recovered by a more ancient title, then the ſeigniory ſhall be revived in all, &c. and then ſhe may have dowry of the ſeigniory, &c. Perk. ſ. 321.

(X) *Aſſignment.*

How it is to be *made.*

[1. IF a woman recovers dower *of land, of which the tenant is ſole ſeiſed*, it ought to be aſſigned by *metes and bounds*. 45 E. 3. 5, 6.]

An aſſignment of dower where the huſband was ſole ſeiſed, cannot be made of the 3d or 4th part in common, but ought to be in ſeveralty. Co. Litt. 34. b. in principio.

[2. But *otherways* it is *where the thing* recovered *is not ſeverable*. 43 E. 3. 15. 6.]

Where the huſband was *ſeiſed in common*, the wife ſhall not be endowed *by metes and bounds*. Co. Litt. 32. b.

[3. If *A. ſeiſed of* lands *in fee takes a wife, and* after *deviſes it for* 21 *years to B.* and dies, and after *C. his heir aſſigns to the wife the third part of the land for her dower, without* ſetting it out by *metes and bounds*, and the *wife accepts it in ſatisfaction of her dower*; though ſhe was not bound to accept ſo in common, without ſetting it out by metes and bounds, nor the heir bound to aſſign it but by metes and bounds, for the prejudice that may accrue to them to occupy it in common, yet inaſmuch as the third part in common is due by law, and they both conſented to accept it according to law, *they may by their conſent waive the aſſignment by metes and bounds*, which is only for their * own advantage, and accept it as it is due by law; *and though the leſſee for years did not agree* thereto, *yet the aſſignment of the tenant of the freehold ſhall bind him.* Trin. 1651. between COOTS AND LAMBERT, adjudged upon a ſpecial verdict. Intratur Somerſet. H. 1649. Rot. 201.]

Sty. 276. Booth v. Lambert. Trin. 1651. B. R. the S. C. where a ſpecial verdict found that the tenant ſaid to the widow thus, viz. *I do endow you of a third part of all the lands my couſin J. S. your huſband died ſeiſed of.* Roll Ch. J. to which Nicholas and Aſk. Juſtices agreed, held that it may be aſſigned generally of the third part in ſome caſes, and the parties may agree againſt common right, and that here both parties agreed to take dower in this manner; but Jerman e contra. But per Roll Ch. J. if the *ſheriff aſſigns* dower, and does it not *per metas & bundas*, it is error if it might have been ſo aſſigned, and where a feme cannot be endowed per metas & bundas, ſhe may *enter without aſſignment*. Sty. 277.

* [257]

[4. A *rent* may be *reſerved for equality of dower, if the thing aſſigned be of greater value* than ſhe ought to have. 17 E. 3. 10.]

[5. *But* this *cannot enure as a reſervation, if the wife in another clauſe of the deed makes a grant of the rent, without any mention* in the deed, *that the thing is of greater value.* 17 E. 3. 10.]

[6. If the *guardian aſſigns* dower, *reſerving a rent for equality during the nonage* of the heir, *this is not good*, becauſe this ſhall not go to the heir. 17 E. 3. 10.]

[7. If

(A. a) pl. 1. S. P.—Co. Litt. 34. b. S. P.

[7. If dower be *aſſigned upon condition*, the condition is void. Com. Colthirſt. Beju. for ſhe comes in by her huſband.]

[8. If dower be *aſſigned* of the lands, *excepting the trees growing on the land*, this is a void exception for the cauſe aforeſaid. Mr. Coventry at a moot cited 44 El. B. R. between BULLOCK AND FINCH, to be ſo adjudged.]

Pl. C. 25. b. S. C. the remainder is void, though livery and ſeiſin is made to the feme, becauſe the dower has relation to the death of the baron.

[9. If dower be *aſſigned with a remainder over*, it is a void remainder, becauſe ſhe comes in by her huſband; and when it ſhould be a good remainder, it would be without a particular eſtate. Com. Colth. Beju.]

[10. The *king may aſſign* dower, *without limiting any eſtate.* Fitz. Natura, 263. Da. 1. 46.]

Co. Litt. 22. a. is that ſhe ſhall be endowed of the third preſentation to an advowſon.

[11. If a woman be endowed *of an advowſon, ſhe ſhall be aſſigned the third part of the advowſon*, and *not only the third part of the profit*, ſcilicet the third preſentation. 17 E. 3. 38. b. Contra, 17 E. 3. 22. b.]

Co. Litt. 32. a. ſays that the fureſt endowment of tithes is of the third ſheaf, becauſe it is uncertain what land ſhall be ſown. ——— 11 Rep. 25. b. Coke Ch. J. cited Paſch. 5 Jac. the Counteſs of Oxford's caſe, held accordingly.

[12. If a woman *recovers dower of a rectory impropriate, where there is not any glebe*, the *ſheriff ſhall put her in poſſeſſion of the third part of the tithes generally*, and not of the tithes that iſſue out of any third part of lands of the pariſh in certain. Mich. 9 Jac. B. per Curiam.]

S. P. per Cat. and Littleton. Br. Dower, pl. 72. cites S. C. So of three acres; for if he aſſigns the third part of every acre it would be infinite. ——— If upon a recovery in a writ of dower de tribus maneriis, the ſheriff on an hab. fac. ſeiſinam returns that he has rendered * to the feme one manor, this is not good; for ſhe ſhall have the third part of each. But if the writ was of all lands and tenements, and there was meadow and paſture, the ſheriff may aſſign all the meadow; agreed by all the juſtices. Bendlows ſaid, that if the writ had been of all tenements it would have been good, which Brown denied. Mo. 12. pl. 47. Trin. 4 & 5 P. & M. Anon. ——— Ibid. 19. pl. 66. Mich. 2 Eliz. Anon. S. P. and ſeems to be S. C. held accordingly. And if the aſſignment be made by conſent of the parties, or by aſſignment of the heir or tenant of the land, then the aſſignment of the one manor in the name of her dower of all the manors is good enough; and ſo was the opinion of all the juſtices.

[13. If a woman be *dowable of three manors*, the *ſheriff may aſſign her one of the manors* in lieu of all three. 12 E. 4. 2. or the moiety of a manor. Ancient Entries. Quare Impedit, 529. 10.]

* [258]

S. P. Br. Dower, pl. 72. cites 12 E. 4. 2.

[14. *So* if an *advowſon* be *appendant to one or more of the ſaid manors*, the ſheriff *may aſſign one of the manors with the advowſon appendant* in lieu of dower. 12 E. 4.]

[15. If a woman be *dowable of one manor*, the *ſheriff may aſſign the third part of the manor in common* in lieu of dower, *without* ſetting it out by *metes and bounds*. Ancient Entries, Quare Impedit, 529. 10. and Quare Impedit in Dower, 1. ſo aſſigned in Chancery.]

16. A feme is *endowed of a third part of the manor to which franchiſes are appendant*, ſhe ſhall not have the third part of the *franchiſes*; for theſe cannot be divided. Contra where ſhe has the whole manor in dower. Br. Dower, pl. 102. cites 3 E. 3. Itinere Derby.

17. If *on a recovery of the third part* in dower, the *ſheriff aſſigns a moiety*, &c. the tenant has *remedy* againſt the ſheriff *by aſſiſe*, or he may have a *ſcire facias* againſt the ſheriff *to aſſign de novo*. F. N. B. 148. (I) in the new notes there (b) cites 22 R. 2. Execution, 165. and ſays, ſee 21 H. 7. 29.

18. If the *freehold*, whereof ſhe is dowable, be *in the poſſeſſion of divers perſons by ſeveral titles*, the wife in a writ of dower brought againſt one of them, ſhall recover but the third part of the freehold which is in his poſſeſſion; ſo that a man or a woman who hath poſſeſſion of parcel of the freehold (of which the woman is dowable) ſhall not be charged according to the poſſeſſion of the whole freehold of which the woman is dowable; if he or ſhe will not. Perk. ſ. 423.

19. Dower *aſſigned by ſheriff per metas*, &c. *and demandant* refuſes, yet ſhe may enter at any time after. D. 278. b. pl. 4. Mich. 10 & 11 Eliz.

20. If aſſignment and *grant* of land be made to the feme *for term of years*, in recompence of her dower, this will not bar her; becauſe of this ſhe is not tenant in dower, nor has ſuch eſtate in ſuch caſe as ſhe would have if ſhe had been endowed, viz. an abſolute eſtate for life. 2 And. 31. in pl. 20. Trin. 38 Eliz. Anon.

So if feme accepts a rent for years in allowance of her dower, or for the life of him that aſſigns it, theſe rents ſhall not bar her of her dower, becauſe they are not ſuch like eſtates as ſhe ſhould have in her dower, which the law appoints to be an eſtate for her life. And. 288. in pl. 296. ad finem. Paſch. 34 Eliz.——Hob. 153. S. P. by Hobart Ch. J. cites 7 H. 6. 34. and 33 H. 6. 2.

21. The *wife of one jointenant* ſhall have the *third part of a moiety*, which her huſband purchaſed to hold in common with the heir of the huſband, for in this caſe her dower cannot be aſſigned by metes and bounds. Litt. ſ. 44.

22. Though of many *things that be intire*, whereof no diviſion can be made by metes and bounds, a woman cannot be endowed of the thing itſelf, yet a woman ſhall be endowed thereof in a ſpecial and certain manner. Co. Litt. 32. a.

23. As of a *mill* a woman ſhall not be endowed by metes and bounds, nor in common with the heir, but either ſhe may be endowed of the *third toll-diſh*, or *de integro molendimo per quemlibet tertium menſem*. Co. Litt. 32. a. [259]

She ſhall have the third part of the profit aſſigned to her, and ſhe ſhall have a freehold in the third part of the mill, &c. F. N. B. 49. (K) cites Mich. 45 E. 3.——Perk. ſ. 342. S. P. as to the third part of the profit, cites 1 H. 5. 1. Mich. 45 E. 3. Dower, 50. 16 Aſſ. 41.——11 Rep. 25. b. Coke Ch. J. cited Mich. 3 & 4 Eliz. Bendl. [118. 120. pl. 151.] where the aſſignment was accordingly.

24. Of a *villein*, either the third day's works, or every third week or month. Co. Litt. 32. a.

25. Of the third part of the profit of *ſtallage*. Co. Litt. 32. a.

26. Of

26. Of the third part of the profits of a *fair*. Co. Litt. 32. a.

28. Of the third part of the profits of the office of *marſhalſea*. Co. Litt. 32. a.

29. Of the third part of the profits of the *keeping a park*. Co. Litt. 32. a.

30. Of the third part of the profits of a *dove-houſe*. Co. Litt. 32. a.

31. Of the third part of the profits of a *piſcary*, viz. tertium piſcem, vel jactum retis tertium. Co. Litt. 32. a.

32. Of the third part of the *profits of courts* fines, heriots, &c. Co. Litt. 32. a.

33. If the wife be intitled to have dower of three acres of marſh, every one of the value of 12d. and the heir by his induſtry and charge makes it good meadow, every acre of 10s. value, the wife ſhall have her dower according to the *improved value*, and not according to the value as it was in her huſband's time; for her title is to the quantity of the land, viz. one juſt third part. Co. Litt. 32. a.

34. And the like law it is if the heir *improve the value* of the land *by building*. Co. Litt. 32. a.

35. And on the other ſide, if the *value* be *impaired* in the time of the heir, ſhe ſhall be endowed according to the value at the time of the aſſignment, and not according to the value as it was in the time of her huſband. Co. Litt. 32. a.

36. There *needs neither livery of ſeiſin nor writing* to any aſſignment of dower, becauſe it is due of common right. Co. Litt. 35. a.

37. Both of dower ad oſtium eccleſiæ, and ex aſſenſu patris, *the certainty muſt be expreſſed*. Co. Litt. 35. b.

38. Dower demanded of the *third part of tithes of wool and lamb* in three ſeveral towns, and it was demanded of the Court how the ſheriff ſhould deliver ſeiſin; and the Court held it the beſt way for the ſheriff to *deliver the third part of the tenth part*, and the third tenth lamb, viz. the 30th lamb. Brownl. 126. Mich. 9 Jac. Anon.

39. Writ of dower *of tithes* ought to be brought of the *third ſheaf*. Roll. Rep. 68. per Coke Ch. J. Trin. 12 Jac. B. R.

Palm. 264. S. C.

40. Upon an *habere facias ſeiſinam* in dower, the ſheriff *returned quod habere fecit ſeiſinam de tertia parte of the honour, hundreds, tenements*, &c. *viz. de uno tenemento ſive firma in C. vocat' Weſton-farm, in tenura J. S. and* 12 *other tenements by copy*; and it was held, that this being in an aſſignment of dower, and only the return of the ſheriff, was certain enough, and that there needed not ſuch preciſe certainty therein as in declarations and indictments; adjudged. Cro. J. 621. Mich. 18 Jac. Sir Charles Howard v. Sir William Cavendiſh.

S. P. Toth. 145. cites 25 Eliz. Wild v. Wells.

41. *Commiſſion out of Chancery* was ordered to aſſign thirds for dower. Chan. Rep. 38. 7 Car. 1. Huddleſtone v. Huddleſtone.

[260]

42. Error of a judgment in dower of the *third part of a mill and kiln*, and two acres of land, where the judgment was to recover

cover ſeiſin of the third part of the aforeſaid tenements *ſeverally per metas & bundas*, and the error aſſigned was, that it could not be per metas & bundas of the mill and kiln, for if it ſhould, neither of the parties could uſe his part, but that the judgment ought to be *de tertia parte tantum*; and the judgment was reverſed. Lev. 282. Paſch. 18 Car. 2. B. R. Gilpin v. Cookſon.

43. Where a writ of *dower* was *brought againſt ſeveral purchaſors*, the Court directed that the ſheriff ſhould *charge them all proportionably*, though otherwiſe the ſheriff might have charged all out of one party, and the party could have no remedy at law; but *in equity* they ought to be all equally charged; and therefore the Court gave this direction. Freem. Rep. 227. pl. 234. Paſch. 1677. Anon.

44. Equity will relieve againſt a *fraudulent and partial aſſignment* of dower by the ſheriff. Vern. 218. pl. 216. Hill. 1683. Hoby v. Hoby. 2 Chan. Caſes, 160. S. C.

(Y) Aſſignment of Dower *againſt common Right*, in lieu of Dower.

What it is.

[1. TO aſſign dower *of an advowſon* is againſt common right, for ſhe ought to have the third preſentation of common right. 12 E. 4. 2.] See (X), pl. 11.

[2. *So* an aſſignment *of rent out of land* is againſt common right. 12 E. 4. 2.] This it ſeems is to be intended out of other lands. See (Z), pl. 7.

[3. An aſſignment *of all the* wood, or all the *meadow in lieu of all the wood, meadow, paſture, and arable*, is not againſt common right, but common right is the third part of each. 12 Ed. 4. 2. 6.] Upon an habere facias ſeiſinam upon recovery of dower of three manors, reſolved the ſheriff cannot give her ſeiſin of one manor, but he muſt give her ſeiſin of the third part of every manor; but if the recovery be of all lands, viz. meadow, &c. paſture, the ſheriff may aſſign her dower in the meadow only. Mo. 12. pl. 47. Trin. 4 & 5 P. & M. Anon.

[4. If ſhe be *dowable of three manors*, and ſhe *accepts of* the heir *one manor* in dower allowance of all, this is an endowment againſt common right. 18 H. 6. 27. 19 E. 3. Quare Impedit, 154.]

5. A feme was endowed of the *moiety of the rent, by reaſon of the cuſtom of the land out of which* the rent iſſued. Br. Rents, pl. 20. cites 4 E. 3.

6. In dower the *tenant pleaded a fine levied by the prior of N. of the ſame rent of* 20 l. *of which dower is demanded, to J. M. and his heirs, upon condition, that if the heir, or any heir of J. M. ſhall be within age at the time of the death of his anceſtor, that then the grantor and his ſucceſſors ſhall be diſcharged of the payment of the rent during the nonage, and ſaid, that the baron died, W. his ſon within age;* judgment if dower during his nonage; for the rent is ceaſed during [261]

during the nonage, and yet the feme recovered dower by award and ceſſet executio during the nonage, and therefore error was brought in B. R. Brook ſays, to what end the writ of error was taken? for it ſeems that it is a good judgment. Br. Dower, pl. 51. cites 23 E. 3. 19.

(Z) What Perſon may aſſign it.

[Againſt Common Right.]

[1. THE *ſheriff cannot* aſſign dower againſt common right. 12 E. 4. 2. contra 18 H. 6. 27.]

[2. The *heir may*. 12 E. 4. 2. b. 26 Aſſ. 41.]

[3. And *ſo* the *right tenant of the land* may. 12 E. 4. 2. b.]

[4. The *ſheriff may aſſign a rent* in lieu of dower. 20 Aſſ. 41.]

Dower cannot be aſſigned in Chancery unleſs where the heir of the king's tenant is in ward, and in ſuch caſe it is aſſigned in court, which is more uſual, or a writ to the eſcheator to do it, cites F. N. B. 263. If it had been ſaid, that the heir had aſſigned in obedience to the decree, it might have been good, but in ſuch caſe the tenant had been in by the aſſignment, and not by the decree; per Holt Ch. J. in delivering the opinion of the Court. Ld. Raym. Rep. 784. Trin. 1 Ann. in caſe of Smith v. Angel.——1 Salk. 354, 355. pl. 1. S. C. and Holt Ch. J. held it plain, that no eſtate or intereſt veſted in the wife by the decree in Chancery. ——7 Mod. 43. S. C.——Jenk. 9. pl. 17. cites 7 Aſſ. 48. Fitzh. Dower, 78. and 26 Aſſ. 4. [but it ſeems miſprinted, and ſhould be 26 Aſſ. according to Roll].

[5. If the *heir* be *in ward to the king*, and the wife is to be endowed in Chancery, the *Chancery may aſſign a rent de novo* to her *out of the land* of which ſhe is dowable, in lieu of dower, and this ſhall bind the heir. 26 Aſſ. 41.]

[6. *So* if a *writ* be directed *out of Chancery to the eſcheator to deliver to the wife ten marks rent, and land in the name of dower*, and the *eſcheator aſſigns to her five marks land, and five marks rent de novo out of other land of which ſhe is dowable*, this ſhall bind the heir. 26 Aſſ. 41. adjudged by all the juſtices.]

The guardian in chivalry may aſſign a rent out of the lands and tenements which he hath in ward, in allowance of dower, and it is good. Co. Litt. 39. a.

[7. A *rent out of the ſame land* may be aſſigned in lieu of dower. 7 H. 6. 34. b. 26 Aſſ. 41.]

8. If *tenant in tail* aſſigns a rent out of the land in lieu of dower, this ſhall bind his iſſue, unleſs it amount to more than a third part; per 2 judges. And. 288. Paſch. 24 Eliz. Bickly v. Bickly.

Co. Litt. 35. a. and 357. b. S. P. and if it be not prejudicial to the diſſeiſee.——Br. Damages, pl. 96. cites 12 Aſſ. 20. S. P.——S. C. cited per Cur. 2 Rep. 67. a. for it is a lawful act.

9. Aſſignment of dower made *by a diſſeiſor* is good, and ſhall not be avoided, if it be not made by covin or fraud, if the woman have right to have the thing in dower. Perk. ſ. 394.

Co. Litt. 35. a. and 357. b. S. P.

10. If a *diſſeiſor*, abator, or intruder, be of land *by covin of the woman who has right to have dower* of the ſame land, and ſuch diſſeiſor, abator, or intruder, endow the ſame woman, the diſ-

ſeiſee who has right unto the land, may avoid and defeat ſuch dower by his entry into the land, &c. Perk. ſ. 395.

*11. If J. S. be *tenant* of land unto which a woman has right to have dower, and he is *diſſeiſed* of the ſame land *by the woman and a ſtranger*, or by the woman alone, and *afterwards ſhe is endowed of the ſame land* by one who is in the land by her and *the other joint diſſeiſor*, or by one of them, ſuch endowment may be avoided by the entry of the diſſeiſee, becauſe ſhe ſhall not take advantage of the wrong of which ſhe herſelf was party, &c. Perk. ſ. 396.

12. If an *aſſignment of rent* be made unto a woman in allowance of dower, which ſhe ought to have of the ſame land, *by a diſſeiſor*, abator, or intruder, the diſſeiſee, or he who has right unto the land, ſhall not be bound by ſuch aſſignment, notwithſtanding that it be without any covin of the woman, &c. Perk. ſ. 398. Co. Litt. 35. a. S. P.

13. Aſſignment of dower by a *guardian in ſocage* is not good, as it ſeems, becauſe a writ of dower does not lie againſt him. Perk. ſ. 404.

14. The ſame law is of *tenant by elegit*, tenant by ſtatute merchant, tenant by ſtatute ſtaple, and by leſſee for years, &c. Perk. ſ. 404.

15. But if made *by him who has the freehold* it is good, if it be of ſuch a thing as may be aſſigned, and of which ſhe has right to have dower; and though ſhe has not right to have dower thereof, yet it ſhall ſtand good, until it be defeated and avoided, &c. Perk. ſ. 404.

16. It *muſt be made by* him that is *tenant of the land*, but herein certain *diverſities* are to be obſerved; if two or more be *jointenants* of lands, the one of them may aſſign dower to the wife of a third part in certainty, and this ſhall bind his companion, becauſe they were compellable to do the ſame by law. Co. Litt. 34. b. 35. a. Perk. ſ. 397. S. P.—— 2 Rep. 67. a. S. P. per Cur. cites 7 H. 6. 34. 8 E. 3. 38. Fitzh. Dower, 110. and 10 E. 2. Dower, 139.

17. *But* if one of them aſſign *a rent* out of the land to the wife, this ſhall not bind his companion, becauſe he was not compellable by the law thereunto. Co. Litt. 35. a. Perk. ſ. 397. S. P.

18. If the huſband makes *ſeveral feoffments* of ſeveral parcels, and dies, and the *one feoffee aſſigns dower* to the wife of parcel of land in ſatisfaction of all the dower which ſhe ought to have in the land of the other feoffee, the other feoffees ſhall take no benefit of this aſſignment, becauſe they are ſtrangers thereunto and cannot plead the ſame. Co. Litt. 35. a.

19. *But* in that caſe, *if the huſband dies ſeiſed of other lands* in fee-ſimple, and the ſame deſcend to his heir, and the heir *endows the wife in certain of thoſe lands, in full ſatisfaction* of all the dower that ſhe ought to have, as well in the lands of the feoffees as in his own lands, this aſſignment is good, and the ſeveral feoffees ſhall take advantage of it and therefore if the wife bring a writ of dower againſt any of them, they may vouch the heir, and 9 Rep. 18. b. in Bedingfield's caſe.

he may plead the aſſignment which he himſelf has made in ſafety of himſelf, leſt they ſhould recover in value againſt him, ſo as there is a privity in this reſpect between the heir and the feoffees, and by this means the ſame may be pleaded by the heir that made it; and ſo it is adjudged in our books. Co. Litt. 35. a.

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(A. a) Aſſignment [of] *Common Right.*

How.

2 And. 30. pl. 20. Trin. 38. S. C. the condition was, that if the rent was arrear at the day, it ſhould ceaſe and determine, and that then ſhe ſhould have her dower; and all the Court held that it did not bar her of her dower; for if the aſſignment bars the feme of her dower, ſhe ought to have ſuch eſtate in the thing aſſigned as ſhe ſhould have in the dower, which is an abſolute eſtate for her life, and if it be not ſhe ſhall not be barred. ——— Cro. E. 451. pl. 19. S. C. adjudged for the demandant. ——— Noy, 55. S. C. adjudged for the demandant. ——— See (X) pl. 7. S. P.

[1. IF a man aſſigns *a rent* out of land of which ſhe is dowable *upon condition*, in lieu of dower, this is not good, for ſhe ought to have it free of any condition, as ſhe ſhould have the land. Maſter Bridgman, at a moot in aula cited a report, 27 Eliz. B. between WENTWORTH AND WENTWORTH, to be ſo adjudged.]

[2. A *rent out of the ſame land* may be aſſigned in lieu of dower *without deed.* 12 H. 4. 17. b. 7 H. 6. 33. b.]

3. The aſſignment muſt *be abſolute*, and not conditional, or ſubject to any limitations. Co. Litt. 34. b. ad finem.

(B. a) *What* Things may be aſſigned *in lieu of Dower.*

[And how without Deed.]

[And what Actions be for ſuch Things.]

[And Pleadings.]

Br. Dower, pl. 3. cites S. C. ——

[1. AN *aſſiſe* lies *for rent aſſigned without deed out of land of which ſhe is dowable* (therefore it is in lieu of dower). 33 H. 6. 2. b.]

Br. Aſſiſe, pl. 6. S. C. cited by Littleton and divers ſerjeants; and it is there ſaid that the like matter is 7 H. 6.

[2. [*But*] an aſſiſe lies *not* for rent aſſigned without deed *out of other land* of which ſhe is not dowable (therefore it is void and not in lieu). 33 H. 6. 2. b. Perkins, ſ. 407.]

3. In dower the defendant pleaded that he had aſſigned to the wife 20 *acres of corn out of the land in name of recompence of her dower;* and held a good bar, as well as of rent, or any other profit out of the land. Mo. 59. pl. 167. Trin. 6 Eliz. Anon.

4. The reſervation of an *horſe or ſheep* is a good reſervation of rent, yet aſſignment of an horſe or ſheep in lieu of dower is not good.

good. For it is not *of the nature of the ſoil.* Mo. 59. pl. 167. Trin. 6 Eliz.

*5. *Common of paſture for two cows* is good in name of recompence of dower. Mo. 59. pl. 167. Trin. 6 Eliz. Anon.

6. In dower brought by the wife of Beamont, Maſter of the Rolls, in the time of E. 6. the defendant ſaid, that he himſelf before the writ brought did *aſſign a rent of* 10 *l. per annum* to the demandant, *in recompence of her dower*, upon which the demandant did demur in law; and the cauſe was, becauſe the *tenant had not ſhewed what eſtate he had in the lands at the time of the granting of the rent*, as to ſay that he was ſeiſed in fee, and granted the ſaid rent; *ſo as it might appear* to the Court upon the plea, *that the tenant had a lawful power to grant ſuch a rent*, which was granted by the whole Court, and the demurrer holden good. 2 Le. 10. pl. 15. Hill. 20 Eliz. C. B. Beamont v. Dean. D. 361. b. pl. 11. S.C. ruled accordingly.

7. Upon an *aſſignment of part of the lands* in dower, the *heir by parol may aſſign a way through the other parts.* Adjudged 2 Roll. Rep. 475. Mich. 22 Jac. White v. Robinſon.

(C. a) In what Caſes a Woman ſhall be *twice endowed.*

[Eviction.]

[1. IF a woman be endowed, and after her *dower* is *evicted* by an elder title, ſhe ſhall have a new writ of dower, and ſhall be endowed of the other two parts. 43 Aſſ. 32. admitted.] Br. Scire Facias, pl. 161. cites S. C. —F. N. B. 149. (M). S. P. and Ibid. in the new notes there (c) ſays, ſee 4 E. 3. 25. 36. 50 E. 3. 7. yet there ſeems to be this diverſity, if a feme be endowed by a diſſeiſor, ſhe ſhall have the warranty, &c. but if ſhe recovers the lands only which are granted over by the heir, ſhe has loſt her warranty againſt the grantee. 7 E. 3. 7. 21 E. 3. 48. 10 E. 3. Quid Juris, 41. ——Perk. ſ. 418. S. P. unleſs in ſpecial caſes.

[2. If a woman brings a *writ of dower* againſt the *tenant* of the land, who *vouches the heir in the ſame county*, and the *woman recovers againſt the heir if he hath, and if not, againſt the tenant, and* the woman *ſues execution againſt the heir*, and after *this is evicted* by an elder title, ſhe ſhall have a ſcire facias upon the firſt recovery againſt the tenant to be endowed of the two parts. 43 Aſſ. 32.] Br. Scire Facias, pl. 161. cites S. C.

[3. The *ſame* law *if the firſt endowment was in Chancery.* 43 Aſſ. 32. adjudged.] Br. Scire Facias, pl. 161. cites S. C.

4. Feme *tenant of the king is endowed in Chancery during the nonage of the heir*, and after the *heir has livery*, and after the *feme is evicted*, ſhe *ſhall have ſcire facias to have the land re-ſeiſed, and to be endowed of other two parts*, and when the heir is vouched in the ſame county the feme ſhall recover dower of the land of the heir. Br. Dower, pl. 65. cites 43 Aſſ. 32.

5. If a woman after the death of her huſband entereth and *agrees to dower ex aſſenſu patris, or ad oſtium eccleſiæ*, ſhe is concluded to claim any dower by the common law; but if ſhe will,

ſhe may refuſe the dower ad oſtium eccleſiæ, &c. and then ſhe may be endowed according to the courſe of the common law. Litt. ſ. 41.

6. If a man *ſeiſed of two acres of land in fee by rightful title, and of another acre by diſſeiſin*, takes a wife and dies, and his *heir* enters and * *aſſigns the acre which his anceſtor had by diſſeiſin* unto the wife in name of dower, in allowance of all the freehold which her huſband had, &c. and the *diſſeiſee enters into the acre aſſigned* unto her and puts her out, ſhe ſhall be new endowed of the third part of the two acres which her huſband had by rightful title, in ſuch manner as if the other acre had never been in the poſſeſſion of her huſband, &c. Perk. ſ. 419.

7. If *tenant in tail make a diſcontinuance in fee, and the diſcontinuee taketh a wife and hath iſſue and dieth, and* the diſcontinuee *is not ſeiſed of any other thing during the coverture, of which his wife is dowable, and his iſſue enters*, againſt whom his *mother bringeth a writ of dower and recovers*, and hath execution of the third part by metes and bounds, and the *iſſue in tail bringeth a formedon* againſt the tenant in dower, and *ſhe vouches the iſſue of the diſcontinuee, who enters into the warranty and loſeth, and the demandant had execution.* Now, the tenant in dower ſhall be new endowed of the third part of the two parts which remain, &c. notwithſtanding that his iſſue hath enfeoffed a ſtranger of part thereof, or of all. For notwithſtanding that the poſſeſſion which her huſband had (whereof ſhe is dowable) be defeaſible, yet ſhe ſhall have dower thereof until it be defeated, &c. Perk. ſ. 420.

8. If a woman endowed loſes by action tried her dower, if ſhe *prays aid of him in reverſion*, ſhe ſhall be new endowed of that which remaineth. F. N. B. 149. (M).

9. If the *baron aliens parcel* of his lands *during the coverture and dies*, and the *heir enters into the reſidue, and allows his mother parcel of the lands, which remain, in recompenſe of all her dower*, and ſhe after brings action of dower againſt the *alienee* of other lands, he *ſhall plead this aſſignment* and bar her of her dower; but if the executor of the baron aſſigns to the feme parcel of the lands aliened in recompence of her dower, the heir nor the other feoffees of the baron ſhall not plead it; per Dyer. Mo. 25, 26. in pl. 86. Trin. 3 Eliz. ſaid that it had been ſo adjudged.

10. B. ſeiſed of land in fee *takes to wife J. and enfeoffs C. in* fee, *who takes Alice to wife; C. dies, Alice is endowed, B. dies*, J. recovers dower againſt Alice and dies, Alice ſhall enjoy the land again during life. Co. Litt. 42. a.

11. If ſhe *is endowed of the immediate eſtate deſcended from the baron to the heir*, and ſhe is impleaded afterwards, ſhe ſhall vouch the heir and ſhall be newly endowed of other lands which the heir has; *but if* ſhe is endowed by *the alienee of the baron or of the heir*, and ſhe is after impleaded, ſhe ſhall not vouch the alienee to be newly endowed. 9 Rep. 17. b. Hill. 28 Eliz. per Cur. in Bedingfield's caſe.

And this is the reaſon, that when the feme brings writ of dower againſt the alienee of the baron, &c. and he vouches the heir, the demandant may ſhew that the heir has lands deſcended to him in the ſame county (for to another county the original does not extend), and pray that ſhe may be endowed of his eſtate, and this is for the benefit of his voucher to be newly endowed. Ibid. 17. b.

(D. a) *What Charges* made by the Huſband, or other, and upon what Things, the Wife ſhall avoid.

[1. D. 8 Eliz. 251. a *man* takes a wife, *having a manor in which is a cuſtom*, that the lord ſupervisor, or deputy, may *demiſe by copy*, and *deviſes*, *that two ſhould make cuſtomary eſtates for the payment of his debts, and dies, the two hold courts in their own name, and grant copies in reverſion according to the cuſtom*, the *wife hath one of the copyholds aſſigned to her for her dower*, and per Curiam ſhe ſhall avoid this grant.]

[2. Co. 4. 26 Eliz. 24. the lord of a copyhold *manor*, *within which there were* many *copyholders for life*, took wife, a *copyholder died*, and the *lord granted it to another*, and died, and adjudged, that the *wife ſhould not avoid this grant* in a writ of dower, becauſe the cuſtom was before the title of dower, and the ſaid opinion of 8 El. cited contra.]

In what caſes the feme ſhall have dower of copyhold lands, ſee tit. Copyhold (E. e).

[3. If the wife *accepts dower*, *of the heir againſt common right*, ſhe ſhall hold it ſubject to the charges of her huſband. 18 H. 6. 27.]

A man ſeiſed of lands in fee takes a wife, and grants a rent-charge, and after makes a feoffment, and takes back an eſtate-tail and dies. The wife recovers dower againſt the iſſue in tail by reddition; the wife makes a ſurmiſe that her huſband died ſeiſed, and prays a writ to inquire of the damages, and it is granted to her; in this caſe ſhe holds the lands charged with the rent-charge, for by her prayer ſhe accepts herſelf dowable of the ſecond eſtate; for of the firſt eſtate whereof ſhe was dowable her huſband died not ſeiſed, and ſo ſhe had concluded herſelf. Wherefore if the rent-charge be more to her detriment than the damages beneficial to her, it is good for her in that caſe to make no ſuch prayer. Co. Litt. 33. a.

[4. But *otherwiſe* it is *if* ſhe be *endowed* againſt common right *by the ſheriff*. 18 H. 6. 27.]

[5. If the *huſband grants a rent out of four manors*, and dies, and his wife is *endowed by the heir of one manor in lieu of all*, ſhe ſhall hold it diſcharged. 19 E. 3. Quare Impedit, 154. per Thorpe.] Fol. 685.

If a man be ſeiſed of three manors of equal value and taketh wife, and charge one of the manors with a rent-charge and dies, ſhe may by the proviſion of the law take a third part of all the manors and hold them diſcharged; but if ſhe will accept the entire manor charged, it is holden that ſhe ſhall hold it charged. Co. Litt. 173. a.

[6. If A. *ſeiſed in tail of a manor to which an advowſon is appendant*, *grants the next preſentation* to the church of B. *and after takes* C. to *wife*, and dies, and the wife is *endowed of this manor with the appurtenances in lieu of all her dower*, and after the church is void, *quære* whether ſhe may preſent and avoid the grant made before the coverture.]

7. The dower of a wife who was *married after a ſtatute or recognizance acknowledged*, ſhall be extended; but if the title of dower precede the ſtatute or recognizance, it is not liable at all to ſuch ſtatute or recognizance. Jenk. 26. pl. 69. cites 8 E. 1. Fitzh. Aſſiſe, 417.

8. W. brought a writ of dower againſt B. C. leſſee for years by *leaſe* of the huſband rendering rent *before the coverture*, prayed to be received for his term. The wife recovers and had judgment. By the Court the leaſe of C. is ſaved by 21 *H.* 8. *cap.* 16. [267]

and the Court adviſed, that an *habere facias ſeiſinam* ſhall be awarded to the ſheriff to put the wife in poſſeſſion, with a *proviſo quod ten' ad termin' annor' non expellatur*. And Beamond ſaid, that 3 Eliz. it was ſo ſaid. Noy, 65. Whitley v. Beſt.

F.N.B.157. (A) ſays there is a writ in the Regiſter directed to the ſheriff, that he do not diſtrain the wife who holds lands in dower for the debts of the huſband which he owed to the king *before the contract of marriage between him and his wife*, and ſhe may have ſuch writ out of the Chancery directed unto the treaſurer and barons of the Exchequer, commanding them that they inquire thereof, and if they find the ſame, that they ſurceaſe and diſcharge the wife.

9. Tenant in dower *ſhall not be diſtrained for a debt due to the king by the huſband* in his life-time in the lands which ſhe holds in dower. Co. Litt. 31. a.

10. The *endowments by metes and bounds according to common right is more beneficial* to the wife than to be *endowed againſt common right*; for there *ſhe ſhall hold the land charged, in reſpect of a charge made after her title of dower*. Co. Litt. 32. b.

11. If *baron and feme grant a rent-charge by fine* out of land, *or make a leaſe for years*, rendering rent to the baron and his heirs, and afterwards the feme recovers dower, ſhe ſhall hold the land charged. 10 Rep. 49. b. Mich. 10 Jac. in Lampet's caſe.

(E. a) Attendancy.

Lord, meſne, and, tenant are, and the tenant takes feme and

[1. TEnant in dower *of a meſnalty ſhall be attendant* to the heir for the third part of that which the rent is over. 1 H. 4. 3.]

dies without heir, and afterwards the meſne enters into the land and endows the wife of the third part; whether the wife ſhall pay to the third part of the ſervices which were due between her baron and the meſne, or the third part of the ſervices which are between the meſne and the lord paramount; dubitatur Kellw. 129. a. b. pl. 98. Caſus incerti temporis. Anon.

[2. [*But*] if a woman be endowed of a meſnalty, the *heir cannot diſtrain the woman for the third part which ſhe ought to pay him*. 1 H. 4. 3.]

3. Feme tenant in dower ſhall hold of the heir *pro particula*, and he ſhall make avowry for the portion upon her, and it is a *good plea for her that the heir holds by leſs ſervices*. Br. Tenure, pl. 84. cites Fitzh. Avowry, 173. 3 E. 3.

4. *And* if *great grandfather, grandfather, father, and ſon*, are, and the *lord gives the ſervices to the grandfather and his feme in tail*, and the *great grandfather attorns*, and the *grandfather dies in the life of the great grandfather*, and the *feme has iſſue*, and the *great grandfather dies*, and the *iſſue enters and does the ſervices to his mother*, and *after he and his mother dies*, and *the ſon enters and endows his mother*; quære if ſhe ſhall be attendant of any ſervices, becauſe the ſervices which the baron did are now ſuſpended in the tenancy by the deſcending of the land held by the great grandfather to the iſſue in tail, who is heir to the great grandfather who was tertenant. Br. Tenures, pl. 84. cites Fitzh. Avowry, 173. 3 E. 3.

5. Where

5. Where a *man gives in tail rendering certain ſervices*, and the *donee takes feme, and dies without iſſue*, and the *feme is endowed*, ſhe ſhall render the third part of the ſervices, and the donor may avow for them, and yet the tail is extinct. Br. Tenures, pl. 82. cites 10 E. 3. Avowry, 159.

6. Where *tenant in tail dies without iſſue*, the *donor enters*, the *feme of the tenant in tail recovers dower and has execution*, ſhe *ſhall render the third part of the ſervices to the donor*. Br. Extinguiſhment, pl. 31. cites 34 Aſſ. 15. S. P. Br. Dower, pl. 64. cites 34 E. 3. 15.

7. *So* where there is *lord and tenant*, and the *tenant dies without heir*, ſo that the *land eſcheats*, and after the *feme of the tenant is endowed*, &c. Ibid. S. P. and yet in theſe caſes the ſeigniory was once extinct, 14 E. 2. For there is a *diverſity between the act of the law*, as a dying without iſſue or without heir, &c. *and the act of the party*, as ſeignory purchaſed in fee, &c.

8. *Contra where the lord purchaſes the tenancy in fee, and the feme of the tenant is after endowed*, ſhe ſhall not render any thing; for the two firſt caſes of the death are the act of the law, and the caſe of the purchaſe or ſuing proceſs of forejudger in writ of meſne, &c. are the acts of the party and his folly. Ibid. Br. Dower, pl. 64. cites 34 E. 3. 15 & 23 E. 3.

9. Where tenant in tail dies without iſſue, and the feme is endowed, or if lord and tenant are, and the tenant dies without heir, the lord may enter by eſcheat. And in the other caſe the donor entered, the feme, the tenant, or the *feme of the tenant* in tail *recovers dower, and has execution*, ſhe *ſhall hold by the third part of the ſervices*; for this is the act of God or of the law; *contra where the lord purchaſes the land in fee, and ſhe is endowed*, ſhe ſhall render nothing to the lord, for it is his own act and folly. Br. Tenures, pl. 33. cites 34 Aſſ. 15.

10. If a *man holds by homage and fealty, and 10 s. rent*, and *makes a gift in frankmarriage of the ſame* land ſo held *with his ſiſter*, and after the *donee in the fourth degree takes feme and has iſſue and dies, and his iſſue enters and endows the mother of the poſſeſſion of his father*, the queſtion was, if the mother ſhall pay the third part of the rent to the heir as he pays over to the donor? or whether ſhe ſhall hold this third part diſcharged during her life? it was argued that ſhe ſhall hold it diſcharged; but Keble was of opinion that ſhe ſhould pay the third part of the rent to the heir. Keilw. 124. a. pl. 80. Caſus incerti temporis. Anon.

11. If there be *lord, meſne, and tenant*, and the *meſne grants to the tenant to acquit him againſt the lord and his heirs*: the *lord dies*, his *wife has the ſeigniory aſſigned to her for her dower*, and diſtrains the tenant, although the grant was to acquit him againſt the lord and his heirs only; yet becauſe ſhe continued the eſtate of her huſband, and the reverſion remained in the heir, *this grant of acquittal did extend to the wife*. Co. Litt. 241. a.

12. A man makes a *gift in tail, reſerving 20 s. rent, and dies*, the *donee takes wife and dies without iſſue*: the *heir of the donor* enters and *endows the wife*: ſhe is ſo in of the eſtate of her huſband, that although the eſtate tail be ſpent, and the rent reſerved thereupon determined, yet after ſhe be endowed ſhe

ſhall be attendant to the heir in reſpect of the ſaid rent; and ſo it is of lord and tenant, the wife that is endowed ſhall be attendant for the due ſervices, but if any ſervices be incroached, although the incroachment ſhall bind the heir, yet the wife ſhall be contributary, but for the ſervices of right due. Co. Litt. 241. a.

[269] (F. a) Ex Aſſenſu Patris, &c.

1. AN *infant* being *in ward at the age of* 18 *years took feme by aſſent of his guardian, and endowed her ad oſtium eccleſiæ;* it was adjudged a good endowment though the *baron died before the the age of* 21, becauſe he * was paſſed the age of 14, and that the marriage was with conſent of his guardian. Fitzh. Dower, pl. 197. cites Paſch. 9 H. 3.

* The original has the word (ne) Anglice (not), which is not ſenſe, and ſo ſeems to be miſprinted.

Co. Litt. 36. a. S. P.— The *wife ought to have a deed of the father or mother, proving his aſſent* and conſent, for his freehold ſhall be bounden thereby, and livery and ſeiſin ſhall not be made thereof, and the father may well make ſuch a deed unto his ſon's wife, &c. and yet in ancient books ſuch aſſent and conſent has been tried by proofs, but the law is contrary at this day. Perk. ſ. 442.

2. Aſſignment of dower ex aſſenſu patris, this ſhall be by deed; for otherwiſe the franktenement of the father cannot paſs, and aſſent lies not in averment but in ſpecialty, and *here franktenement paſſes without livery of ſeiſin;* quod nota. Br. Dower, pl. 7. cites 40 E. 3. 43.

† Co. Litt. 35. b. S. P. Such dower is good.— S. P. F.N.B. 150. (L).— The laſt edition of F.N.B. 150. (L) cites 9 H. 3. Dower, 19. and 18 E. 2. Dower, 167. Contra. But Dower, 19. is neither the S. C. nor the S. P. and Dower, 167. is the S. C. of 8 E. 2. and ſo likewiſe is pl. 168. but neither of them is S. P. But Dower, 191. cites Trin. 9 H. 3. and is that on iſſue as to the aſſent of the mother, &c. it was found againſt the demandant, by which ſhe was barred. But Dower, 134. cites 29 E. 3. is an inference drawn from that caſe, viz. that a man cannot endow his feme ex aſſenſu of any other than his father; for that ſhe ſhall not have writ of dower ex aſſenſu conſanguinei.

3. In the ſame manner as there is dower ex aſſenſu patris, in the ſame manner and form there is dower † ex aſſenſu matris, mutatis mutandis. Perk. ſ. 441.

4. But there is no dower *ex aſſenſu fratris nec conſanguinei.* Ibid.

5. *Such endowments ought to be made immediately after affiance* made betwixt them *at the church door, or in the church,* if the marriages are uſed to be in the church, &c. Perk. ſ. 442.

‡ Fitzh. Dower, pl. 199. S.P. cites anno 2 H. 3.— F.N.B. 150. (L) S. P.

6. And *yet* it has been holden in ancient books, that *where the ſon is heir apparent* unto his father (and ſo he ought to be, for ſuch endowment made unto the wife of the ſecond ſon is nothing worth), ‡ if he *marries againſt his father's will, and afterwards within eight weeks* after the marriage, the ſame ſon *endows his wife, with the aſſent of his father,* of the lands and tenements of the father, &c. it was holden that the ſame was a good endowment, &c. Perk. ſ. 443.

Litt. ſ. 40. and Co. Litt. 35. b. S. P.

7. Where the endowment ex aſſenſu patris, vel matris, is good and ſufficient in law, *the wife* of the ſon *immediately after the death of her huſband, in the life of the huſband's father, may*

enter

enter into the ſame lands ſo aſſigned unto her in dower, &c. Perk. ſ. 444.

8. *So* if the ſon endows his wife with the aſſent of the father, *of lands of the father which he held jointly in fee with a ſtranger* at the time of his aſſent, &c. Perk. ſ. 446.

9. *So* ſhall it be if ſuch endowment be made *of lands* or tenements *which the father holds for the term of his life*, at the time of ſuch endowment. Perk. ſ. 446.

10. *But if* the father had been *ſeiſed in tail* of ſuch lands whereof ſuch endowment is made at the time of his aſſent, &c. *he ſhall be bounden thereby* during his life; *but the iſſue in tail ſhall* [270] *not* be bound thereby, nor a woman who has title to have dower of the ſame land before the aſſent, &c. As the father's wife which he had at the time of the aſſent, *nor any ſtranger who have ancienter title* to the ſame land, &c. ſhall be bound by ſuch endowment or aſſent, &c. Perk. ſ. 447.

11. If there be father and ſon, and the *father is ſeiſed* of land *in fee with his wife in the right of his wife*, and the *ſon endows his wife of the ſame land with the aſſent of the father*, and the *ſon dies, living his father*, the ſon's wife ſhall not have dower of this land againſt the father, yet the father may make feoffment of the ſame land during the coverture between him and his wife, and it ſhall be good againſt him; and it has been ſaid, that it is becauſe that in ſuch caſe the huſband does preſently diſmiſs himſelf of the poſſeſſion, but in the other caſe he remains ſeiſed of the ſame land during the coverture, and in the right of his wife; and when this matter appears unto the Court, the Court, who is a third perſon, ſhall ouſt the ſon's wife of her dower, becauſe otherwiſe the Court ſhould do wrong unto the wife of the father, &c. Tamen quære, for that the father cannot plead ſuch matter; but if it be in an action in which reſceit lies, if the wife be received upon the default of her huſband, ſhe may plead this matter, &c. yet notwithſtanding that ſhe is received, it ſeems that, upon the matter of law, the ſon's wife ſhall have the dower which was aſſigned unto her by her huſband with the aſſent of his father, &c. [during the coverture]. Perk. ſ. 448.

12. *Writ* of dower ex aſſenſu patris *lies as well againſt the guardian* as againſt *the tenant of the freehold*. F. N. B. 150. (B).

13. If the ſon *endows his wife at* the age *of ſeven years ex aſſenſu patris*, if ſhe before the huſband *attain to the age of nine years*, the dower is good; but *otherwiſe it is of an original abſolute diſability*. Co. Litt. 33. a.

14. *Tenant for life of* a carve of land, the *reverſion to the father in fee*. The ſon and heir apparent endows his wife of the carve by the aſſent of the father. The *tenant for life dies*. *The huſband dies*. The reverſion was a tenement in the father, and yet this is no good endowment ex aſſenſu patris, becauſe the father at the time of the aſſent had but a reverſion expectant upon a freehold, whereof he could not have endowed his own wife, and though tenant

Perk. ſ. 445. S. P. cites Trin. 6 E. 3. 34. —F. N. B. 150. (A) S. P. and the new edition cites

4 E. 3. Dower, 117. and 6 E. 3. 34. and Perk. 86. [which is the ſame caſe as cited above].

tenant for life died, living the huſband, yet *quod ab initio non valet tractu temporis non convaleſcet.* Co. Litt. 35. a.

S. P. per Cur. 3 Rep. 38. a. Hill. 34 Eliz. B. R. in Ratcliff's caſe.

15. The *youngeſt ſon*, and heir apparent, cannot endow his wife ex aſſenſu patris of lands whereof the father is ſeiſed in fee, of the nature of borough Engliſh, becauſe the father may have another ſon, and then the huſband is not heir apparent, and it is in reſpect of the conſtant and perpetual appearance, that the ſon and heir apparent may endow his wife of his father's land. And ſo it is of lands in *gavelkind*, and this is the reaſon that dower ex aſſenſu fratris, or conſanguinei, is not good, for that although he is heir apparent at that time, yet for the common poſſibility that he may have iſſue, and every iſſue that the brother or couſin ſhould have afterwards ſhall exclude him, he is no ſuch heir apparent as the law intends; ſo it muſt be ſuch a ſon and heir apparent as *muſt continue an heir apparent.* Co. Litt. 35. b.

16. Though the freehold and inheritance is in the father, yet in reſpect of the conſtant and perpetual appearance of the heir, *the heir apparent does endow*, and the father *does but aſſent;* and
[271] therefore where the father did endow the wife of his ſon and heir apparent, that endowment was held void, becauſe the huſband in that caſe muſt endow, and the father aſſent. Co. Litt. 35. b.

17. If a man endows his wife ex aſſenſu patris, and the huſband dies, the *wife may enter, or have a writ* of dower, *though the father be living.* Co. Litt. 35. a.

Fitzh. Dower, pl. 158. cites Paſch. 12 E. 2. S. P.

18. If a wife be endowed ex aſſenſu patris, and the huſband dies, the *wife has election either to have her dower at the common law, or ex aſſenſu patris;* if ſhe bring a writ of dower at the common law, and count, albeit ſhe recover not, yet ſhe ſhall never after claim her dower ex aſſenſu patris. Co. Litt. 145. a.

(G. a) De la pluis beale.

1. IN dower, the *tenant vouched the heir of the baron in ward of the demandant for cauſe of nurture, and ſet forth deed of the anceſtor of the infant*, and he *was compelled to plead in bar, becauſe now the feme may endow herſelf of the beſt part*, becauſe *guardian by nurture is always intended ſocage tenure, upon which tenure this endowment of the beſt*, &c. *lies.* Br. Dower, pl. 42. cites 21 E. 3. 30.

2. *Contra* of tenure *in chivalry*, and therefore ſhe was barred. Br. Dower, pl. 42. cites 2 E. 3. 30.

3. If there be *lord, meſne, and tenant*, and the *tenant holds of the meſne by* 3*d.* and the *meſne holds over by* 20*d.* and the *tenant takes a wife*, and the *meſne releaſes unto the tenant all the right which he has in the tenancy*, &c. and the *tenant dies*, and his *wife is endowed* by the heirs *of the third part of the tenancy, ſhe ſhall be attendant* unto him *by* 1*d. and not by the third part of the* 20*d.* becauſe that ſhe ſhall be endowed of the beſt poſſeſſion which her huſband had during the coverture, &c. Perk. ſ. 428.

4. If

4. If the *husband has a bailiwick*, &c. or *a fair*, &c. *as appendant unto his manor* within the same precinct, of which manor the husband was seised in fee during the coverture, and held the same in socage, now *if the wife be endowed of the moiety of the manor by the custom, she shall have the profit of the moiety of the bailiwick, &c. or of the fair as appendant* unto the moiety of the manor; but quære if the bailiwick or fair be disappendant in fee from the manor after the death of the husband, and before the endowment, whether she shall then have the moiety of the profit of the bailiwick or fair, &c. But it seems she shall have the same, because she shall be endowed of the best possession which her husband had during the coverture or marriage, &c. Perk. s. 436.

5. Where *judgment is given* in a writ of dower *that the demandant shall be endowed de la pluis beale*, she may take her neighbours, and in their presence endow herself by metes and bounds of the fairest part of the tenements which she hath as guardian in socage, to have and to hold for term of her life. Litt. s. 49.

6. A *woman guardian in socage bringing a writ of dower against guardian by knight's service* (before 12 Car. 2. 24.), should upon his pleading the whole matter, have been adjudged to endow herself de pluis beale, i. e. that is the fairest of the socage land. But such dowment could not be without judgment; *if the socage land were not sufficient for her whole dower, she should retain for part, and recover against the guardian in chivalry for the other part.* After judgment as aforesaid, * whether in the king's court or the lord's, the wife should in the presence of her neighbours have endowed herself of the best of the land, which she held as guardian in socage by metes to hold it for life. Hawk. Co. Litt. 55.

Litt. s. 48. Co. Litt. 38. a. b.—— If feme who has title of dower occupies the land as guardian in socage by her own right, and not as rightful guardian, she shall not endow herself de la pluis beale; for this is in a judgment given in the king's court. 5 Rep. 30. b. 31. a. in Coulter's case.

* [272]

(H. a) By Custom.

1. IN *assise* the *tenant said, that the land is within the manor of D. in which is the fee of L. where the usage has been time out of mind, that the feme shall have the whole in dower dum sola sit, and if she marry that she shall forfeit it*, and admitted. Br. Customs, pl. 67. cites 25 Ass. 11.

2. Vill which is not a borough or incorporated may have a custom that the feme shall be *endowed of the whole*, as in gavelkind and others. Br. Customs, pl. 72. cites 21 E. 4. 53, 54. F.N.B. 150. (P) S. P.

3. In some boroughs by custom she shall have for her dower *all the tenements* which were her husband's. Litt. s. 166. In some places she shall have the whole or half dum sola & casta vixerit, and the like. Co. Litt. 111. a.

4. The custom of Kent is, that the wife shall be endowed *of the moiety of gavelkind land*, and shall lose her dowry if she marry again; three justices held the plea good, and that she had not election to be endowed of the third part at the common law, but Co. Litt. 33. b. and 111. a. S. P.— S. P. adjudged accordingly.

was

cordingly. Cro. E. 825. pl. 26. was tied to the cuſtom; but Anderſon e contra. Mo. 260. pl. 408. Paſch. 30 Eliz. Anon.

Paſch. 4 Eliz. C. B. Davis v. Selby. ——— Le. 133. pl. 182. Hill. 30 Eliz. C. B. Hunt v. Gilburn. S. P. adjudged accordingly. ——— Cro. E. 121. pl. 11. S. C. held accordingly. ——— Gouldſb. 108. pl. 13. Hum v. Auſtin. S. C.

5. If a cuſtom be that a feme ſhall be endowed *of a moiety of the lands*, yet ſhe *ſhall not be endowed of the moiety of a fair held on the ſame land*; per Newdigate J. 2 Sid. 139. Hill. 1658. B. R.

(I. a) Quarantine.

She ſhall remain there but 40 days, of which the day of his death is accounted the firſt; and if upon her huſband's death ſhe departs from her houſe, ſhe cannot return again within the 40 days. 2 Inſt. 17. ——— Hob. 153. per Hobart Ch. J. cites D. 76. Mich. 6 E. 6. [b. pl. 32. Kettillſby v. Kettillſby.]

1. *Mag. Charta*, 9 H. 3. *cap.* 7. *THE widow ſhall have her dower and quarentine in the chief houſe if it be not a caſtle, and if it be, a competent houſe ſhall be provided until her dower is aſſigned, and ſhe ſhall have in the mean time her reaſonable eſtovers of the common, and ſhe ſhall have a third part of the lands of her huſband aſſigned for her dower, which were his during coverture, except ſhe was endowed with leſs at the church-door.*

——— If the widow be holden from her quarantine, ſhe ſhall have her *writ* de quarentina habenda to the ſheriff, by virtue of which writ the ſheriff may make a *proceſs* againſt the defendant *returnable* * *within two or three days, and* may and ought, if no juſt cauſe be ſhewn againſt it, *ſpeedily* to *put her into poſſeſſion*. 2 Inſt. 16, 17.

By a *caſtle* in this ſtatute it is intended one that is *fortified* and maintained for the defence of the realm, and *not* a caſtle *in name* for the habitation of the owners; but this muſt be of a houſe whereof ſhe is dowable. 2 Inſt. 17.

* [273]

Co. Litt. 32. b. S. P.

2. If ſhe *marries within the* 40 *days* ſhe loſes her quarantine; for then her widowhood is paſt, and the quarantine is appropriated to the widow's eſtate. 2 Inſt. 17.

3. The word *eſtovers in the ſtatute is taken for ſuſtenance*. 2 Inſt. 17. And Lord Coke there ſays, that there is an opinion in the books [and in Marg. cites 19 H. 6. 14. b. and Regiſt. 175.] that the widow *cannot kill any of the oxen* of the huſband's whilſt ſhe remains in the houſe; but obſerves, that the Regiſter ſays, quod interim habeat rationabilia eſtoveria de bonis eorundem maritorum, which Lord Coke ſays, ſeems to be an expoſition of this branch. And that in this caſe it *ſeems to contain meat, drink, garments, and habitation*, though *when reſtrained to woods, it ſignifies houſe-bote, hedge-bote, and plough-bote*. 2 Inſt. 17, 18.

4. Widow for 40 days next after the death of her baron is by the law allowed her *quarantine* to live in the houſe of her baron, and to be ſuſtained with victuals there, and not for any longer time. Per omnes J. Jenk. 284. pl. 18.

(K. a) Againſt whom Dower lies.

1. IN dower the *tenant vouched*, and the *vouchee vouched the heir of the baron* of the demandant; the *demandant ſhewed that the heir had aſſets by deſcent in the ſame county*. The demandant ſhall not recover againſt the heir, but againſt the tenant only; for there is no immediate privity between the heir and her; for ſhe ſhall recover againſt the heir only when the tenant in demeſne vouches him. 9 Rep. 17. b. per Cur. in Bedingfield's caſe, cites 18 E. 3. 36. b.

2. Writ of dower does not lie *againſt a guardian in ſocage*, as it lies againſt a guardian *in chivalry*, therefore the *endowment is diſſeiſin; quære* inde. Br. Dower, pl. 63. cites 29 Aſſ. 68. Co. Litt. 35. a. S. P.

3. Dower ſhall be brought *againſt the guardian where the infant is in ward, and not againſt the infant*, becauſe the *guardian has intereſt*. Br. Dower, pl. 20. cites 46 E. 3. 19. Co. Litt. 35. a. S. P.

4. In raviſhment of ward it was agreed that writ of dower may be brought *againſt the baron alone, where the baron is poſſeſſed of a ward in jure uxoris, and the feme mother of the infant demands dower*; for in writ of dower againſt guardian voucher does not lie. Br. Dower, pl. 23. cites 48 E. 3. 20.

5. *But right of ward* ſhall be againſt both; for there voucher lies. Br. Dower, pl. 23. cites 48 E. 3. 20.

6. Where there were *grandfather, father, and ſon*, and the *grandfather held of the king*; the *father took feme*; the *grandfather died*; the *father had iſſue and died before office found, and before any entry*, and after an *office was found for the king, that the grandfather was ſeiſed, and died ſeiſed, and held of the king, and that he had iſſue, who had iſſue him who now is heir and within age*, by which the *king ſeiſed and committed the ward durante minore ætate*, and the *feme of the father, ſon of the grandfather, brought writ of dower againſt the committee*, and the committee demurred upon the matter. Br. Dower, pl. 66. cites 1 H. 7. 17. [274]

7. Writ of dower lies againſt the *committee* of a ward, and he *may have aid of the king*. Br. Dower, pl. 66. cites 4 H. 7. 1. per Vaviſor, who vouched 15 E. 3.

8. Where the *tenant pleads in bar of dower, and demands judgment ſi actio*, there though the action does not lie againſt the committee, yet *by this concluſion the defendant has loſt his advantage*, and ſo *quacunque via* the action lies well. Br. Dower, pl. 66. 1 H. 7. 17. per Brian.

9. A *grantee of a rent in fee takes wife*; the *grantee releaſes to the tertenant and dies*; his wife ought to bring her writ of dower *againſt the tertenant*, for he is to pay the rent, and there is no other againſt whom the writ of dower may be brought. *So* in the caſe of the *releaſe* of the meſne, *or fore-judger of the meſne by the tertenant*; where dower is brought by the wife of the meſne, it ought to be againſt the tertenant. Jenk. 4, 5. pl. 6.

10. *But*

10. *But where a grantee of a rent in fee dies*, and his wife is dowable, ſhe ought to bring her writ of dower *againſt the heir of the grantee*, and not againſt the tenant of the land; for he (the grantee) is the true tenant of the rent; in the other caſes the rent is extinct; in this laſt caſe it is not. Jenk. 5. pl. 6.

(L. a) Writ and Abatement.

By the common law, if a woman had *accepted part of her dower* from any perſon, *ſhe could not recover the reſidue unleſs by writ of right* of dower. 2 Inſt. 262. in principio, cites Bract. lib. 4. fol. ‡ 321. b.

1. *Weſtm.* 1. *cap.* 49. 3 E. 1. *IN a writ of dower (unde nihil habet) the writ ſhall not abate by the exception of the tenant, that ſhe has received her dower of another before the writ purchaſed, unleſs he can ſhew that ſhe received part of her dower * of himſelf; and in the † ſame town before the writ purchaſed.*

‡ This is miſprinted for (311. b.) and is in lib. 4. cap. 13. f. 15.

* Firſt, It muſt be of the ſame tenant, and not of another, though it be in the ſame town; as if the *huſband enfeoffs A. of Whiteacre, and B. of Blackacre, both in Dale*, and the *wife receives dower of A. ſhe* notwithſtanding *ſhall have a writ of dower (unde nihil habet) againſt B.* by the expreſs purview of this act, for he is not the ſame tenant of whom ſhe received her dower 2 Inſt. 262.

2dly, If A. having a wife does *enfeoff the huſband of one acre, and the wife of another, and both in Dale*; A. dies; the huſband aſſigns dower of his acre, yet does the writ of dower (unde nihil habet) lie againſt the huſband and wife, for they are not the ſame tenant. 2 Inſt. 262.

3dly, If the *baron* be *ſeiſed of Blackacre and Whiteacre in Dale*, and *after the coverture makes a leaſe for life of Blackacre, and grants Whiteacre and the reverſion of Blackacre to A and his heirs*, to whom attornment be made, and dies, the *wife receives dower of A. of Whiteacre*, and after the *leſſee for life dies, the wife ſhall have a writ of dower (unde nihil habet) to be endowed of Blackacre.* For although it be againſt the ſame tenant, and in the ſame town, and before the writ purchaſed, whi h are the three points required by this act, yet is there another property neceſſarily implied, and that is, that he be ſuch a tenant of both the one land and the other at the time of the receipt of the dower, as ſhe might have had her writ of dower (unde nihil habet) againſt him, of both which ſhe could not have in this caſe, in reſpect the leſſee for life was tenant of the freehold at that time, and ſo no default of her. 2 Inſt. 262.

† A writ of dower (unde nihil habet) *does lie in an hamlet*, but yet if the demandant had received dower out of the hamlet, and in the ſame town, the writ ſhall abate; otherwiſe it is, though it be in the ſame pariſh, if it be in another town, for the words of the ſtatute be, en meſme le ville. 2 Inſt. 263.

[275] 2. In writ of dower aſſigned, it is *no plea to the writ to ſay that the demandant is ſeiſed of parcel of her dower* of this ſame, &c. But it is good in common writ of dower. Thel. Dig. 148. lib. 11. cap. 35. ſ. 2. cites Mich. 9 E. 2. Brief, 813. Britton, ca. 109.

3. In dower, the *tenant pleaded jointenancy by fine* with one Tho. and the *demandant ſaid, that after this fine her baron was ſeiſed and enfeoffed the tenant*, and ſo he is ſole tenant, and iſſue taken thereupon, and found for the demandant, by which ſhe recovered. But it was ſaid, that all might be reverſed in B.R. Thel. Dig. 226. lib. 16. cap. 7. ſ. 8. cites 3 E. 3. It. North. Maintenance de Brief, 14.

4. *Dower in N.* and the *tenant ſays that H. is a hamlet of N.* judgment of the writ, this is a good plea; [*but*] *if he brings another writ in N.* the *tenant ſhall not ſay that there are two N.'s, and none without addition.* Br. Brief, pl. 540. cites 3 E. 3.

5. In dower *of the third part of a manor*, where the tenant *pleaded nontenure of parcel*, the *demandant was received to maintain that he was fully tenant* of her demand, *notwithſtanding that nontenure*

tenure ought not to be alleged in writ of dower, &c. Thel. Dig. 226. lib. 16. cap. 7. ſ. 11. cites 4 E. 3. 159. Quære.

6. Where a *feme takes a manor in allowance of all her dower of the tenements* of her baron, the writ of *waſte ſhall be brought againſt her as tenant in dower, and not as leſſee for life*, as well by the heir of the baron as by a ſtranger; but otherwiſe it is, if upon debate had between her and him in reverſion ſhe receives the manor by accord of the leaſe of him in reverſion to releaſe her action of dower. Thel. Dig. 170. lib. 11. cap. 52. ſ. 9. cites Paſch. 4 E. 3. 138.

7. In dower, the *demand was as to parcel of the moiety, and of the third part of the reſidue*, and the tenant would have compelled the demandant to ſhew cauſe why he demanded the moiety, but before cauſe ſhewn the tenant *pleaded to the reſidue in abatement, that ſhe had received parcel of her dower*, and iſſue thereupon taken, and after the *demandant would not have ſhewn cauſe of the other demand*, becauſe the tenant had pleaded to the writ for the reſidue, &c. *Yet ſhe was compelled* by the Court to ſhew cauſe, or to amend her demand. Thel. Dig. 88. lib. 10. cap. 1. ſ. 11. cites Hill. 7 E. 3. 308. Dower, 102.

8. *In dower unde nihil habet*, it was *pleaded* to the writ, *that the tenant himſelf had aſſigned her dower* to the demandant *in the ſame vill of which the demandant was ſeiſed*, the demandant replied, *that at the time of his aſſignment, the tenant was not ſeiſed of the tenements of which dower is now demanded, but one A. then held them for term of his life, the reverſion expectant to you*, and ſo theſe tenements are come to you after the death of the ſaid A. &c. Judgment of this writ be not good enough; upon which the tenant was put to *anſwer over*. Thel. Dig. 225. lib. 16. cap. 7. ſ. 3. cites Mich. 2 E. 2. Dower, 124. and Hill. 12 E. 3. Dower, 86.

9. In dower by ſeveral præcipes, the name of one of the tenants was left out in this clauſe, unde queritur, and alſo in the ſummons, by which it was abated againſt all. Thel. Dig. 94. lib. 10. cap. 6. ſ. 3. cites Hill. 12 E. 3. Brief, 671.

10. *But* in dower *unde nihil habet, ſeiſin of parcel* of her dower *in the ſame vill* is a good plea. Thel. Dig. 148. lib. 11. cap. 35. ſ. 2. cites 7 E. 3. 308. Mich. 2 E. 2. Dower, 124. and 12 E. 3. Dower, 86.

Seiſin of parcel of her dower *in the ſame vill, is no plea* in writ of dower by the ſtatute of Weſtm. 1. cap. 49. *without ſaying that it is of the aſſignment of the tenant.* Thel. Dig. 149. lib. 11. cap. 35. ſ. 21. cites Hill. 12 E. 3. Dower, 89. Quære.

11. It was adjudged that *in* writ of *waſte brought againſt tenant in dower*, it ſuffices to name the feme by her proper name and ſurname, *without naming her by her proper name, with that wife of ſuch a one.* Thel. Dig. 50. lib. 6. cap. 2. ſ. 3. cites Mich. 31 E. 3. Brief, 326. & Paſch. 32 E. 3. Brief, 295. [276]

12. In dower *againſt a guardian*, the *demand was of the third part of a carve of land*, &c. The tenant *pleaded that the demandant herſelf is ſeiſed of the third part of this carve*, et non allocatur to all the writ; becauſe he does *not ſhew how* ſhe is ſeiſed, *or of whoſe aſſignment or otherwiſe*, &c. by which the tenant was put to an-

ſwer to the two parts. Thel. Dig. 149. lib. 11. cap. 35. ſ. 12. cites Trin. 39 E. 3. 22.

13. In dower, the demand was *of the third part of* 40*l. rent.* Br. Demand, pl. 47. cites 44 E. 3. 32.

14. *So of the moiety of rent*, and not of ſum certain. Ibid.

Br. Brief, pl. 512. cites S. C. and ſo the demand of the thing in itſelf is good.

15. Dower was brought againſt the Earl of Warwick, and the *writ was de libero tenemento of J. W. her huſband in terra Gwerr in Wales*, and her *demand was de tertia parte terræ Gwerr*, and ſo ſhe ſuppoſes *the land of Gwerr to be in terra Gwerr*, and yet good by award. Br. Demand, pl. 1. cites 47 E. 3. 6

Br. Brief, pl. 512. cites S. C.

16. *So* of *the manor of B. in B.* Ibid.

Br. Brief, pl. 512. cites S. C. it ſhall be in foreſta, and not de foreſta.

17. *And* where land is *in foreſta de K. which is not of any vill*, the writ ſhall be præcipe quod reddat, &c. *in foreſta de K.* and *not de foreſta.* Ibid.

18. Dower *of the third part of* 10*l.* and did not demand five marks, and ſo it ought to be, quod nota. Br. Demand, pl. 51. cites 11 H. 4. 83.

19. In dower, the demandant *demanded the third part of a garden*; for the *writ is general rationabilem dotem ſuam quæ ei contingit de libero tenemento J. B. viri ſui in N.* &c. Per Marten, the demand is good, becauſe the writ has paſſed the Chancery; but note that this term is not in the writ, but only libero tenemento, &c. and the opinion of the Court was, that the writ was good as in aſſiſe, by which the tenant demanded the view, &c. Br. Demand, pl. 8. cites 8 H. 6. 3.

20. In *waſt* it was agreed by the opinion of all the Court, that a feme ſhall be endowed *of a villein appendant in groſs*, and the *writ ſhall be de libero tenemento.* Br. Dower, pl. 91. cites 2 H. 6. 11.

21. Dower *of the moiety by cuſtom* the *writ ſhall be general*, and ſhall have ſpecial *declaration of the cuſtom* for the moiety. Br. General Brief, pl. 23.

22. In dower the demand was *medietatis* 23 *acrarum terræ, pro eo quod the land eſt de tenura in gavelkind, ſecundum conſuetudinem ab antiquo uſitat' quod de medietate dotari debent*, and *did not ſay de tempore cujus contrar'*, &c. and yet good, becauſe the courſe is ſo, and it ſeems there, that ſhe *ſhall ſay ſhe is ſole according to the cuſtom.* Br. Dower, pl. 70. cites 2 E. 4. 17.

23. Dower *againſt a guardian* ſhall be *by name of guardian*; and there it is a good plea, that he is not guardian. Br. Dower, pl. 94. cites 9 E. 4. 31.

[277] 24. Writ of dower lies *againſt guardian in chivalry, without naming other guardians who have parcel of the heritage of the heir in ward, but all* the guardians *ſhall be jointly vouched.* Thel. Dig. 49. lib. 5. cap. 23. ſ. 1. cites Mich. 16 E. 3. Brief, 657.

25. Dower, and made the *demand of two mills.* Skrene demanded judgment of the writ; for where ſhe makes demand of two mills *they are only two ſcites of mills and two tofts, and have been always in the life of the baron,* by which the *demand ſhall be of two tofts,* &c. quod non negatur. Br. Demand, pl. 5. cites 14 H. 4. 35.

26. In dower *of the third part of the moiety of a manor,* and the *tenant demanded the view,* by which the *demandant made her demand of the third part of the manor of B. ſevering the other moiety.* Pigot ſaid, now the demand ſhall be *of the third part of all the acres and rent,* and yet good as above per Cur. For *where a manor is parted between two coparceners, each has a moiety* of the manor; contra it ſeems *where the one has all the demeſnes, and the other all the ſervices,* but as long as the one has land and ſervices, and the other likewiſe, each has a moiety of the manor. Br. Demand, pl. 10. cites 9 E. 4. 5.

27. In dower if the *tenant makes default by which grand cape iſſued,* the *demandant ſhall make his demand;* for no certainty appears before the demand made, nor in aſſiſe before the plaint. Contra in præcipe quod reddat. Br. Dower, pl. 96. cites 38 H. 6. 18.

28. A writ of dower *unde nihil habet lies in caſe* where a woman takes her huſband, who is ſole ſeiſed of lands or tenements to him and his heirs in fee-ſimple, or unto him and the heirs of his body, &c. or if the huſband during the marriage betwixt him and his wife be ſolely ſeiſed in fee ſimple or in fee tail of ſuch eſtate, that the iſſue begotten betwixt him and his wife may inherit the ſame, or dies ſeiſed thereof, or be thereof diſſeiſed and dies, his wife ſhall have a writ of dower unde nihil habet againſt him who is tenant of the freehold of the land, or againſt him who is guardian in knight's ſervice of the land. F. N. B. 147. (E).

29. Dower, the *writ was, præcipe A. quod reddat E. Fulliam rationabilem dotem ſuam de terris, &c. dudum B. Fulliam quondam viri ſui,* &c. Exception was taken to the writ, becauſe it was not in this manner; præcipe A. *quod reddat E. Fulliam que fuit uxor B. Fulliam,* &c. For in the beginning of the writ, ſhe ought to be named uxor of her huſband, &c. for that is the name whereby ſhe claims her dower; and ſhe ought to be his lawful wife, otherwiſe ſhe may not claim any dower. And the Court held that the writ was ill; and that the words in the writ B. Fulliam quondam viri ſui, &c. are not ſufficient, Cro. J. 217. pl. 4. Hill. 6 Jac. B. R. Fulliam v. Harris.

2 Brownl. 300, 301. S. C. reſolved to be error. And it is ſaid that it does not vary in ſubſtance, but becauſe the form in the Regiſter is otherwiſe, the juſtices would not amend it.

30. For the moſt part dower *ad oſtium eccleſiæ, & ex aſſenſu patris, enſue the nature of a dower at the common law;* and for theſe the wife may have a writ of dower, although they be certain, as for the third part at the common law. Co. Litt. 35. b.

31. Although the *guardian in chivalry,* or the *grantee of the king of a wardſhip,* has but a chattel during the minority of the heir, and the woman ſhall recover a freehold in her writ of dower, yet after the guardian, as is aforeſaid, has entered into the land, that

writ lies againſt him, and not againſt the heir who is tenant of the freehold, becauſe the law has truſted the guardian to plead for the heir within age, and that is in his cuſtody, and alſo for his own particular intereſt, and by this diverſity all the books be reconciled. Co. Litt. 38. b.

[278] 32. So if the *guardian dies the wife ſhall have a writ of dower againſt his executors*, and if there are two executors and one of them alone takes the profits, the writ of dower ſhall be maintained againſt him only. Co. Litt. 38. b.

Noy, 126. Brownlow v. Littleton, S. C. held accordingly; and cites Paſch. 39 Eliz. B. R. Williams v. Williams, where in the like caſe the plaintiff brought a new writ of error quod coram vobis reſidet againſt the executor, who brought a ſci. fa. to have execution of the damages, and the party pleads that there is error hanging for the damages; and per Cur. if the plaintiff in error has aſſigned error according to the courſe of the Court, then the plea is good, but otherwiſe if he had not aſſigned errors. For the ſci. fa. for the damages is to haſten him to proceed cum effectu in the error.

32. In dower there was *judgment by default, and a writ of inquiry* if the huſband died ſeiſed, and of what eſtate either in fee or tail, *and judgment* was given *that ſhe recover, &c. and her damages to* 60 *l.* and a writ of *error brought, and the record being removed, the widow died;* adjudged that the writ ſhall not abate by the death of the defendant in error, though otherwiſe by the death of the plaintiff, and thereupon the plaintiff in error proceeded and aſſigned errors. Yelv. 112. Mich. 5 Jac. B. R. Bromley v. Littleton.

33. Dower is brought *againſt a guardian in chivalry*, pending the writ, the *heir comes of full age*. The writ of dower abates, for the guardianſhip ended *by the act of God;* and the guardian has nothing of which dower may be rendered. Jenk. 170. in caſe 32.

34. A writ of dower *de rectoria & omnimodis decimis, without ſhewing the particulars*, is good; for the *demand in a writ of dower need not be ſo particular as in other writs;* for the demandant has not the charters ſo as to be enabled to make a preciſe demand; and as dower is favoured in law, ſo are the proceedings therein. Sty. 68. 92. 99. Hill. 23 Car. Thyn v. Thyn.

35. A writ of dower will lie *de uno crofto;* per Roll Ch. J. Sty. 194. Hill. 1649.

36. Error aſſigned to reverſe a judgment in dower was, that the *demand was de tertia parte decimarum garbarum in* C. whereas the word garba admits of divers conſtructions, and ſignifies any thing bound up in bundles, ſo that it is uncertain what kind of tithes are demanded by that word, but adjudged that it was certain enough, for the word garba is taken at common law to be corn bound up, and here the demand was of the third part of the tithes garbarum granorum. Sty. 236. 238. Mich. 1650. B. R. Fairfax v. Fairfax.

37. So where it was *de rectoria de C* it was aſſigned for error that it ſhould be de rectoria *eccleſiæ de C.* but the Court held it well enough in a writ of dower, in which there is *not ſuch certainty required* as in a præcipe. Sty. 236. 238. Mich. 1650. Fairfax v. Fairfax.

(M. a) Proceedings and Pleadings.

1. *Stat. Marlb.* 52 *H.* 3. 12. *IN dower (unde nihil habet) four days ſhall be given in the year, and more if conveniently may be; ſo that they ſhall have five or ſix days (at leaſt) in the year.*

2. Writ of *dower by one præcipe againſt W. of land in C. and by another præcipe againſt R. of land in eadem villa. R. made default,* and *W. ſaid that C. is not a vill but a hamlet, judgment of the writ,* and held a good plea in his mouth, notwithſtanding that the fault was in the other præcipe, in which the demandant had ſuppoſed it to be a vill. Thel. Dig. 193. lib. 13. cap. 1. ſ. 1. cites Mich. 18 E. 2. Brief, 829. [279]

3. If a *diſſeiſor or abator endows a feme, ſhe may plead it in bar againſt the heir of her baron;* and Brook ſays, it ſeems to him that it is *the ſame againſt others.* Br. Dower, pl. 59. cites 12 Aſſ. 20.

4. In aſſiſe the *tenant ſaid, that her baron was ſeiſed in fee during the eſpouſals and died, and the land deſcended to the plaintiff within age, and becauſe it was held in ſocage, A. B. as next of kin to the infant entered, and we aſſigned dower;* judgment if aſſiſe. Br. Dower, pl. 63. cites 26 Aſſ. 68.

5. Dower *againſt B. guardian of the land, and heir of K.* The *defendant ſaid, that the father of the infant was J. of R. Judgment of the writ, and in caſe the writ ſhall be good, we are ready to render dower;* per Knivet, you cannot plead to the writ and render all at one time. The demandant prayed judgment, by which ſeiſin of the land was awarded, and becauſe the demandant averred that he was not at all times ready to render dower, inqueſt of damages was awarded, and that the execution ceaſe till the inqueſt ſhall be paſſed. Br. Dower, pl. 40. cites 38 E. 3. 33.

6. In dower, the *tenant ſaid that the feme had married A. and living him married B. of whoſe dowment ſhe now demands, and A. is yet alive,* & non allocatur; by which he added, *and ſo not accoupled in lawful matrimony,* by which nothing was entered but ne unques accouple, &c. and writ awarded to the biſhop to certify it; quod nota. Br. Dower, pl. 54. cites 39 E. 3. 15.

7. In dower, the demand was *of the third part of a carve of land;* Clam ſaid, that *ſhe herſelf is ſeiſed of the third of this carve;* judgment of the writ; per Knivet J. this is no plea unleſs he had *ſaid of whoſe aſſignment, or that ſhe recovered it;* for if it be by diſſeiſin, yet ſhe ſhall have dower of two parts, by which he was compelled to anſwer to the two parts. Br. Dower, pl. 55. cites 39 E. 3. 17.

8. Dower was brought by a feme *againſt two by ſeveral præcipes,* and *the one prayed aid of the other as coparcener,* and ſo it ſeems that *ſeveral tenancy is a good plea* in dower. Contra in aſſiſe. Br. Dower, pl. 99. cites 39 E. 3. 4.

9. In *dower*, the *feme juſtified to hold evidences*, becauſe ſhe was *enſeint* by her baron, and *detain them to the uſe of the infant*, and the *tenant tendered iſſue that ſhe was not enſeint by her baron the day of her baron's death*, and the iſſue was not received, but only *if ſhe was enſeint the day of the death of her baron* or not. Br. Iſſues Joines, pl. 6. cites 41 E. 3. 11.

10. A *protection does not lie in dower*, for this would tend to ſtarve the widow. The *ſame law* is *in a quod ei deforceat* brought by tenant in dower, where ſhe has loſt her dower by default. Jenk. 50. pl. 95. cites 43 E. 3. 6. by all the counſel.

11. In dower, the feme confeſſed and avoided *a recovery had againſt her baron*. Br. Confeſs and Avoid, pl. 9. cites 47 E. 3. 13.

12. In dower, the *baron makes a feoffment and ouſts the feoffee*, and *he recovers by aſſiſe*. The *baron dies*. The *feme brought dower*, and the *feoffee pleaded the recovery in aſſiſe againſt the baron*, and therefore ſhe ſhall not falſify in this caſe; by which ſhe ſaid, that long time before her baron was ſeiſed que dower la poit, and the other e contra; and ſo ſhe is dowable of the firſt poſſeſſion before the recovery. Br. Dower, pl. 22. cites 47 E. 3. 13.

[280] 13. *Dower unde nihil habet*, the *tenant came at the firſt day and ſaid, that he had been always ready to render* dower, and the *demandant averred, that often-times before the writ purchaſed ſhe demanded dower*, and could not have it, and was received inaſmuch as it was at the firſt day; and it is ſaid elſewhere, that this is inaſmuch as the heir is in by title; but contra in coſinage, aiel, and mortdanceſtor, for this is to affirm the title and eſtate of the tenant; note the diverſity; for there ſuch averment ſhall not be taken. Br. Tout temps priſt, pl. 34. cites 2 H. 4. 7.

14. In *dower*, the *tenant vouched proceſs continued to the ſequatur*, which was *returned not ſerved*, and the *tenant was eſſoigned*, and at the day made default, and therefore *petit cape* was awarded, and yet per Hull clearly, he cannot ſave his default; quære. Br. Proceſs, pl. 29. cites 3 H. 4. 4.

15. In dower, the *tenant ſaid*, *that N. gave to the baron and his firſt feme for life*, the *remainder to this tenant in the tail*, the *remainder in fee to the right heirs of the baron*, and after the *firſt feme died*, and *he married this feme and died*, and this *tenant entered as in his remainder*, and demanded judgment if of ſuch eſtate, dower, &c. Till ſaid, the plea amounted but to ne unques ſeiſie que dower la poit; but per Hank. and Thirn. he *ought to anſwer to the plea* by reaſon of the fee in remainder in the baron, which is doubtful to the lay gents; but where a man *leaſes to a baron for term of life*, the *reverſion to the leſſor*, *or* the *remainder to a ſtranger*, there the demandant may ſay, that ſeiſie que dower la poit; ſo a diverſity, &c. for the baron has not fee. Br. Dower, pl. 33. cites 11 H. 4. 73.

16. Dower *of the third part of* 20 *l.* [*rent*;] Norton ſaid, your *baron never had any thing in the rent but jointly with N. who is alive*. Judgment if dower, and *was not compelled to ſhew whether he pleaded as tertenant, or as pernor of the rent*; and the *demandant ſaid, that N. releaſed to her baron all his right which he had in the rent, and did not ſhew the deed of releaſe*, and therefore was *counſelled*

ſelled by the Court to plead that *ſeiſie que dower* la poit, and ſo ſhe did, and *proved the releaſe in evidence;* quod nota, and ſo to iſſue; quære of this iſſue general. Contra of the ſpecial matter. Br. Dower, pl. 34. cites 11 H. 4. 83.

17. In dower; the *baron purchaſed rent,* and *died before the day of payment,* yet the feme ſhall be endowed; and if the *tenant pleads that baron ne fait unques ſeiſie que dower* la poit, *the other ſhall not plead ſpecial matter, but ſhall ſay* that *ſeiſie que dower* la poit, and *ſhall give the matter in evidence.* Br. Dower, pl. 35. cites 11 H. 4. 88.

18. It is no plea in dower *that the tenant at another time brought formedon againſt the baron of the demandant, who upon deed of tail ſhewed in pais rendered the land in pais, pending the writ, by which the tenant entered and averred the tail;* judgment ſi actio; for render does not bar a ſtranger of a meſne eſtate, and alſo fee-ſimple cannot be rendered without livery of ſeiſin. Br. Dower, pl. 37. cites 12 H. 4. 21. Br. Confeſſion, pl. 15. cites S. C.

19. In dower, the *tenant pleaded recovery in aſſiſe againſt the baron,* and the *demandant ſaid, that the baron infeoffed him during the coverture, and after diſſeiſed him, of which diſſeiſin he recovered;* and the *tenant ſaid, that he was ſeiſed till by the baron diſſeiſed, upon which he recovered,* abſque hoc *that the tenant any thing had before the recovery,* and it ſeems that it ought to be, abſque hoc that he any thing had *before the diſſeiſin.* Br. Traverſe per, &c. pl. 52. cites 14 H. 4. 33.

20. In dower, the tenant *pleads jointenancy by fine with B. who is not party to the writ.* The *demandant avers, that after the fine her huſband was ſeiſed in fee* of this land, *and thereof infeoffed the tenant alone,* and ſo he was ſole tenant. Iſſue was taken upon this, [281] and found for the demandant. The demandant had judgment by advice of parliament. This is in favour of dower; otherwiſe in other præcipes, if there be not a confeſſion and avoidance of the joint ſeiſin, and an averment of ſole ſeiſin on the day of the purchaſe of the writ. 43 Aſſ. pl. 6. 14 H. 6. 8. 25. 17 E. 2. pl. 1. and 13. The ſtatute de conjunctim feoffatis aids jointenancy by deed, but not by fine; but the law is as above. Jenk. 9. pl. 15. cites 3 E. 3.

21. Dower, and *demanded the third part of two mills, and of other land,* the *tenant demanded judgment of the plaint; for where ſhe demanded of two mills, they were only the ſcite of two mills at all times during the coverture, and were tofts,* and *to the other parcel alleged tail in N. and conveyed remitter to the tenant during the ſeiſin of the baron,* and *to the other parcel that the demandant detained from him certain evidences concerning the ſame land, and if ſhe would render the evidences, he is, and at all times has been, ready to render dower.* Br. Dower, pl. 39. cites 14 H. 4. 43.

22. In dower, the *tenant pleaded recovery in aſſiſe againſt the baron;* judgment ſi actio; the *demandant ſaid, that the baron was ſeiſed and eſpouſed her, and enfeoffed the tenant, and after diſſeiſed him, and he brought aſſiſe and recovered,* and the baron died, and prayed dower; the *tenant ſaid, that he was ſeiſed till diſſeiſed by the baron, and after he recovered by aſſiſe, abſque hoc that the baron was ſeiſed* Br Confeſs and Avoid, pl. 12. cites S. C.

before the diſſeiſin que dower la poit. The demandant ſaid, that ſhe was ſeiſed before que dower la poit. Br. Dower, pl. 38. cites 14 H. 4. 33.

23. In dower the *tenant demands the view; after the view* had the *writ abates for falſe Latin;* the demandant *brings another writ of dower for the ſame land* againſt the *ſame tenant,* he *ſhall not have the view* in this caſe; for viſus non eſt neceſſarius, and the * ſtatute ſays, non concedatur viſus niſi ubi eſt neceſſarius. By the juſtices of both benches. Jenk. 106. pl. 3. cites 3 H. 6. 34.

* Weſt. 2. 13 E. 1. cap. 48.

24. In dower the *tenant ſaid, that he was ſeiſed till by the baron diſſeiſed, upon whom he re-entered;* judgment, &c. The *demandant ſaid, that before the tenant any thing had W. was ſeiſed and enfeoffed her baron, by which he was ſeiſed,* &c. and prayed dower; and per Martin, it is an ill replication; for it *may be that all this was before the coverture,* and the diſſeiſin alſo, and then no ſeiſin in the baron que dower la poit. Br. Dower, pl. 95. cites 14 H. 6. 5, 6.

25. If it be pleaded that the land was aſſigned to the feme in dower, ſhe *need not ſay that it was by metes and bounds;* for it ſhall be intended a lawful aſſignment, which is by metes and bounds. Br. Pleadings, pl. 145. cites 10 H. 6. 1.

26. In dower it is no plea *to ſay that the baron had nothing but for life;* for this *amounts to general iſſue,* that ne unques ſeiſie que dower la poit; per Cur. Br. Dower, pl. 84. cites 10 H. 6. 17.

27. *But* it is a good plea *that the baron had nothing but jointly in fee with the tenant who ſurvived,* by reaſon of the fee-ſimple confeſſed in him. Br. Dower, pl. 84. cites 10 H. 6. 17.

28. Where the *tenant pleads a joint eſtate made to the baron and J. N. and* that the baron died, and *J. N. ſurvived, whoſe eſtate he has,* the *demandant ſhall not ſay that ſeiſie que dower la poit, without ſhewing how, or* to *traverſe that J. N. nothing had of the feoffment of the feoffor,* per Newton; which Brook ſays ſeems to be law. Br. Dower, pl. 48. cites 22 H. 6. 42.

29. In dower *tenant to parcel ſaid, that* 40 *acres parcel,* &c. *are in the vill of D. of which he was not tenant the day of the writ purchaſed, nor ever after, but J. N. was tenant;* judgment of the writ; *and as to ſix meſſuages in D. the plaintiff detained from him certain evidences concerning the ſame land, and that he has been at all times ready to render dower in caſe ſhe would render the evidences;* judgment, &c. *and as to* 20 *acres in another vill, that N. was ſeiſed and enfeoffed the baron, and the heir now tenant, and the baron died, and the heir ſurvived and held by ſurvivor,* judgment, &c. *and as to the land in P. he demanded the view,* and was ouſted of the view; and the reaſon ſeems to be becauſe he has pleaded to the reſt, he has taken notice; and the plaintiff to the part of which the ſurvivor was pleaded, ſaid, that the defendant releaſed to his father in his life, and ſo ſeiſie que dower la poit priſt, and it was held a good plea; and to the detainer of the evidence Littleton ſaid, this goes to all the action; which was denied; and the tenant was compelled to ſhew in certain what evidence he detained, and ſo he did, viz. a charter ſpecial, &c. Br. Dower, pl. 4. cites 33 H. 6. 51.

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30. In treſpaſs it is not ſufficient *to ſay that the tenant holds in dower of the dowment of A. B.* but *ſhall ſay that W. was ſeiſed in fee and took her to feme and died, and the iſſue entered and endowed her;* quod Curia conceſſit. And by ſome *ſhe ſhall ſhew how ſhe held by metes and bounds*; but per Priſot *contra*; for when it is alleged that ſhe held in dower, it ſhall be intended by metes and bounds. Br. Dower, pl. 56. cites 37 H. 6. 38.

31. In dower, the *tenant ſaid, that S. was ſeiſed in fee, and enfeoffed him, and leaſed to the baron to hold at will, which eſtate he continued during his life, abſque hoc that he was ſeiſed of ſuch eſtate que dower*, &c. and had *all entered* by judgment, by reaſon of the long continuance of the poſſeſſion for doubt of the lay gents. Br. Dower, pl. 58. cites 39 H. 6. 9.

32. By which he *ſaid that the baron during the eſpouſals was thereof ſeiſed in fee, and conveyed eſtate to him, and that he endowed the feme* of it, viz. of *the third part thereof, to which the feme agreed*, and the demandant imparled. Br. Dower, pl. 68. cites 5 E. 4. 22.

33. Dower unde nihil habet, the *tenant ſaid that he was ſeiſed of two meſſuages and ten acres of land in fee, and this aſſigned to the demandant for her dower, to which ſhe agreed;* & non allocatur *without alleging ſeiſin in the baron.* Br. Dower, pl. 68. cites 5 E. 4. 22.

34. Dower *againſt a guardian* ſhall be by name of guardian, and there it is a *good plea that he is not guardian.* Br. Dower, pl. 94. cites 9 E. 4. 31.

35. In *dower* of the moiety *of the manor of D. in D.* the *tenant ſaid, that two acres, parcel* of it, *is in S.* and is no plea; for as the demand is in D. ſhe ſhall recover nothing but that which *is* in D. Br. Brief, pl. 216. (218.) cites 9 E. 4. 6.

36. And the ſame year, fol. 17. the tenant was awarded to anſwer, and therefore no plea to the writ. Ibid.

37. In dower, the *tenant ſaid that he has been at all times ready to render dower, and yet is*, &c. and the *demandant ſaid that he*, viz. *the baron, died ſeiſed, and that ſuch a day and year ſhe required the tenant to endow her at D. and he refuſed*, &c. the *tenant ſaid that the ſame day the tenant offered the feme to go with her to the land, and to aſſign her dower, and ſhe refuſed, abſque hoc that he refuſed*, and the Court held the iſſue good upon the refuſal upon this ſpecial pleading. Br. Dower, pl. 73. cites 13 E. 4. 7.

38. *But* if he had *ſaid generally that he did not refuſe*, ſome ſaid that it ſhould not be [a good] plea, becauſe he *does not deny the requeſt.* Br. Dower, pl. 73. cites 13 E. 4. 7.

39. In dower, the *tenant pleaded ne unques ſeiſie que dower* la poit; and the *demandant ſaid that the father of her baron was ſeiſed in fee, and died ſeiſed, and the land deſcended to her baron as ſon and heir;* this feme *demandant then being his feme, and* after the *baron, before any entry made by him or any other, died*, and ſo ſhe dowable by the law; and note, that *ſhe was compelled per Cur. to ſay, that no entry; for if any had entered ſhe ſhould not have dower, for then there is poſſeſſion in fact, which tolls the poſſeſſion in law*, and after *ſhe concluded, and ſo ſhe dowable by the law*, and the juſtices held

Br. Waiver, &c. pl. 26. cites S. C.

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held the concluſion good, and ſo *ſhe was not compelled to ſay, and ſo ſeiſed of ſuch eſtate que dower la poit, but to put it to the law and to the judgment of the Court*, and ſo note, that a feme ſhall be endowed of the ſeiſin and poſſeſſion in law without ſeiſin in fact; quod nota; for otherwiſe it is of tenant by the curteſy; and the reaſon ſeems to be *inaſmuch as the baron may enter in jure uxoris, but* the *feme cannot compel her baron to enter into his land*; for if he ſhould ſay ut ſupra, and *ſo ſeiſie que dower la poit, this concluſion ſhall waive the ſpecial matter.* Br. Dower, pl. 75. cites 21 E. 4. 60.

40. Error was aſſigned becauſe the *tenant in the writ of dower pleaded that the baron was not ſeiſed the day of the eſpouſals, et unquam inde poſtea*, which was held *a confeſſion of the action* in a manner, tamen quære inde, and after becauſe it appeared by the examination of the clerk of C. B. that the *record there was nec unquam* inde poſtea, therefore it was *amended* by the ſtatute per judicium, and that the demandant recover her dower and damages taxed by the inqueſt 20 l. according to the firſt judgment. Br. Error, pl. 188. cites 22 E. 4. 45.

41. In *dower, the tenant ſaid that the baron was not ſeiſed thereof the day of the eſpouſals nor ever after*, and the jury *found that they were ſeiſed thereof the day of the eſpouſals and ever after*, the verdict has not made the plea good, but if the plea had been that they were not ſeiſed the day of the eſpouſals, and the others e contra, and it had been found that he had been ſeiſed the day of the eſpouſals, this verdict had made the plea good. Br. Verdict, pl. 81. cites 22 E. 4. 46.

42. In dower, the *tenant vouches the heir* of the huſband *in the ſame county*; the *heir demands the lien and denies it; this iſſue ſhall be tried before the demandant ſhall have judgment in dower.* By all the judges in the Exchequer Chamber. Jenk. 176. pl. 52. cites 4 H. 7. Fitzh. Dower, 19.

43. In this caſe of dower the *judgment* varies; if it be *found againſt the heir that he has lands in the ſame county* where the writ is brought, the *demandant in* dower *ſhall have judgment againſt the heir; if* the iſſue be *found for the heir*, the *demandant ſhall have judgment againſt the tenant.* Jenk. 176. pl. 52. cites 28 E. 1. Voucher, 241. 17 E. 3. 47. 19 E. 2. Fitzh. Reſceipt, 17. 16 E. 3. Fitzh. Variance, 61. Judgment, 165, 166.

44. The proceſs is *ſummons, grand cape, and petit cape*, in the Common Pleas. F. N. B. 148. (D).

45. Dower, the *defendant pleaded that the huſband of the demandant was alive at C. in K.* The *feme replied that her huſband died at F.* in the pariſh of F. *in the ſaid county of K.* upon which they were at iſſue; on day given to make proofs, the plaintiff examined her witneſſes in court, the defendant examined no witneſſes. Judgment was, the plaintiff ſhould recover her dower. Mo. 14. pl. 35. Paſch. 2 Eliz. Thorn v. Rolfe.

D. 185. a. pl. 65. S.C. there were no poſitive proofs of his being dead, but conjecturæ and preſumptive, and no proof at all of his being alive; And ſo the demandant recovered. —— Bendl. 86. pl. 131. S. C. and judgment accordingly. —— And. 20. pl. 42. S. C. adjudged.

46. In dower *againſt ſeveral defendants, ſome confeſſed the action,* and *others demanded the view.* The juſtices at firſt ſeemed clear, that ſince they did not vary in dilatories, &c. they ſhall have the view. But 11 R. 2. and 46 E. 3. and 33 H. 6. being to the contrary, and 14 H. 6. 6. this being an action which is favoured in law, the view at length was ouſted according to thoſe books, but the Court offered to ſeal a bill of exceptions, ad quod non fuit reſponſum. D. 179. pl. 41. Hill. 2 Eliz. Herbert v. Vernon.

47. Dower by E. M. *tenant vouched as leſſee for life of a leaſe of the huſband with warranty, the heir of the huſband in ward to the king, for cauſe of gard, and prayed aid to the king,* and had it, and after a procedendo judgment was given that the demandant recover againſt the tenant, and tenant againſt the heir, ſed expectet executio per recompenſationem tertiæ partis prædict' againſt the heir till he come to full age, and till the hands of the king be amoved. Dy. 256. pl. 7. Mich. 8 and 9 Eliz. Michell v. Nethercote. Bendl. 118. pl. 151. S. C. adjudged.— 4 Le. 201. pl. 323. S. C. adjudged.

48. The *demandant* after the death of her huſband *entered into the land in demand, and continued the poſſeſſion of it five years,* and afterwards the *heir entered,* upon which *ſhe brought dower.* It was agreed in that caſe, that the *tenant needed not to plead tout-temps priſt after his re-entry,* for the time the demandant had occupied the ſame is a ſufficient recompence for the damages. 3 Le. 52. pl. 75. Mich. 15 Eliz. C. B. Riche's caſe. Dal. 100. pl. 31. S. C. accordingly.

49. It was adjudged, that if the *ſheriff aſſigned dower* to the wife by writ to him directed, *and does not return the writ,* yet the wife is lawfully ſeiſed in dower. Cro. E. 17. in pl. 8. cited Paſch. 25 Eliz. C. B. by Fenner, to have been adjudged 10 Eliz. in Aſhborough's caſe.

50. If dower be demanded of *common* certain, *the certainty muſt be ſhewed.* Godb. 21. pl. 27. Paſch. 26 Eliz. C. B.

51. In dower, the tenant *pleaded quod dedit & conceſſit unum annualem redditum,* &c. in recompence of dower, *which ſhe accepted,* &c. Per Walmſley, as this caſe is pleaded there is not any aſſignment of the rent for the dower, and therefore it is not any bar of dower, for it is pleaded, quod dedit & conceſſit unum annualem redditum, &c. and although dedit & conceſſit are good words in the deed, yet when the tenant is to plead it, he is to plead it in apt words, viz. *quod aſſignavit;* for a gift of rent or land is no bar to dower, and to that purpoſe cited a caſe in the years of Ed. 2. in the book at large, where it was pleaded, that the ſon granted land in dower to his feme ex aſſenſu patris, and ruled that it was not good, for it ought to have been aſſignavit; for in pleading every one ought to plead according to law, and as it is here pleaded the feme may have a writ of annuity upon this grant, which ſhe cannot have if it were an aſſignment, and the words of the deed being dedit, &c. the intent of the parties to have it a grant does thereby appear, and the tenant, againſt whom it is, has pleaded it as a grant; and if he has election to uſe it as he will (as in many caſes a man ſhall have)

have) yet he has here made his election to have it as a grant, and we may not take it otherwiſe, and judgment accordingly. Cro. E. 452. pl. 19. Mich. 37 and 38 Eliz. C. B. Wentworth v. Wentworth.

52. In dower, the *tenant appeared upon the grand cape*, and *being only leſſee for years* of the land, he *might plead non-tenure*, but whether now he might wage his law of non-ſummons ſo as the writ be abated was doubted, becauſe by the wager of law he takes upon himſelf the tenancy, and affirms himſelf to be tenant according to 33 H. 6. 2. per Priſot, to which it was anſwered by Rhodes and Windham J. that here the tenant being only leſſee for years is not
[285] at any miſchief; for *if judgment and execution be had againſt him, he might notwithſtanding afterwards enter upon the demandant.* Le. 92. pl. 119. Mich. 29 and 30 Eliz. C. B. Michel v. Hyde.

53. Dower againſt W. and D. *Upon the grand cape W. made default. D. furniſed that he is not tenant of the land, but that the demandant's huſband leaſed to him for* 50 *years*, and that this action is brought by covin to him to loſe his term, and prayed to be received. And per tot. Cur. *he ſhall be received though he was party to the writ*, and that by the ſtatute of Glouceſter, becauſe he is in equal miſchief; and they held clearly, that upon the default of W. the demandant ſhould not have a judgment for a moiety, the cauſe of the receipt trenching to the whole; and by all but Rhodes, *if judgment had been given upon the default of both*, viz. *W. and D. yet the term of D. ſhould ſtand; but D. ſhould be out of poſſeſſion, and put to his action.* 3 Le. 168. pl. 219. Mich. 29 Eliz. C. B. Williams v. Drew.

54. A writ of dower was brought of lands in the county of Northumberland. The pariſh church wherein this land lay was at Newcaſtle, which is a county by itſelf. Per Cur. the *proclamation of ſummons* ought to be *at the pariſh church-door*, though *in another county* than where the land lies, and this by the ſtatute of 31 El. Cro. E. 472. pl. 35. Paſch. 38 Eliz. C. B. Regiſter's caſe.

Win. 88. S. C. cited as adjudged and affirmed in error.

55. Tenant in dower *vouched the heir of the huſband* in the ſame county, *who preſently entered into the warranty, and ſaid that he had no aſſets; judgment* was given preſently *againſt tenant, with a ceſſet executio*; and afterwards the iſſue was tried and *found that the heir had not aſſets, and the wife had execution.* Cited Hutt. 72. as Mich. 28 & 29 Eliz. Aſhburnham v. Skinner.

56. Note, if a man be ſeiſed of certain lands, and takes wife, and after *alieus* the ſame *land with warranty*, and after the feoffor and feoffee die, and the *wife of the feoffor brings* an action of *dower againſt the iſſue of the feoffee, and he vouches the heir of the feoffor*, and *hanging the voucher*, and undetermined, and the *wife of the feoffee brings* her action of *dower againſt the heir of the feoffee*, and *demands the third part of that whereof her huſband was ſeiſed*, and *will not demand the third part of theſe two parts of which her huſband was ſeiſed*; it was adjudged, that ſhe ſhould have no judgment until ſuch time as the other plea was determined. Litt. ſ. 54.

57. The *reaſon why tout temps priſt is a good plea* in a writ of dower brought againſt the heir to bar her of the mean values and damages

damages is, *becauſe the heir holds by title, and does no wrong till a demand be made.* But in a writ of aiel, coſinage, &c. where the land and damages are to be recovered, there ſuch plea is not good; for there the tenant of the land has no title, but holds the land by wrong, and the feoffee of the heir cannot at the firſt day plead tout temps priſt, becauſe he had not land all the time ſince the death of the anceſtor. Co. Litt. 33. a.

58. In a writ of dower unde nihil habet, *no protection is allowable;* becauſe the demandant has nothing to live upon; but *otherwiſe* it is *in a writ of right of dower.* Co. Litt. 131. a.

59. If one grants a *rent-charge to a man and his heirs,* and dies, and his wife brings a writ of dower againſt the heir, and the *heir in bar* of her dower *claims the ſame to be an annuity* and no rent-charge, yet the wife ſhall recover her dower; for he cannot determine his claim by election, but by ſuing of a writ of annuity; neither can the heir have after the endowment an annuity for the two parts; for that ſhould not be according to the deed of grant; for either the whole muſt be a rent-charge, or the whole an annuity. Co. Litt. 144. b. 145. a.

60. *Tout temps priſt* is a good plea in a writ of dower brought againſt the heir to *bar her of the mean values and damages,* the reaſon is, becauſe the heir holds by title, and does no wrong till a demand be made. Co. Litt. 33. a. in principio. [286]

61. If dower be *brought againſt one who is not tenant of the freehold,* the tenant before judgment ſhall be received, and upon default of the tenant he may falſify after judgment. Brownl. 126. Mich. 6 Jac. Anon.

62. In dower, the *tenant after appearance of the jury, but before they were ſworn, made default,* and a petit cape was awarded; at the day in Bank the *tenant informed the Court that he is only tenant for life, and that the reverſion is in one P.* who ought to be received to ſave his title, and the Court ordered him at the return of the petit cape to plead his plea. Brownl. 126. Mich. 9 Jac. Ld. Morley's caſe.

63. The *manner to make ſummons* in dower, if the *land lies in one county and the church in another county,* then upon the ſtatute the ſheriff ought to come to the next church, though it be in another county, and there make proclamation. 2 Brownl. 122. Mich. 9 Jac. C. B. Anon.

64. If *proclamation* be made by the ſheriff on the ſummons, at the door of any of the churches where the lands lie, it is ſufficient, and need not be at the doors of all. Brownl. 126. Hill. 13 Jac. Allen v. Walter.

65. No *writ of error* lies before the value be inquired of; for till then the judgment is not perfect. Brownl. 127. Hill. 13 Jac. Glefold v. Carr.

66. In dower *of lands in three villages,* ALLEN'S CASE was cited 14 Jac. C. B. that a *ſummons and proclamation at the church of one of them is good; and* that the ſummons *muſt be* 14 *days before the return of the writ.* But in the caſe between GRAY AND ROWLAND, that *want of a ſummons is not error, but* that *otherwiſe no*

grand

grand cape ſhall be awarded by the ſtatute 31 Eliz. cap. 3. Noy, 22. Trin. 15 Jac. Harriſon v. Maſſam.

67. In a writ of dower, the *tenant demands the view*, and the *demandant counterpleads* the view, *quod le tenant n'ad entry niſi per le baron;* and thereupon the tenant demurs; and it was adjudged a good counterplea, and the tenant ouſted of his view. Hutt. 44. Hill. 18 Jac. Bridgeland v. Poſt; and cites 9 E. 4. fol. 6. and 2 H. 4. 24.

Win. 81. S. C. adjournatur. —— Ibid. 88. S. C. the Court ſeemed of opinion that the judgment might be conditional, but the judgment ſtood as it was. —— Hutt. 71. S. C. adjudged for the demandant upon view of a precedent of 38 & 39 Eliz. Rot. 1208. [or 1288, according to Cro. J.] Aſhburnham v. Skinner.

68. Dower, the *tenant vouches the heir in the ſame county, who entered into the warranty, and pleaded riens per deſcent*, upon which they were at iſſue, and at the niſi prius made *default* at the day in Bank; *judgment* was given againſt the tenant; it was moved that it ought to have been *conditional*, viz. againſt the heir for what he had in the ſame county, and if he had not any eſtate, then againſt the tenant; but the Court held both ways good. Cro. J. 688. pl. 3. Trin. 21 Jac. B. R. Goldingham v. Somes.

69. In dower againſt an infant, he appeared by his guardian, and *pleaded that* his father who was *huſband* to the demandant, was *ſeiſed of a meſſuage and certain lands in ſocage*, and *deviſed them to the widow for her jointure, and full ſatisfaction of dower, and that* after the death of his father, *ſhe entered* into the ſaid meſſuage and lands, *and was ſeiſed* by virtue of the deviſe, &c. The *widow replied* by proteſtation that he did not deviſe, and for plea confeſſed the ſeiſin
[287] of the huſband and her entry; but farther pleaded, *that ſhe entered as guardian in ſocage to the infant, and that ſhe diſagreed to accept the land by the deviſe*, and traverſed the entry and the agreement. The Court ſaid, that this bar was good, though it had been more pregnant to have alleged that ſhe entered virtute legationis prædictæ, and ſo was ſeiſed. And after it was ſaid that the replication was good without the traverſe; for this was not expreſsly ſet down, but that was merely the conſequence of the plea, which in truth was not traverſable. Win. 100. Mich. 22 Jac. C. B. Baker v. Baker.

70. Error in dower where the defendant *pleaded ne unques accouple in loyal matrimony;* upon a writ to the *biſhop* he *certified quod copulata fuit in vero matrimonio ſed clandeſtino; & quod W. & E. thori & menſæ participatione mutuo cohabitaverunt ad mortem prædicti W.* Error was aſſigned, that the certificate does not anſwer to the words of the iſſue, which is quod ne unques accouple in loyal matrimony. But reſolved the certificate was good; for vero matrimonio (although clandeſtino) copulati is as good as legitimo copulati matrimonio, for they are all one by intendment; and although it be clandeſtino, yet it does not vitiate the marriage; and when it is added, thori & menſæ participatione durante vita cohabitaverunt, that proves they continued huſband and wife during his life. And judgment was affirmed. Cro. C. 351 pl. 16. Hill. 9 Car. B. R. Wickham v. Enfield.

71. A woman brings dower againſt the tertenant of certain land in H. in com. Suſſex ex dotatione A. viri ſui defuncti; the tenant *pleads a feoffment of the manor of Dale to certain perſons to the uſe of the ſaid huſband, and the demandant for their lives for her jointure*, &c. the remainder to a ſtranger; this plea is ſufficient without ſaying, that after the huſband's death ſhe entered and claimed it for her jointure; theſe words are ſuperfluous in this caſe; (for the ſaid jointure is a bar prima facie to the demandant in dower;) the *demandant replies, that the ſaid huſband before the ſaid feoffment, had conveyed the ſame manor to the uſe of himſelf in tail, remainder to the demandant for life*, remainder to a ſtranger in tail; and that after the death of her huſband, without iſſue, ſhe claimed the ſaid eſtate and entered, and by that was in her remitter; *the tenant rejoins as above, and does not traverſe the claim*, and the ſaid entry and remitter to be in of the ſaid firſt eſtate; the demandant had judgment affirmed in error. The demandant in the replication need not traverſe the ſaid entry after the death of her huſband pleaded in bar; for it is vain and impertinent; but the tenant in the rejoinder ought to maintain his bar, and traverſe her entry, and claim by the former eſtate tail, remainder to the demandant for life. This firſt conveyance with a remainder ut ſupra ſhe ſhould not waive becauſe of the prejudice of the ſaid remainder. Jenk. 334. pl. 72. cites Cro. J. 489. Wood's caſe.

72. And though *neither day nor place of marriage was mentioned* in the bp.'s certificate it was held not material; for it is not iſſuable becauſe the certificate of the bp. is concluſive. Ibid.

73. The Court was moved for a ſuperſedeas to ſtay proceedings upon the *grand cape* in dower, quia *erronice emanavit*, becauſe the *return of the ſummons was not according to the ſtatute* 31 *Eliz. cap.* 3. which ſays, after ſummons. 2dly, The land lies in a vill called H. and the return is of a proclamation of *ſummons at the pariſh church of J. and it does not appear that the land was in that pariſh*; beſides it was proclamari feci ſecundum formam ſtatuti, and it is *not returned to be made on the land*; ſo the grand cape was ſuperſeded. Mod. 197. Hill. 26 & 27 Car. 2. C. B. Furnis v. Waterhouſe.

74. *Error* to reverſe a judgment in C. B. *in a writ of dower unde nihil habet, becauſe the view was not granted*; and it was alleged, that although in a writ of right of dower the view is grantable, yet in dower unde nihil habet *it never was at the common law*, becauſe the woman that had nothing to maintain her ſhould not be delayed in the recovery of her right. Freem. Rep. 375. pl. 483. Mich. 1674. Aſtmall v. Aſtmall. [288]

75. Dower unde nihil habet the *tenant demanded the view*; the *demandant counter-pleaded, becauſe the baron alienavit tenementa prædicta to the tenant*, & hoc, &c. the tenant demurred generally, and it was inſiſted for him that the counter-plea was ill, and that it ought to have been *feoffavit*, for by the word *alienavit* it does not appear what eſtate he had alienated; for a leaſe for years is an alienation; but adjudged that *alienation implies all the whole eſtate which he had*, and the ſtatute Ed. 2. 48. ouſts the tenant of the view

view of the lands which the husband aliened to him, or to any of his ancestors, and so the plea is in the very words of the statute, and good. 3 Lev. 220. Trin. 1 Jac. 2. C. B. Bernes & Ux' v. Rich.

3 Lev. 275. S. C. adjornatur.—— Carth. 133. S. C. adjudged that the writ does not lie.——3 Mod. 281. S. C. And per Cur. when a statute which gives a remedy for mean profits is expounded, it ought to be according to the common law. Now where intire damages are to be recovered, and the demandant dies before a writ of inquiry executed, the executor cannot have any remedy by a scire facias upon that judgment, because damages are no duty till they are assessed. Sed adjornatur.——2 Show. 97. S. C. adjudged accordingly.

76. *Tenant* in dower *dies before writ of inquiry* executed; administrator cannot bring scire facias for the damages and mesne profits. 1 Salk. 252. pl. 1. Trin. 2 W. & M. in B. R. Mordant v. Thorold.

77. Detainer of charters was pleaded *after imparlance*, and on demurrer judgment was for the plaintiff. Show. 271. Trin. 2 W. & M. Burdon v. Burdon.

78. In dower upon *default grand cape issued*, and *demandant suggested that her husband died seised*, &c. and a *writ of inquiry of the value of the lands*, and 60 l. damages were returned; it was moved to stay the filing this writ of inquiry because the tenant had no notice of it; but it was answered, that in real actions, personal notice is not to be given, but the tenant is to take notice, because the writs, viz. the summons, are always executed on the lands and not elsewhere; but per Cur. *personal notice ought to be given of the writ of inquiry, and of the execution thereof*, for the grand cape is a judgment, and thereby the suit is determined at common law; the damages for the value of the land is only an addition by the statute of Marlbridge, and therefore for want of notice the inquisition was discharged, and restitution was awarded of the damages levied. 3 Lev. 409. Hill. 6 W. 3. C. B. Perkins v. Lamb.

79. *Want of abridgment* was assigned in *error*. See 10 Mod. 225. Pasch. 13 Ann. B. R. Shipley v. Shipley.

In dower, a *plea of lessee for years* ought not to be received *after plea and judgment for the demandant.*

80. A *recovery in dower will estop* the tenant and all claiming under him from *giving a prior term in evidence.* 2 Ld. Raym. Rep. 1293. Mich. 8 Ann. B. R. Booth v. the Marques of Lindsey, & al'.

Comyn's Rep. 382. Trin. 11 Geo. 2. Green v. Roe.

(N. a) Pleadings.

Where there muſt be a Profert or Monſtrans of Deeds.

1. IN dower the *tenant vouched the heir of full age*, he ſhall ſhew deed as it is ſaid; *quære*. Br. Dower, pl. 98. cites 48 E. 3. 5.

2. In *dower* the *tenant pleaded jointenancy* in the baron *with W. who ſurvived*, and the *demandant pleaded a releaſe by W. to her baron*, and becauſe ſhe did not ſhew the releaſe all the Court counſelled her to plead ſeiſie que dower, and to give this matter or releaſe in evidence, and yet the deed does not belong to her, and ſo ſhe did. Br. Monſtrans, pl. 37. cites 1 H. 4. 13.

3. *But* the feme was not ſuffered to plead a *releaſe in fee made to her baron tenant for life* without ſhewing the deed of releaſe; but ſhe might ſay ſeiſie que dower la poit, and give the matter in evidence; per Paſton, Weſtbury, and Rolf. Br. Monſtrans, pl. 5. cites 11 H. 4. 83.

4. A *feme* who is *endowed of rent* ſhall not have aſſiſe without ſhewing the deed of commencement, for this belongs to the heir in reverſion; per Paſton, Weſtbury, and Rolf. Br. Monſtrans, pl. 5. cites 3 H. 6. 20.

5. A feme who demands *dower of rent* of the baron need not ſhew deed, for the deed of rent belongs to the heir; per Strange; quod non negatur. Br. Monſtrans, pl. 49. cites 7 H. 6. 1.

6. A feme ſhall have dower of a *rent-charge* without ſhewing the deed, becauſe the deed does *not belong* to her; Arg. Pl. C. 46. in the caſe of Wimbiſh v. Talbois.

(O. a) Judgment and Executions.

1. *Stat. Merton*, 20 *E.* 3. *cap.* 1. *OF widows which be deforced of their dower, or quarentine of lands whereof their huſbands died ſeiſed, and they recover by plea, they that be convict of ſuch deforcement ſhall yield damages the value of the whole dower to the day that the widows by judgment ſhall have recovered ſeiſin, and ſhall be amerced at the king's pleaſure.*

The *ſtatute of Merton* extends to copyholds, where the *cuſtom* is, that women are dowable. Co. Litt. 33.

a. ——S. P. agreed by all the juſtices. Mo. 410. pl. 559. Trin. 27 Eliz. B. R. in caſe of Shaw v. Thompſon. ——Cro. E. 426. pl. 26. S. C. & S. P. admitted, that the damages were well awarded in the copyhold-court. ——4 Rep. 30. b. pl. 22. S. C. reſolved accordingly. ——S. P. by Yelverton. Cro. C. 43.

Ld. Coke ſays, he had read in an ancient and learned reading upon the ſtatute 20 *H.* 3. *cap.* 1. that it *extends only to a writ of dower unde nihil habet*, and not to a writ of right of dower; for in no writ of right damages are to be recovered. Co. Litt. 32. b.

2. Where a *man married infeoffed A. and died, J. abated* (without covin of the feme) *and endowed the feme*, and *A. brought aſſiſe againſt*

Br. Damages, pl. 181. cites S. C.

againſt them, and *all found ut ſupra*, and the *plaintiff recovered two parts*, and * the *feme retained the third part in dower*, and the *plaintiff recovered damages, and the third part of the damages was recouped.* Br. Dower, pl. 59. cites 12 Aſſ. 20.

Br. Utlagary, pl. 36. cites S. C. and M. 3 E. 3.

3. Where a feme brings dower ſhe ſhall not recover damages, becauſe the *baron was outlawed in treſpaſs*, ſo that the frank-tenement was void only. Br. Damages, pl. 98. cites 13 Aſſ. 5.

4. K. was *endowed by the king in Chancery*, and among other things *a rent reſerved by patent to the king and his ſucceſſors upon grant of a fair to the prior of B. and his ſucceſſors was aſſigned to her.* Upon this aſſignment ſhe brought a ſcire facias in the Exchequer, and had judgment there to recover the rent, the arrearages, and damages; but on error brought in the Exchequer Chamber the judgment was reverſed as to the rent and damages; becauſe ſhe ought not to have judgment of the rent being the inheritance of the king, nor of damages in the ſcire facias, but as to the arrearages the judgment was affirmed, becauſe they were due to her, and as to theſe ſhe was privileged by her eſtate for life to ſue in the Exchequer; Arg. Mod. 565. in pl. 770. cites 14 E. 3. the Counteſs of Kent's caſe.

5. In *dower*, the *tenant ſaid*, that *he has been at all times ready to render* dower, *and yet is*, and the *demandant averred the contrary*, by which *ſhe recovered dower, and* for damages *prayed the inqueſt to inquire of the damages*, and could not have it; for it is an iſſue joined between the parties, which ſhall be tried by niſi prius; per Cur. Br. Enqueſt, pl. 79. cites 34 E. 3. and Fitzh. Enqueſt, pl. 79.

6. If *a feme recovers in dower*, ſhe cannot diſtrain for the rent, nor ſuch like, before execution, and the ſheriff may put her in ſeiſin by graſs, turf, or beaſts of the land, but he cannot drive them out, but ſhall take ſeiſin by them, and diſmiſs them there. Br. Executions, pl. 108. cites 40 E. 3. 21, 22.

7. Dower *againſt the tenant for life of the leaſe of the heir of the baron, who vouched the heir to warranty*, the *demandant recovered againſt the tenant, and he over in value againſt the heir.* Br. Dower, pl. 10. cites 41 E. 3. 24.

8. *But* where the *tenant vouches the heir to warranty by the deed of his anceſtor*, there the *demandant recovered againſt the vouchee, and* the *tenant ſhall hold in peace.* Contra ſupra upon his own deed; note a diverſity. Br. Dower, pl. 10. cites 41 E. 3. 24.

9. *But* it is ſaid in the next note there enſuing, that in dower *againſt tenant for life of the leaſe of the baron, who vouched the heir to warranty*, the *feme ſhall recover againſt the tenant and he over in value*, and yet in this caſe the reverſion made by the anceſtor is cauſe of warranty. Br. Dower, pl. 10. cites 41 E. 3. 24.

Br. Aſſiſe, pl. 24. cites S. C.

10. In writ of admeaſurement of dower, if the *tenant comes at the firſt day ready* to be admeaſured, the *plaintiff ſhall not recover damages*; quod nota. Br. Admeaſurement, pl. 1. cites 42 E. 3. 19.

11. Where a feme is *newly endowed in Chancery*, there ſhe ſhall not recover damages; for thoſe of the Chancery do not give damages. Br. Damages, pl. 195. cites 42 Aſſ. 32. and 43 E. 3. 32.

12. In

12. In dower, the *tenant made default after default*, and the *demandant averred that her baron died ſeiſed, and prayed writ to inquire of damages*, and had it, and the *ſheriff returned that the inqueſt returned no damages*, and the demandant prayed that he be amerced, becauſe the writ is not ſerved; per Thorpe, he ſhall not be amerced but where he returns illy of himſelf, and here he returned as the jury found. Br. Dower, pl. 13. cites 44 E. 3. 3.

Br. Damages, pl. 27. cites S. C.

13. Scire facias *againſt the baron and feme upon recovery in dower againſt them.* The *baron appeared*, and the *feme made default*, and *he ſaid that he is ſole tenant, and the feme had nothing*; and the opinion there was that he ſhall have the plea well without his feme, by which he was ſuffered to plead in bar alone, *and ſaid, that after the recovery the demandant entered into the land claiming the third part, and delivered ſeiſin to the defendant, who had the two parts by name of all that which to him belong in name of the third part, rendering one mark per annum, and has received it and ſhewed acquittance thereof*; judgment if execution; and the opinion was, that it is no plea; for he who recovers dower cannot enter into the third part. Br. Scire Facias, pl. 36. cites 45 E. 3. 5.

Br. Dower, pl. 16. cites S. C.

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14. In *dower*, the *tenant came at the ſummons, and ſaid that he has been at all times ready* to render dower, and yet is, and the *demandant ſaid that he was not ready*, and that her baron died ſeiſed, and the firſt averment of the demandant cannot be taken, becauſe the tenant came at the ſummons, and *writ to enquire of the damages* was awarded, and found that the baron died ſeiſed, and damages, &c. Per Tilleſley, this *is only inqueſt of office*, where it *ought to have been by iſſue tried*, and therefore the demandant ſhall not have judgment upon it; contra per Thirn. *quære.* Br. Enqueſt, pl. 17. cites 11 H. 4. 40, 41.

Where the *tenant has been at all times ready to render* dower, the demandant ſhall not recover damages though her baron died ſeiſed; for this is not

any default in the tenant. Br. Dower, pl. 32. cites 11 H. 4. 40.——If the *baron dies ſeiſed*, the feme ſhall recover damages. Br. Damages, pl. 52. cites 11 H. 4. 40, 41.

But per Chyan and Hill, where the *tenant is at all times ready to render* dower, the demandant ſhall not recover damages; for no default is in the tenant. Ibid.

But in coſinage the demandant ſhall recover damages, though the tenant be ready to render dower; for he *is not in by good title*; *contra of the heir* in dower. Ibid.

15. In dower *againſt two*, the *one ſaid that he aſſigned 6 s. 8 d. rent out of the land to the feme for her life, the which ſhe accepted*, &c. and *the other ſaid that he is, and at all times has been, ready to render dower*; and it was held a good aſſignment, by which *ſhe ſaid that ſhe did not agree to the aſſignment*; and per Strange, ſhe ſhall recover dower againſt him immediately of the moiety, though the plea of the other be not yet tried; for *this is as a confeſſion by the one, and a plea in bar by the other.* Br. Dower, pl. 46. cites 7 H. 6. 33, 34.

16. Note, that where the *tenant confeſſes the action, or pleads to the writ* in dower, the * *demandant ſhall make ſurmiſe that her baron died ſeiſed*, and otherwiſe ſhe ſhall loſe her damages. Br. Dower, pl. 78. cites 22 H. 6. 44.

* S. P. *notwithſtanding the tenant pleaded only to the writ; and in the*

end of the ſurmiſe ſhall maintain her writ; for otherwiſe it cannot appear upon plea to the writ whether the baron died ſeiſed or not. Br. Dower, pl. 93. cites S. C.——Br. Surmiſe, pl. 13. cites S. C.

17. In dower, the *tenant ſaid that he has been at all times ready to render dower, and yet is*, &c. and the *demandant ſaid, that* he, viz. *the baron, died ſeiſed, and that ſuch a day and year ſhe required the tenant to endow her at D. and he refuſed*, &c. The *tenant ſaid, that the ſame day the tenant offered the feme to go with her to the land and to aſſign her dower, and ſhe refuſed abſque hoc that he refuſed*, and the Court held the iſſue good upon the refuſal upon this ſpecial pleading. Br. Dower, pl. 73. cites 13 E. 4. 7.

18. And per Brian J. ſhe cannot have ſeveral judgments of one and the ſame thing, but one intire judgment; for by the firſt plea the demandant may recover dower; but the other juſtices were in a clear opinion that *ſhe ought to have her judgment immediately*, and H. 18 E. 3. in dower, ſhe had judgment to recover her dower *and enqueſt for the damages*. Br. Dower, pl. 73. cites 13 E. 4. 7.

Br. Dower, pl. 49. cites S. C.

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19. In dower, the *tenant confeſſed upon the cauſe* of dower, and *did not ſay that he has been at all times ready*, &c. by which the *demandant prayed judgment, had it, and after ſaid, that her baron died ſeiſed, and prayed damages* and writ of inquiry of it, and had it notwithſtanding the averment is taken after judgment where the tenant cannot aver any thing; for it was ſaid, that it ſhall be intended by his confeſſion that ſhe is intitled to the dower and damages; for it is *included that the tenant is deforceor; but* per tot. Cur. *if the tenant had come at the firſt day and ſaid that he has been at all times ready* to render, &c. if the demandant cannot aver the contrary ſhe ſhall not recover any damage. Br. Damages, pl. 79. cites 14 H. 8. 25.

20. Dower; the *tenant vouched the heir* and prayed he might be ſummoned in the ſame county, *and he was ſummoned and entered into the warranty, and confeſſed the dower; it was moved againſt whom the judgment ſhould be.* And the Court was in great doubt, *for it did not appear that the heir had ſufficient to render dower*, for it would be in vain, and a great miſchief to the demandant if they give judgment for her, when perhaps the heir had nothing or not ſufficient to render dower; and they commanded precedents in this caſe to be ſearched. Cro. E. 46. pl. 1. Paſch. 28 Eliz. C. B. Killigrew's caſe.

After judgment for the plaintiff, ſhe may before execution awarded aver, that her huſband was ſeiſed, and ſo to have damages.

21. In dower the jury aſſeſſed damages, as in caſe where the huſband died ſeiſed, the which *dying ſeiſed was not found by the verdict*; and exception being taken thereto, the Court ſaid that the demandant might pray judgment of the lands and *releaſe damages, or ſhe may aver that the huſband died ſeiſed, and have a writ to inquire of the damages*, which all the prothonotaries agreed. Le. 192. pl. 118. Mich. 29 and 30 Eliz. C. B. Butler v. Ayres. Per tot. Cur. Godb. 212. pl. 302. Mich. 11 Jac. C. B. Porter's caſe.——Ibid. cites 14 H. 8. 95. and 26 H. 6. 44. b.

Noy, 65. Whitley v. Beſt. S. C. accordingly, and the

22. In dower the tenant made default after default; *B. prayed to be received for his term made to him before the coverture*, which was done; then the queſtion was, how execution ſhould be? It was agreed, that the *judgment ſhould be entered generally*, that ſhe ſhould

ſhould recover ſeiſin of the moiety of the land (the land being gavelkind), and that the *writ ſhould be ſpecial*, that the ſheriff ſhould not ouſt the termor, but he ſhould come upon the land and demand ſeiſin for the feme, and thereby ſhe to have the moiety of the rent, with the reverſion. Cro. E. 564. pl. 26. Paſch. 39 Eliz. C. B. Wheatley v. Beſt.

Court ſaid, that the leaſe of B. is ſaved by the 21 H. 8. cap. 16.

23. She ſhall recover damages *only where the huſband ſeiſed*, viz. *of the freehold and inheritance*; for though the huſband before the title of dower had made a leaſe for years, reſerving a rent, ſhe ſhall recover a third part of the reverſion with a third part of the rent and damages; for the words of the ſtatute are, de quibus viri ſui obierint ſeiſiti. Co. Litt. 32. b.

D. 284. a. pl. 33. ſays it is common experience, and the precedents of C. B. are ſo.——Yelv. 112.

Mich. 15 Jac. B. R. that if the *baron aliens and retakes for life and dies*, the feme ſhall have dower, but no damages of ſuch dying ſeiſed; for it was only of franktenement.

24. In ſome caſes where the huſband was ſole ſeiſed, the wife ſhall not be endowed in ſeveralty by metes and bounds; as for example, if a man ſeiſed of lands in fee, took a wife and *infeoffed eight perſons*, a writ of dower was brought againſt theſe eight perſons, and two confeſs the action, and the other ſix plead in bar and deſcend to iſſue, the demandant ſhall have judgment to recover the third part of the two parts of the land, in eight parts to be divided, and after the iſſue being found for the demandant againſt the ſix, the demandant ſhall have judgment to [293] recover againſt them the third part of ſix parts in eight parts to be divided, which is worthy the obſervation. Co. Litt. 32. b.

25. In a writ of dower *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, ſhe ſhall recover no damages, becauſe *ſhe may enter*, and the words of the ſtatute are, et dotes ſuas habere non poſſunt ſine placito. Co. Litt. 32. b.

26. Some ſay, that the demandant in a writ of dower that *delays herſelf* ſhall not recover damages. Co. Litt. 32. b.

27. If ſhe brings a writ of dower againſt the heir, and the *heir comes into court upon ſummons the firſt day, and pleads* that he has been *always ready, and yet is*, to render dower, &c. If the *wife has* * [*not*] *requeſted her dower*, ſhe ſhall loſe the mean values and her damages; but if ſhe have requeſted dower ſhe may plead it, and iſſue may be thereupon taken. Co. Litt. 32. b.

* This word (not) is omitted in the original, and therefore ſeems miſprinted.——But Ld. Coke ſays it is holden in ſome books, that a requeſt en pais is not ſufficient, but he ſays, that the law, and many books, are to the contrary, and that ſo are the words of the ſtatute, viz. et dotes ſuas habere non poſſunt ſine placito. 2 Inſt. 32. b. 49.

28. If the wife has dower *aſſigned* to her *in Chancery*, ſhe ſhall have no damages; for the words of the ſtatute be, et viduæ per placitum recuperaverint, &c. So it is if the heir or his feoffee aſſign dower, and the wife accepts it, ſhe loſes damages. Co. Litt. 33. a.

29. The *values and damages* are to be recovered againſt the tenant in a writ of dower, as it appears in a record between BENFIELD v. ROWSE, where the *tenant as to a parcel pleaded nontenure*, and *for the reſidue, detainment of charters*, upon which pleas they were

4 Le. 198 pl. 316. Mich. 8 & 9 Eliz. C. B. Balfield v.

Rouſe, S.C. adjudged for the demandant.——Bendl. 153. pl. 215. S. C. and the pleadings, adjudged for the demandant; and to recover damages from the death of the baron.—Mo. 80. pl. 213. S. C. adjudged accordingly.

were at iſſue, and both iſſues *found* by the jury *againſt the tenant*, and found *further that the huſband died ſeiſed* ſuch a day and year, *and had iſſue a ſon, and that the demandant and the ſon by ſix years after the deceaſe of the huſband together took the profits of the land, and after the ſon* ſuch a day and ſuch a year *died without iſſue, after whoſe deceaſe the land deſcended to the tenant as uncle and heir* to him, by force whereof he entered and took the profits until the purchaſing of the original writ, and found the value of the land by the year, and aſſeſs damages for the detaining of the dower, and coſts, and upon this verdict, after often debating, the *demandant had judgment to recover her damages for all the time from the death of her huſband without any defalcation.* Co. Litt. 33. a.

30. A man ſeiſed of lands in fee *takes a wife* and *grants a rent-charge*, and after *makes a feoffment in fee*, and *takes back an eſtate tail and dies*, the *wife recovers dower againſt the iſſue in tail by reddition*, the *wife makes a ſurmiſe that the huſband died ſeiſed*, and prayed a writ to inquire of the damages, and that is granted to her. In this caſe ſhe holds the land charged with the rent-charge, for *by her prayer ſhe accepts herſelf dowable of the ſecond eſtate*, for of the firſt eſtate whereof ſhe was dowable her huſband died not ſeiſed, *and ſo has ſhe concluded herſelf*, wherefore if the rent-charge be more to her detriment than the damages beneficial to her, it is good for her in that caſe to make no ſuch prayer. Co. Litt. 33. a.

31. In a *writ of admeaſurement* of dower the demandant ſhall recover damages, if the *tenant appears not the firſt day, and yields to admeaſurement*, for the iſſues in the mean time. 2 Inſt. 368.

[294] 32. If *tenant in dower* be *diſſeiſed*, and the *diſſeiſor makes a feoffment*, the tenant in dower *ſhall recover all her damages againſt the feoffee*, for ſhe is not within the ſtatute of Glouceſter, cap. 1. by which every one ſhall anſwer for their time. 2 Brownl. 31. Hill. 8 Jac. C. B.

33. After judgment *for part*, the demandant may be *nonſuit for the reſidue*, and yet have execution of that part for which he had judgment. Godb. 166. pl. 231. Paſch. 8 Jac. C.B. Foliamb's caſe.

34. Where a *reverſion of lands leaſed for years, rendering rent, is granted to the huſband in fee*, who dies ſeiſed of this reverſion, the *widow ſhall be endowed of the reverſion and the rent*, but ſhall recover *no damages* of the tenant. Win. 8. Paſch. 22 Jac. C. B. Anon.

She ſhall have preſent execution of the land, and ſhall thereby have the third part of the reverſion,

35. A. ſeiſed of land in fee, makes *leaſe for years rendering rent*, takes wife and dies; the wife ſhall have judgment to have the third part of this land for her dower, and ſhall have the third part of this rent, but *ceſſabit executio for the poſſeſſion of the land during the leaſe.* Jenk. 73. pl. 38.

and the rent and execution ſhall not ceaſe; for per all the juſtices, the ſheriff ſhall *ſerve execution of the land as if there was no leaſe* for years; for it may be that the leaſe is void, or it may be that there is no leaſe, and though it be pleaded the wife cannot anſwer to it, and therefore the execution ſhall be general; and *leſſee may re-enter* notwithſtanding the recovery and the execution of dower: and if he be *ouſted*, he ſhall have his action. Godb. 165. pl. 231. Paſch. 8 Jac. C. B. Foliambe's caſe.

36. Re-

36. Regularly where an *husband died seised* the wife shall recover her dower, with *damages for the whole time after her husband's death;* but if he does not die seised, then after her demand, and the tenant's refusal to assign dower to her, she shall recover damages from the time of the refusal. Jenk. 45. pl. 85.

37. In dower the defendant *pleads ne unques seisie que dower.* It was found by the jury that the husband was seised, and died seised, and assess damages to the plaintiff generally. It was *moved in arrest of judgment, that the jurors did not inquire of the value of the land,* and then ultra valorem terræ, tax damages, as much as is the usual course, as the prothonotaries informed the Court, for the statute of Merton gives damages to the wife, scil. valorem terræ, and the statute of Glouc. cap. 1. gives costs of suit; but the Court gave judgment for the plaintiff, although the damages are given generally, and certainly intended for the value of the land; and there might be in the case a writ of error. Hett. 141. Trin. 5 Car. C. B. Hawe's case.

38. If *baron makes a feoffment to the use of himself for life,* remainder *to the son in tail,* this is not a dying seised in the baron for the feme to have damages in dower; per Curiam; and so it was adjudged in * DAME EGERTON'S CASE. But the baron *ought to die seised of estate tail or fee simple, which may descend to his heir,* &c. Litt. Rep. 341. Trin. 6 Car. C. B. Anon.

S. P. by Haughton J. cited to have been ruled accordingly. 3 Bulst. 278. * Hutt. 28. Hill. 16 Jac. Egerton v. Egerton, S. C. but S. P. does not appear.

39. If a *feme* brings a writ of dower, and *recovers,* and the *defendant dies,* the feme shall have the *damages against the terre-tenants;* per Glyn Ch. J. Sty. 470. Mich. 1655. Anon.

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40. 16 & 17 *Car.* 2. *cap.* 8. *Execution shall not be stayed by* writ of error *upon any judgment after verdict in dower, unless the plaintiff in such writ becomes bound to the defendant in such sum as the Court to whom the writ is directed shall think fit, that if judgment be affirmed, or the writ discontinued in his default, or he be nonsuit, he* will pay such costs, damages, and sum and sums of money, as shall be awarded *upon, or* † *after such judgment, &c. to ascertain which* a writ of inquiry *shall issue to inquire of the mesne profits and damages by waste done after the first judgment; upon return whereof judgment shall be given, and execution awarded for them, and also for costs of suit.*

A judgment was obtained in dower, and a writ of error thereupon brought, and recognizance entered into. The judgment was affirmed, and then the *demandant died* intestate *before the damages ascertained by a writ of inquiry.* A sci. fa. was brought by the administrator, supposing that the entering into a recognizance to the demandant according to the statute vested a duty in her, eo instanti, and consequently the executor or administrator intitled, and therefore that he was regular to revive the judgment by sci. fa. and so to proceed to a *writ of inquiry,* and after the inquisition returned, and the duty ascertained to execute the recognizance. But it was answered, that the *taking the mean profits* after the first judgment *was a personal tort and in nature of a trespass,* and so died with the person, and here is no judgment for any damages given to the intestate; and that as to this matter there is no difference betwixt a sci. fa. for damages upon the *statute of Merton,* and upon the statute of 16 & 17 Car. 2. for *in both cases the judgment quoad the damages ought to be complete in the life time of the parties.* And the Court was of that opinion, and Holt Ch. J. gave another reason, viz. that the *judgment given was in the realty* wholly, and an administrator cannot have execution of any judgment but only in the personalty, and judgment accordingly. Carth. 132. Mordant v. Thorold. ——— Per Holt, there can be no suit on this recognizance till there be a judgment for these damages, and consequently the recognizance does not any ways alter it. *The sci. fa. to ascertain* the damages *must be at the common law,* and the common law rule is that *actio personalis moritur cum persona.* Show. 97. S. C.

S. C. ——— 1 Salk. 252. pl. 1. S. C. adjudged. ——— 3 Mod. 281. S. C. adjornatur. ——— 3 Lev. 275. S. C. and the Court inclined to that opinion; but advisare vult.

Lev. 38. Aleworth v. Roberts, S. C. states it, that pending the writ of error the tenant aliened the land and died, and the judgment was affirmed, and the demandant brought fci. fa. against the heir and the alienee for damages, suggesting her husband's dying seised, but the Court agreed that the damages being given against the deforceurs only by the death of the heir, they are lost and are not a lien on the land which passes with it, and that the heir, against whom the judgment was had, was the deforceor. ——— S. C. cited Carth. 135.

41. *Judgment* in dower *by default and a writ of inquiry* of damages. A writ of *error was brought, and pending that writ the tenant in the original action died.* The judgment was affirmed, and execution against the lands, and a scire facias against the heir to shew cause why the demandant should not have damages; adjudged, *that no damages shall be recovered because the judgment when the tenant died was only complete as to the lands, and not as to the damages, and they are distinct judgments;* and when the tenant died before judgment given as to the damages, this remains a judgment at common law. Sid. 188. Pasch. 16 Car. 2. B. R. Aleway v. Roberts.

1 Salk. 252. pl. 1. S. C. & S. P. resolved; but if damages had been ascertained upon the writ of inquiry and judgment, they had been vested in the intestate as a debt, and the administrator as a debt, and the administrator should have had them; but she dying before the final judgment, and when the damages were due to her only by way of satisfaction for an injury, which is in nature of a trespass, and the writ of inquiry being in nature of a personal action for them, it dies with the person, and a scire facias lies not for the executor or administrator.

42. *Scire facias in a recognizance* to pay mesne profits if judgment be affirmed, does not lie for an executor of tenant in dower. Show. 97. Trin. 2 W. & M. Mordant v. Thorold.

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(P. a) Error.

1. IN dower, *judgment* was given *upon nihil dicit*, and because the *baron died seised* a *writ of inquiry* of damages was awarded, by which it was *found, that the third part of the land which she ought to have in dower was of the value of* 8 *l. a year, and that eight years elapsed from the death of her husband next before the inquisition, and assess damages to* 8 *l.* and it appeared upon the record, that after judgment in the said writ of dower, the demandant had execution on habere facias seisinam, and so, *upon the whole record put together, it appears that damages have been assessed for eight years where the demandant has been seised for part of the said eight years;* whereupon the tenant brought a writ of error, because damages are *assigned to the time of the inquisition*, whereas they ought to be but to the time of the judgment only; sed non allocatur. Le. 56. pl. 71. Pasch. 29 Eliz. C. B. Walker v. Nevil.

2. Another error assigned was, because where it is *found that the land was of the value of* 8 *l. a year*, they have *assessed damages for eight years, to* 80 *l.* beyond the revenue; for according to the rate and value found by verdict it did amount but to 64 l. but that error was not also allowed; for it may be, that by the long detaining of the dower, the demandants have *sustained more damages than the bare revenue*, &c. Le. 56, 57. pl. 71. Pasch. 29 Eliz. C. B. Walker v. Nevil.

3. Another

3. Another error was aſſigned, becauſe damages are *aſſeſſed for the whole eight years after the death of the huſband*, where it appears that *for part of the ſaid years the demandant was ſeiſed of the* lands by force of the judgment and execution in the writ of dower, and upon that matter the writ of error was allowed. Le. 57. pl. 71. Paſch. 29 Eliz. C. B. Walker v. Nevil.

4. Writ of *dower* was brought *againſt an infant and two others*, and a *recovery had by default*. The infant brought error; but the Court ſeemed that it is not reverſable, becauſe it is *not a recovery in which he might have his age*. Mo. 342. pl. 465. Hill. 35, and Trin. 38 Eliz. Williams's caſe.

Cro. E. 557. pl. 14. Williams v. Williams, S. C. adjornatur. —— Ibid. 567.

pl. 1. S. C. the Court divided, & adjornatur. —— S. C. cited per Cur. Cro. J. 392. that the infant ſhould not avoid it by error for this cauſe; for if ſo, then ſhe never ſhould recover. —— —— Roll. Rep. 326. cites S. P. adjudged. Paſch. 35 Eliz. Williams v. Drue. —— Mo. 847. pl. 1148. cites S. P. and ſeems to be S. C. —— Cro. E. 638. pl. 36. Mich. 40 & 41 Eliz. B. R. Harvey v. Wrot. S. P. the Court held it to be no error; and rule was given to affirm the judgment; but it was afterwards reverſed for the defect of warrant of attorney. —— Roll. Rep. 326. pl. 32. S. C. cited accordingly. —— Cro. J. 111. pl. 8. Hill. 3 Jac. B. R. Smith v. Smith, S. P. and judgment in C. B. affirmed accordingly niſi. —— 2 Brownl. 118. Mich. 9 Jac. Anon. S. P. adjudged accordingly in C. B. and affirmed in error. —— 2 Le. 59. pl. 85. Mich. 32 Eliz. C. B. the S. P. holden contra; but ſays that afterwards the judgment was reverſed.

5. Another *error* was *aſſigned*, viz. *that he had nothing in the land*. The Court doubted, becauſe the damages were recovered to 200 l. and the *feme demandant being dead, her executors brought ſcire facias againſt the infant for the damages*. Mo. 342. pl. 465. Hill. 35, and Trin. 38 Eliz. Williams's caſe.

Cro. E. 568. pl. 1. Williams v. Williams, Trin. 39 Eliz. B. R. the

S. C. and Fenner J. as to this ſecond error held, that he might well aſſign it for error to diſcharge himſelf of the damages, but the other juſtices did not ſpeak thereto; ſed adjornatur. —— S. C. cited per * Cur. Roll. Rep. 326. that the tenant being within age at the time of the recovery, the judgment was erroneous by reaſon of the damages recovered againſt him.

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6. Dower is brought *againſt an heir being an infant within age*. He *makes default*. A *grand cape iſſues*. He *makes default again*. The *demandant has judgment*. The infant ſhall not reverſe this judgment, becauſe a default is imputed to the infant in this caſe, and *his infancy ſhall not ſave his default as in other caſes*; for if ſo, the woman demandant ſhall have no ſuſtenance during the infant's nonage; for the infant will make default, and afterwards when ſhe has judgment, upon default the infant will reverſe it. By all the judges. Regularly infancy excuſes the default of an infant, but it does not hold in dower for the reaſon aforeſaid. Jenk. 284. pl. 16. cites Mich. 9 Jac. C. B. Rot. 1611.

7. The *demand* in dower *was of the third part of two meſſuages in three parts to be divided*, and the *judgment was to recover ſeiſin of the third part of the tenements aforeſaid, with the appurtenances, to hold to him in ſeveralty by metes and bounds*, and adjudged naught, becauſe they are tenants in common, and the judgment ought to be, to hold to him together and in common; but if it had been in three parts divided it had been good. Brownl. 127. Hill 13 Jac. Glefold v. Carr.

8. The *feme ſuggeſted that her huſband died ſeiſed in fee* of all the lands out of which ſhe demanded in dower. *Exception was taken that he died ſeiſed in tail only*; but per Cur. it is not material if he

died ſo ſeiſed, and that ſhe ought to have her dower. Sty. 69. Mich. 23 Car. in caſe of Thynn v. Thynn.

9. If the jury *aſſeſs damages without finding the huſband died ſeiſed*, the demandant may pray judgment of the land, and *releaſe her damages, or aver* that her huſband *died ſeiſed*, and have a writ to inquire of the damages. 3 R. S. L. 17.

(Q. a) Admeaſurement. In what Caſes. And for whom.

1. *Weſtm.* 2. 13 *E.* 1. cap. 7. *A Writ of admeaſurement of dower ſhall be granted to a guardian; neither ſhall the heir, when he comes of full age, be barred by the ſuit of the guardian if he ſues againſt the tenant in dower feignedly and by colluſion, but he may admeaſure the dower after. And as well in this writ as in a writ of admeaſurement of paſture, more ſpeedy proceſs ſhall be than has been uſed hitherto; ſo that when it is come unto the great diſtreſs, day ſhall be given, within which two counties may be holden, at which open proclamation ſhall be made, that the defendant come in at the day; at the which day if he come in, the plea ſhall go forward; and if he do not come, and the proclamation be teſtified by the ſheriff, upon the default they ſhall proceed to make admeaſurement.*

2. The writ of admeaſurement of dower *lies* where the heir, when he is within age, endows the wife of more than ſhe ought to have dower of, or if the guardian endows the wife of more than the third part of the land of which ſhe ought to have dower, then the heir at his full age may ſue this writ againſt the wife, and thereby ſhe ſhall be admeaſured, and the ſurpluſage which ſhe had in dower ſhall be reſtored to the heir, but in ſuch caſe
[298] there *ſhall not be aſſigned anew any land to hold in dower, but to take from her ſo much* of the land *which amounts to above the third part of all* the land of which ſhe ought to be endowed. F. N. B. 149. (F).

3. The lord of F. brought writ of admeaſurement of dower againſt M. tenant in dower, who *ſaid at the grand diſtreſs that ſhe is ready to be admeaſured*, and the *writ was, that ſhe had more by* 40*l. per annum than her third part*, and writ iſſued to the ſheriff, who *returned that ſhe had more by* 40*s. per annum*, &c. and becauſe he *ought to have extended the land into three parts, and to have returned how much ſhe had beyond the third part*, therefore ill, and *ſicut alias iſſued*; quod nota. This is *intended that where iſſue is joined in this writ*, that this paſſes by iſſue; but where it is by *nient dedire*, as here, there it ſhall be by extent by writ before the ſheriff, and this as miniſter, and not as judge, for upon his return judgment ſhall be given of it in Bank. Br. Admeaſurement, pl. 2. cites 44 E. 3. 10.

The writ of admeaſurement of dower is vicontiel, and not returnable,

4. In admeaſurement of dower, where it is made before the ſheriff, the *ſheriff is judge*; Arg. 6 Rep. 11. b. cites 44 E. 3. 10. per Finchden, and 44 E. 3. 11. b.

and the parties may thereupon plead before the ſheriff in the county; but the pleas may be

be removed out of the county court by pone at the ſuit of the plaintiff without ſhewing cauſe in the writ, but if it be at the ſuit of the defendant he ought to ſhew cauſe. 2 Inſt. 369.

5. If the *ſheriff delivers the moiety in execution for the third part*, the *heir ſhall not have aſſiſe* by reaſon of the recovery, *but* ſhall have *ſci. fa.* againſt the feme. Br. Dower, pl. 83. cites 22 R. 2. Br. Scire Facias, pl. 241. cites Fitzh. Execution, 165. and 22 R. 2.

6. If the *ſheriff returns nihil* in writ of admeaſurement of dower, yet the plaintiff ſhall have judgment as if the proceſs had been returned ſerved; quod non negatur. Br. Admeaſurement, pl. 7. cites 11 H. 6. 3.

7. If the *heir endows his mother within age* of more than of the third part, he cannot enter into the ſurpluſage at full age, but ſhall have writ of admeaſurement of dower, per Kingſmill J. But per Rede Ch. J. he may enter, as upon partition made within age which is not equal. Quære. Br. Admeaſurement, pl. 4. cites 21 H. 7. 29. If the *guardian* in knight's ſervice *endows the mother* of the ward, &c. *of more than ſhe ought to have*, &c. the heir when he comes at his full age may ſue forth a writ of admeaſurement of dower; &c. Perk. ſ. 524.

If the *heir within age* be *out of ward*, and *aſſigns more dower than he ought* within age, he may have an admeaſurement of dower within age; for enter he cannot. 2 Inſt. 368.

8. If the *heir within age before the guardian enters* into the land *aſſigns to the wife more land in dower than ſhe ought to have*, then the *guardian ſhall have the writ of admeaſurement* againſt the wife by the ſtatute of Weſtminſter, 2. cap. 7. And if the guardian brings the writ and purſues it againſt the wife, yet the *heir at his full age by the ſame ſtatute ſhall have the writ of admeaſurement* of dower againſt the wife. F. N. B. 148. (F). If the *heir (before the guardian enters) endows the wife of more than ſhe ought*, and the *guardian aſſigns over his eſtate*; his aſſignee ſhall have no writ of admeaſurement, becauſe it was a thing in action. Co. Litt. 39. a.

9. By Bracton, lib. 4. cap. 17. if *ſhe has lands in dower, in divers counties*, there it ought to be coram juſticiariis; and note, there *the tenant ſhall have ſeveral writs*, viz. 1ſt, *In every writ* of admeaſurement *all the lands which ſhe has in the ſame county ſhall be named and admeaſured.* 2dly, If ſhe has lands in ſeveral counties there ſhall be *ſeveral writs, and ſeveral extents of all the lands of which the party died ſeiſed*, as it ſeems, yet he ſhall have one count and one admeaſurement; ſed quære how it ſhall be made. [299] 13 E. 4. Admeaſurement, 17. Yet note 7 R. 2. Ibid. 4. The defendant was to anſwer, notwithſtanding the exception. 7 R. 2. Admeaſurement, 4. F. N. B. 148. (G), in the new notes there (d).

10. If the *wife after the aſſignment* of dower *improves the land, and makes it better* than it was at the time of the aſſignment; an admeaſurement does not lie of that improvement. But if the *improvement* be *by caſualty of a mine* of coals or of lead, which are in the land, &c. which have been occupied in the huſband's time, the doubt is the more; but *ſhe cannot dig new mines*; for that ſhall be waſte if ſhe do ſo. F. N. B. 149. (C).

11. If a *guardian in chivalry aſſigns too much* for her dower, the heir ſhall have a writ of admeaſurement by the common law. Co. Litt. 39. a. 2 Inſt. 368. S. P.

But in ſuch caſe before that ſtatute the guardian had been without remedy; for no admeaſurement of dower, being a real action, lay for the guardian at common law. 2 Inſt. 367.

12. So if the *heir within age aſſigns* before the guardian enters into the land *too much* in dower, the guardian ſhall have a writ of admeaſurement by the ſtatute of Weſtm. 2. cap. 7. and in that caſe he himſelf ſhall have a writ of admeaſurement at full age, and ſome have ſaid, that in that caſe he may have it within age. Co. Litt. 39. a.

13. The heir ſhall have an admeaſurement for the *aſſignment in the life of his anceſtor* by the common law. And a writ of admeaſurement lies upon an *aſſignment in Chancery*. Co. Litt. 39. a.

14. If the *heir within age aſſigns dower and dies*, his heir ſhall have the ſame writ; but if the *anceſtor of full age, being tenant in fee-ſimple, aſſigns dower more than he ought*, his heir ſhall never avoid it, becauſe he had full power to aſſign as much as he would. 2 Inſt. 368.

15. Although the words of the writ be in the preſent time, *plus habet in dotem*, &c. yet it *is to be taken that ſhe had more in value at the time of the aſſignment* of dower; for if by her induſtry and policy it be made of greater value afterwards, no writ of admeaſurement lies for this improvement. 2 Inſt. 368.

16. If in dower the *ſheriff gives ſeiſin on the habere facias ſeiſinam of more than a moiety*, the *heir* cannot enter, nor maintain an aſſiſe, but *muſt have a ſcire facias to admeaſure* the lands in the return. 2 Ld. Raym. Rep. 1294, 1295. Arg. cites Br. Extent, 13. and Fitzh. Execution, 165.

(R. a) In what Caſes Dower may be defeated.

1. 6 E. 1. *cap.* 7. *Statute of Glouceſter.* *IF a woman ſells or gives the land which ſhe holdeth in dower, the heir or other perſon to whom the land ought to revert after her death, ſhall have preſent remedy to recover the land by writ of entry.*

2. *Weſtm.* 2. 13 *E.* 1. *cap.* 4. *If the wife be wrongfully endowed by the guardian during the minority of the heir, the heir when at full age ſhall have action to demand the ſeiſin of his anceſtor; but if ſhe can ſhew that ſhe had a right to her dower ſhe ſhall retain it, and the heir ſhall be grievouſly amerced according to the diſcretion of the juſtices.*

[300] 3. Donor reſerves *a rent upon the tenant in tail* and dies, wife is endowed of the rent, tenant in tail dies without iſſue; the wife ſhall not have dower any longer. But otherwiſe of an eſtate in fee-ſimple though *tenancy eſcheat*, yet the wife ſhall retain her dower of the ſeigniory. Per Dyer, Arg. Mo. 39. pl. 126. Trin. 4 Eliz.

4. *Wife of feoffee on condition* is endowed. Condition is broken. By *re-entry of feoffor* dower is defeated. Le. 299. Arg. pl. 409. Mich. 28 Eliz. C. B.

(S. a) Relief in Equity.

1. IF a feme be *endowed in Chancery*, and after the *land is recovered againſt her*, ſhe may have *ſcire facias there*, to be endowed de novo. Br. Juriſdiction, pl. 114. cites 43 Aſſ. 32.

2. The ſuit ought to be for the dower by petition *in the Chancery*, and not by writ of dower in Bank *againſt the committee of a ward of the king*, for the advantage of the king. Br. Dower, pl. 66. cites 4 H. 7. 1. per Brian.

3. A bill was *to prevent dower*, becauſe her *huſband* was *paſt memory at the time of marriage*, but it was diſmiſſed to law. Toth. 81. cites 3 Jac. Pennington v. Cook.

4. In dower, the defendant pleaded that the demandant was *endowed by commiſſion out of the court of wards*, de dote aſſignanda, which ſhe accepted of; it was holden by the Court to be a *void aſſignment*, and ſhall not bind, for that the dower *ought to be* aſſigned *out of the Chancery by writ de dote aſſignanda*. Cro. E. 364. pl. 28. Mich. 35 & 36 Eliz. B. R. Stainfield v. Bynden.

5. The Lord Keeper declared that a woman cannot have dower of a *truſt*, but compelled the defendant to anſwer who is tenant to the land, to enable her to bring her writ of dower. Toth. 163. cites Mich. 2 Car. Kemp v. Lady Rereſby.

6. A. before his marriage with B. was queſtioned for treaſon, and thereupon made a *deed of his lands to his younger ſon*, and then marries B. A. was acquitted and dies. B. brings a writ of *dower* againſt the heir, whereupon the ſaid conveyance is given in evidence to bar her; thereupon ſhe brings a bill here, and it is decreed that that *deed ſhould not be given in evidence*. 3 Ch. R. 94. 1653. Robinſon v. Fletcher.

S. C. cited by the Maſter of the Rolls. Paſch. 1705. that A. *on good conſideration had promiſed to aſſure* the lands *to B.* his eldeſt ſon in fee, but falling into trouble he *conveyed* them to C. his younger ſon, *only to ſecure them againſt a forfeiture*. After *A.* was free of his trouble, he *conveyed the lands to B.* and died. *B. marries, and dies, and leaves a widow, but no child*, and C. was his heir; the widow brought dower at law, but upon C.'s giving the conveyance to him in evidence, ſhe was nonſuited. Whereupon ſhe brought a bill, and had a decree, and a commiſſion to ſet out the thirds, and his Honour ſaid, that though this was much conteſted, yet equity and juſtice prevailed. Chan. Prec. 250. in caſe of Lady Dudley v. Lord Dudley, cited it as 6 May, 1653. Fletcher v. Robinſon.——S. C. cited by Sir Joſeph Jekyl Maſter of the Rolls, Hill. 1732, who ſaid, that he took it out of the Regiſter Books, and adds, that *C. executed a declaration of truſt* to A. and that the deed to C. was decreed to be ſet aſide as againſt the widow. 2 Wms.'s Rep. 682. in caſe of Sutton v. Sutton.——S. C. of Fletcher v. Robinſon, cited 3 Wms.'s Rep. 231. Hill. 1733. in caſe of Chaplin v. Chaplin.——And Ibid. 233. Chancellor Talbot ſaid, that this ſeemed a ſtrange caſe, and a moſt extraordinary truſt; for if the father, the ceſtuy que truſt, ſhould have come for a performance of that truſt, he could never have recovered, but the ſon ſhould have held the land diſcharged, it being a fraudulent truſt made to protect the eſtate againſt a forfeiture. This probably was a ſhort note of the caſe for the private uſe of ſome gentlemen, and can be of ſervice to no other.——Chan. Prec. 250. S. C. Ld. C. Talbot, in the caſe of Att. Gen. v. Scot, calls this an obſcure caſe.

7. *Deviſe of* leaſes and other *perſonal eſtates* of a conſiderable value *in truſt*, that his wife ſhould thereout have during her life 100 l. *per annum in lieu and diſcharge of her dower*, decreed to iſſue out of the perſonal eſtate only if ſufficient, but if not, then to be ſupplied out of the real eſtate. Fin. R. 134. Mich. 26 Car. 2. Leſquire v. Leſquire. [301]

7. The

7. The *truſt of a term to attend the inheritance* ſhall not be *ſevered* therefrom for dower, or any other conſideration, except for payment of debts. 2 Freem. Rep. 66. pl. 77. Trin. 1681. Tiſſin v. Tiſſin.

Vern. 218. Hoby v. Hoby, S. C.

8. Infant tenant relieved where dower was *unequally ſet forth* by the ſheriff. 2 Chan. Caſes, 160. Hill. 35 and 36 Car. 2. Holby v. Holby.

9. Bill was to ſet aſide a partial and *fraudulent aſſignment of dower*, and relieved. Vern. 218. Hill. 1683. Hobby v. Hobby.

10. The *wife joins with her huſband in a mortgage, and levies a fine to the intent to bar her dower*, and *in conſideration thereof the huſband agrees the wife ſhall have the redemption of the mortgage*, and the *huſband afterwards mortgages this eſtate twice more*. The Court took this agreement to be fraudulent, as againſt the ſubſequent mortgagees, ſo far as to intitle the wife to the whole equity of redemption; but in regard the wife, in confidence of this agreement, had levied the fine, and thereby barred her dower, and the *huſband and wife being both living, the Court decreed that after the huſband's deceaſe, the wife, in caſe ſhe ſhould happen to ſurvive him, ſhould enjoy her dower*; and whereas the mortgagees preſſed, that the decree might only be, that ſhe ſhould enjoy her dower notwithſtanding the fine, the Court thought it unreaſonable in this caſe to put wife to her writ of dower; becauſe they might convey away the eſtate, and ſhe not know againſt whom to bring her writ of dower; and therefore decreed the dower to her. Vern. 294, 295. pl. 287. Hill. 1684. Dolin v. Coltman.

A dowreſs may redeem a mortgage, and hold over till ſatisfied. Ch. Prec. 137. Palmes v. Danby.— S. C. cited by Ld. C. Talbot, Mich. 1734. Caſes in Equity in Ld. Talbot's Time, 140. in caſe of Attorney Gen. v. Scott. ——— Ch. Prec. 33. Arg. ——— Per Ld. Wright, Ibid. 152.

11. If there be a *mortgage* by the anceſtor of the baron upon the whole eſtate, equity will permit her to *redeem*, paying her proportion according to the value of thirds for life, and there is no precedent in equity to the contrary; Arg. and agreed by the other ſide, and that the reaſon is, becauſe the mortgagee has no intereſt but to have his money, and equity is to execute all theſe agreements, but never where there is a *purchaſor*, or where the *intereſt of the mortgage* is *aſſigned to the heir* between herſelf and the mortgagee, ſhe comes in place of her huſband, and the huſband could redeem, and ſo may the wife; but againſt a purchaſor ſhe has no more equity than her huſband had, and that is none at all. Parl. Caſes, 70, 71. in the caſe of the Counteſs of Radnor v. Vandebendy.

Deviſe of lands to the wife is no bar of dower unleſs it be *ſaid to be in ſatisfaction* of her dower. Ch. Prec. 133. Mich. 1700. Hitchin v. Hitchin.

12. A. gives his wife a *legacy, and deviſed to her part of his real eſtate during her widowhood*, and deviſed the reſidue of his whole eſtate to B. for life, remainder to his firſt ſon, &c. per Somers C. this muſt be taken to be in ſatisfaction of dower, and a *collateral ſatisfaction* may be a good *bar* to dower in equity, though pleadable at law, and decreed accordingly; but this decree was afterwards reverſed by Wright K. 2 Vern. 365. pl. 327. Mich. 1699. Lawrence v. Lawrence.

13. Dower

13. Dower being an intereſt that does not ariſe by any contract, but by implication of law, it *ought to ſtand or fall according to the* * *right at law without any aſſiſtance of a court of equity*; per Ld. Chancellor. 2 Freem. Rep. pl. 234. pl. 304. Mich. 1699. Browne v. Gibbs.

14. A. ſettled lands *to the uſe of himſelf for life, remainder to truſtees for 99 years for raiſing 200 l. a-piece for L. and M. daughters of B. his ſon, remainder to the ſaid B. and the heirs of his body, &c. remainder to his own right heirs; provided, that if the heirs of the body of B. pay L. and M. 200 l. a-piece at 21, or days of marriage, then the term to be void. B. died leaving no iſſue but L. and M.* The *widow of B. brought dower* and had judgment, but could have no benefit at law till the determination of the term, and therefore brought a bill in equity to ſet aſide the term, inſiſting that L. and M. were now heirs of the body of B. and the eſtate veſted in them, which was equal to the payment of the money, and ſo the truſt of the term being ſatisfied, the term ought not to ſtand in the way, and ſo it is all one as if the money was paid at the time and then by the expreſs proviſo it ought to be void; but the Court diſmiſſed the bill without coſts. 2 Freem. Rep. 233. pl. 304. Mich. 1699. Brown v. Gibbs.

Chan. Prec. 97. pl. 86. S. C. and bill diſmiſſed.

15. In caſe of a term kept on foot to protect a purchaſe and attend the inheritance, there is no relief againſt a *purchaſor*, and perhaps I could not relieve againſt an heir; per Ld. Somers Ch. Prec. 65. Mich. 1696. Lady Radnor v. Rotherham.

2 Freem. Rep. 212. pl. 28. S.C. accordingly. —Ld. Somers ſaid the Court went not on the reaſon of his being a purchaſor. Ch. Prec. 99.——Maſter of the Rolls thought it was decreed purely in favour of a purchaſor. Ch. Prec. 249. Paſch. 1705.——Hill. 1732. Sir Joſ. Jekyl Maſter of the Rolls cited the caſe of Lady Bodmin v. Vandebendy, ſince reported by the name of Lady Radnor v. Rotherham, and that after the different opinion of two Chancellors (Jeffries and Somers), it was ſettled by the judgment of this Court, and affirmed by the Houſe of Lords in that caſe, that a dowreſs ſhall not have the benefit of a *truſt-term to attend the inheritance* againſt a purchaſor; and ſaid it ſeems, that by the ſame reaſon that ſhe ſhall not have it *againſt a purchaſor* of the legal eſtate, ſo ſhe ſhall not be relieved againſt a purchaſor of the inheritance of a truſt-eſtate, for in both caſes the purchaſor ought to be ſafe. 2 Wms.'s Rep. 639. in caſe of Sutton v. Sutton. ——Show. Parl. Caſes, 69, 70. S. C. by name of Lady Radnor v. Vandebendy.

The Maſter of the Rolls cited the caſe of BROWN v. GIBBS decreed by Ld. Somers, and alſo the caſe of WRAY v. WILLIAMS decreed by Ld. K. Wright, though contrary to his own opinion, he thinking himſelf bound by the caſe of Lady Bodmin v. Vandebendy; and ſaid, that the ſame queſtion came afterwards to be conſidered by the late Maſter of the Rolls, in the caſe of LADY DUDLEY v. LORD DUDLEY, and that he in a ſolemn argument, and great deliberation, decreed for the dowreſs; and that ſo did the Ld. Harcourt. Paſch. 1711. (not in 1710, as mentioned in Abr. Equ. Caſes, 219.) in the caſe of HIGFORD v. HIGFORD; and that upon a bill of review in the caſe of WRAY v. WILLIAMS, he was of opinion for the dowreſs, and over-ruled a demurrer, and that afterwards the defendant ſubmitting, a decree was made by conſent, fixing a ſum for the arrears of dower, and giving her poſſeſſion, agreeable to Lord Hale's opinion in Hard. 489. and to all the reſolutions in the caſe of tenant by the curteſy; ſo that a dowreſs ſhall have the benefit of a *truſt-term attendant* on the inheritance *againſt the heir*, and that this point ſeems ſettled as to dowreſſes and tenants by the curteſy. 2 Wms.'s Rep. 639, 640. Hill. 1732. in caſe of Sutton v. Sutton.

S. P. cited by the Maſter of the Rolls as mentioned by Ld. Somers in the caſe of Brown v. Gibbs. 2 Wms.'s Rep. 647. in the ſaid caſe of Sutton v. Sutton.

16. By marriage ſettlement a term was limited in truſt for raiſing *daughters' portions*, proviſo on payment by the heir the term to ceaſe. *The huſband dies leaving only two daughters.* The wife gets *judgments* in dower with a *ceſſet executio* during the term. Ld. Somers denied to ſet aſide the term, for that would be to relieve her againſt the very judgment upon which ſhe founds her right

But where the truſt of a term was for raiſing daughters' portions and maintenance in the mean

time, and annuities to others for lives; after which followed this clauſe, that the *truſtees may, ſhall, and will permit the perſon and perſons who from time to time ſhall have right to the freehold of the premiſes, by virtue of or under any uſe hereinbefore limited, &c. from time to time to have, receive, and take to his* * *and their own uſe and benefit, the reſidue of the rents and profits which ſhall remain over and above or after the performance of the ſaid truſts, &c.——Proviſo, the term to ceaſe, &c. on payment or ſecuring, &c. to the good liking of the truſtees by the perſon or perſons that ſhall have right to the freehold, &c.* The dowreſs had brought a writ of dower at law and recovered, but with a ceſſet executio during the term, and on a bill by her to remove the term, the Maſter of the Rolls decreed that ſhe ſhould have the benefit of the truſt of the term, as to a third part of the profits, above the charge of the annuities during their reſpective continuance, and after the determination of all, a third part of the whole profits for dower, and the truſtees to account to her accordingly, et vice verſa. Ch. Pr. 241. Paſch. 1705. Ld. Dudley v. Lady Dudley.—Abr. Equ. Caſes, 219. pl. 5. S. C.——S. C. cited by the Maſter of the Rolls, Hill. 1732. 2 Wms.'s Rep. 639. in caſe of Sutton v. Sutton.———S. C. cited by Ld. Ch. Talbot, Caſes in Equ. in Ld. Talbot's Time, 140. Mich. 1735. in caſe of Attorney Gen. v. Scott.———S. C. cited Arg. 3 Wms.'s Rep. 232.

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right of relief, and ſhe muſt be content with the eſtate as the law gives it. Ch. Prec. 97. Mich. 1699. Brown v. Gibbs.

† 2 Vern. 403. S. C. —— S. C. cited by the Maſter of the Rolls, Hill. 1732. 2 Wms.'s Rep. 648.——2 Freem. Rep. 241.

17. Chancery will not let the heir ſet up an old *mortgage term that is ſatisfied* to bar the widow of her dower. Ch. Prec. 133. Mich. 1700. † Hitchin v. Hitchin.

‖ S.C. cited by the Maſter of the Rolls, Hill. 1732. and ſaid, that it was a mortgage for years (though not ſo reported) but that the queſtion is there ſtated generally, whether a dowreſs had a right to redeem a mortgage? and that Ld. Keeper Wright declared ſhe had; and his Honour ſaid, that he ſaw no reaſon for a difference between a mortgage in fee and for years as to the dowreſs's redeeming in a court of equity. 2 Wms.'s Rep. 648, 649. in caſe of Sutton v. Sutton.

18. But in ſuch caſe, *if the huſband had aſſigned over the term* which he had power to do, ſhe had been barred; for there had been a purchaſor in the caſe. Ch. Prec. 137. Hill. 1700. ‖ Palmes v. Danby.

19. Dower *cannot be aſſigned in Chancery* except it was in the caſe of chivalry and wardſhip, &c. But if the heir in purſuance of a decree there aſſigns dower, the wife is in by the heir's aſſignment, and not by the decree. 7 Mod. 43. Trin. 1 Ann. B. R. Smith v. Angel.

20. The *mother was guardian of the infant heir*, and received the rents and profits of the eſtate of which ſhe was intitled to dower, but it was never aſſigned; but Ld. Chancellor held, that the *want of a formal aſſignment of dower*, is nothing in equity; for ſtill the right in conſcience is the ſame; and if the heir brings a *bill againſt the mother for an account of the profits*, it is moſt juſt that a court of equity ſhould in the account *allow a third* of the profits *for the right of dower*. Wms.'s Rep. 118 to 122. Paſch. 1710. D. Hamilton v. Ld. Mohun.

Ld. Wright held that ſhe was not dowable. Ch. Prec. 151. Hill. 1700. S.C. —The caſe of Williams and Wray came by bill of review

21. A. the father ſold land to J. S. and *granted a 99 years term* of other lands *as a collateral ſecurity*. A. died. B. his ſon entered and died. M. the widow of B. recovered a third of thoſe lands for her dower. On a bill by J. S. to be relieved againſt that recovery, the queſtion was, whether a dowreſs ſhall be relieved in equity againſt a term of 99 years granted by her baron by virtue of a power in the deed of ſettlement on his father, who by that deed was only tenant for life, remainder in tail to his ſon (the baron) with power to grant a term of 99 years of

lands in *five pariſhes?* Wright K. decreed ejectment to be brought upon the 99 years term, and ſo the widow would be evicted of dower. 2 Vern. 278. pl. 342. Trin. 1700. and 2 Vern. 680. pl. 605. Hill. 1711. Williams v. Wray.

before Lord Harcourt, and on ſolemn argument, he reverſed Lord Wright's decree, and ordered that the plaintiff, the Lady Williams, having recovered dower at law, the truſt-term ſet up by Sir B. Wray ſhould not ſtand in her way in equity. Wms.'s Rep. 137 to 139. Hill. 1710. S. C.

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22. Lands in fee are *deviſed to J. S. in truſt to pay the deviſor's debts and legacies, and to educate B. until* 21, *or marriage, and then to ſettle the ſame on B. and the heirs of his body.* B. after 21 married M. and ſome years after died, the eſtate tail not being ſettled according to the will. M. brought her bill, praying the aid of equity to help her to her dower, and the ſame was decreed to her by the Maſter of the Rolls. 2 Wms.'s Rep. 632. 651. Hill. 1732. Sutton v. Sutton, alias Banks v. Sutton.

However, that learned argument may be conſidered as tending to prove in general, that a woman ought to be endowed of a truſt; yet in that particular caſe the legal eſtate was, by the will of the donor, directed to be conveyed to the ceſtuy que truſt at his age of 21, and he living to that age, according to the principle abovementioned, his widow was well intitled to dower. 3 Wms.'s Rep. 232. in a note of the reporter, cites 2 Wms.'s Rep. 632. Banks v. Sutton.

23. *And* though in the caſe above, the lands were in mortgage at the death of the deviſor to W. R. in fee, ſo that B. was intitled to an *equity of redemption* only, yet the Maſter of the Rolls decreed her the arrears of her dower from her huſband's death, *ſhe allowing the third of the intereſt of the mortgage money unſatisfied at that time*, and her dower to be ſet out, if the parties differ. 2 Wms.'s Rep. 632 to 651. Hill. 1732. Sutton v. Sutton.

And the Maſter of the Rolls ſaid that he did not know, nor could find any inſtance, where a dower of an equity of redemption was controverted and adjudged againſt the dowreſs. Ibid. 651.——The editor at the end of the pag. 651. refers to the caſe of the ATTORNEY-GENERAL v. SCOT & al', 12 Nov. 1735, when upon a bill for ſale of an eſtate, the Ld. Talbot determined that a wife ſhould not have dower of an *equitable eſtate deviſed to the huſband who had mortgaged it* to the defendant.

24. The widow of a *tenant in tail of a truſt, to whom the legal eſtate is by the will of the donor directed to be conveyed at his age of* 21, and he living to that age is intitled to dower; per Sir Joſeph Jekyl Maſter of the Rolls. 2 Wms.'s Rep. 647. Hill. 1732. in caſe of Banks v. Sutton.

25. A dowreſs ſhall be *aided* in equity *againſt a truſt-term* attendant on the inheritance; per Sir Joſeph Jekyl, Maſter of the Rolls. 2 Wms.'s Rep. 646. Hill. 1732. in caſe of Banks v. Sutton.

26. As dower is more favoured in law, reaſon, and equity, than curteſy, therefore *every precedent for tenant by the curteſy of a truſt is an authority for dower of a truſt;* per the Maſter of the Rolls. 2 Wms.'s Rep. 644. Hill. 1732. in caſe of Sutton v. Sutton.

27. A dowreſs ſhall have the benefit of a *truſt-term* againſt an heir or deviſee, but not againſt a purchaſor; per Sir Joſeph Jekyl Maſter of the Rolls. 2 Wms.'s Rep. 639. Hill. 1732. in caſe of Banks v. Sutton.

28. The Lady Hanby the grandmother of P. C. being ſeiſed in fee, conveyed divers lands to the uſe and intent that certain truſtees,

truſtees, in the deed named, ſhould receive and enjoy a rent-charge of 30 *l.* per ann. to them and their heirs, with power to diſtrain for the ſaid rent, and to enter and hold the land on nonpayment for 40 days; and then the ſaid rent was to be to the uſe of P. C. in tail male, remainder to the uſe of the ſame perſons that had the land in fee. P. C. to whom this eſtate tail was limited in the rent died, leaving iſſue Sir J. C. who intermarried with the plaintiff the Lady C. and afterwards died without iſſue male; whereupon one queſtion was, whether the plaintiff, the Lady C. was dowable of this *rent of which her huſband died in tail male?* After much debate and conſideration, Ld. C. Talbot was of opinion, that the caſe of a truſt-term, ſet up in oppoſition to dower, was nothing like the preſent; for there the judgment
[305] is, that the plaintiff in dower ſhall recover, but ceſſet executio during the term, and if the truſts of ſuch term are ſatisfied and at an end, the term ought not to ſubſiſt in equity to ſtop a favourite right at law as dower; whereas in the caſe of a truſt there is no judgment at law that the wife ſhall recover her dower, for the huſband had no legal eſtate, nor conſequently any thing of which the wife is dowable; and in the caſe of a purchaſor, nay even with notice, the Court would not relieve a dowreſs again a truſt-term that ſtood in her way. 3 Wms.'s Rep. 229 to 233. Hill. 1733. Chaplin v. Chaplin.

29. *Lands in coparcenary deſcended upon A. and B.—A. died* in about 8 months after, *before any receipt of rent or partition made.* The widow of A. brought a bill againſt B. and others, charging, that defendants had got poſſeſſion of all the title-deeds, whereby ſhe was diſabled to ſue for dower at law, and therefore prayed to have dower aſſigned here. Defendants demurred, becauſe dower is a right merely at law, and triable by jury; and that no impediment was ſuggeſted why ſhe could not recover there; and it was inſiſted, that for detainer of dower damages were to be aſſeſſed by a jury, and that ſhe was not intitled to the poſſeſſion of the deeds, but that they belonged to the defendant; but Ld. Chancellor over-ruled the demurrer upon both points, ſaying, that in this caſe A. dying before receipt of rent or partition, ſhe could not recover without the deeds; and that as A.'s eſtate was complicated, ſhe muſt [come] here for a partition, or elſe ſhe muſt at every ſix months' end ſue ſuch as held jointly with her and received the profits, as well for her ſhare as for damages for detainer, which he thought abſurd and unreaſonable. Caſes in Equ. in Ld. Talbot's Time, 126. Trin. 1735. Moor v. Black.

For more of Dower in general, ſee **Jointreſs**, and other proper titles.

Droit de Recto, or [Writ of Right.]

(A) *Who* ſhall have it.

Fol. 686.

[1. A *Parſon* ſhall not have it, becauſe he has not any abſolute fee. 33 Edw. 3. Aid del Roy, 103.] Br. Droit de Recto, pl. 1. that parſon or prebendary cannot have a writ of right, but a juris utrum.——If a *parſon prays aid in writ of right of the patron and ordinary, and they will not join*, there, per Hill, the parſon *may join the miſe*, and judgment final ſhall be given. Br. Droit de Recto, pl. 56. cites 29 E. 3. 34. and Fitz. Scire Facias, 152.—Ibid. pl. 39. cites S. C.

[2. A *prebendary* ſhall not have a writ of right, for he has not an higher eſtate than a parſon. Contra 33 Ed. 3. Aid del Roy, 103.] [306] See pl. 1.

[3. *A dean of a free chapel* ſhall have a writ of right, though he hath no college or common ſeal, for he has an abſolute fee. 33 Ed. 3. Aid del Roy, 103.]

[4. *An abbot* ſhall have this writ, for he hath the mere right. 10 Ed. 4. 16. 8 H. 6. 24. b.]

[5. *Tenant in fee determinable*, who has but a baſe fee, *as* where he has an eſtate *to him and his heirs ſo long as J. S. ſhall have iſſue of his body*, may maintain a writ of right patent, for he cannot have other writ in the right, as tenant in tail, or a parſon may.]

6. If *tenant in tail* brings writ of right, the tenant may ſay, that he has nothing but to him and the heirs of his body. Br. Droit de Recto, pl. 31. cites 5 E. 4. 2.

7. If *tenant for life*, the *remainder over in fee, loſes by default*, he in *remainder ſhall not have writ of right*, for he *never had poſſeſſion*. Br. Droit de Recto, pl. 41. cites Litt. lib. 3. cap. 8.

8. *But if he had entered upon tenant for life, and he had loſt by default*, there he ſhall have writ of right upon this poſſeſſion. Ibid.

9. *None* can ſue or maintain ſuch writ of right patent *but they who have an eſtate in fee ſimple*, as tenant in fee ſimple, or abbot, or prior, or biſhop, or maſter of an hoſpital; and a *body politic*, as mayor and commonalty, or bailiffs and commonalty, &c. and ſuch bodies politic may have ſuch writs for their poſſeſſions. But *parſons, vicars*, or chantery prieſts, or prebendaries, *who have patrons and ordinaries over them*, cannot maintain this writ of right patent, but another writ which is called juris utrum. F. N. B. 5. (C).

(A. 2.) What ſhall be ſaid Writs of Right.

1. QUO *jure*, and *ne injuſte vexes*, are writs of right. Br. Droit de Recto, pl. 31. cites 5 E. 4. 2.

S. P. *So of writ of right of land, and of cuſtoms and ſervices, quod permittat in the debet, right of advowſon*, writ of *ſicta molendini*, and battle, or grand aſſize lies; and *e contra* of writ of right *of ward, ceſſavit, eſcheat*, and right *upon diſclaimer*, which are for the ſeigniory, and the ſame law of writ of *meſne*, as of ceſſavit. Br. Droit de Recto, pl. 34. cites F. N. B. ——And writ of *rationabili parte* is a writ of right in its nature. Co. Litt. 158. b.

2. Note, That a writ of *formedon in deſcender* is admitted a writ of right in its nature, and ordered as a writ of right, and not as an action poſſeſſory; quod nota. Br. Droit de Recto, pl. 33. cites 18 E. 4. 23.

3. *Juris utrum* is a writ of right in its nature. Br. Double Plea, pl. 1. cites 19 H. 8. 7.

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(B) *Againſt whom* it lies.

[1. A *Leſſee for life* cannot join the miſe upon the mere right 20 H. 6. 46.]

[2. A *parſon* cannot join the miſe upon the mere right, for the weakneſs of his eſtate. 20 H. 6. 46.]

(C) *Of what* Things and Eſtates it lies, *and at what Time.*

Of what *Seiſin* it lies.

[1. IF *tenant for life ſurrenders to the remainder-man in fee* (as it ſeems to be intended not in tail), this is a ſufficient ſeiſin to have a writ of right. 42 E. 3. 9. b.]

[2. If an *eſtate* be to *two, and the heirs of one*, and he that has the fee (it ſeems that it ſhould be *he that has not the fee*) *ſurvives, and dies*, and a *ſtranger abates*, the *heir* may have right. 42 E. 3. 9. b.]

[3. If *tenant for life grants his eſtate to the remainder-man in fee*, he may have a writ of right. 42 E. 3. 31. b.]

S. P. Ibid. pl. 26. cites 50 Aſſ. 3. per ſome of the ſerjeants.

4. A *man alienes pending præcipe quod reddat againſt him, &c. and after loſt by judgment*; the feoffee has not any remedy by writ of right, nor in other manner; for the *recovery has relation to the teſte of the writ.* Br. Droit de Recto, pl. 24. Cites 12 Aſſ. 41.

5. *But* if the *tenant brings writ of error, and is reſtored*, the *alienee may enter.* Ibid.

6. Aſſiſe, if a *man gives in tail or in fee upon condition by deed indented*, the *condition is broken*; and after *diſcent is had*, yet the

donor, feoffor, or his heir may enter; for he has no other remedy upon condition but to enter; for he cannot have writ of right; for he *cannot join the miſe upon the mere right upon this poſſeſſion*; the reaſon ſeems to be inaſmuch as by the feoffment the right departs, and alſo *condition is not a right but a title*, and *upon title without right never lies writ of right*; quod nota. Br. Droit de Recto, pl. 25. cites 33 Aſſ. 11.

7. The ſeiſin requiſite in writ of right ought to be *actual ſeiſin*, and not a ſeiſin in law. 4 Rep. 9. a. by the Reporter in a nota, cites 35 E. 3. tit. Droit, 30. and Litt. lib. 3. cap. Releaſes, fol. 112. accordingly.

8. In a writ of right the dmandant muſt count *of a ſeiſin in himſelf or his anceſtors, and it was in the ſame king's time as he counts in his count.* Litt. ſ. 514.

For if neither he nor his anceſtors were ſeiſed within the time of limitation, he cannot maintain a writ of right; for the ſeiſin of him of whom the demandant purchaſed the land, &c. avails nothing. Co. Litt. 293. a.

9. *Diſſeiſor died ſeiſed*, and *his heir enters and is diſſeiſed by A. B.* the *firſt diſſeiſee releaſes to the ſecond diſſeiſor all his right*, the *ſon of the firſt diſſeiſor enters*, the *ſecond diſſeiſſor brought writ of right*, and [308] yet the entry of the heir of the diſſeiſor was lawful to the poſſeſſion; but by the releaſe of the firſt diſſeiſee the ſecond diſſeiſor got the beſt right. Br. Droit de Recto, pl. 52. cites 9 H. 7. 25.

10. *Copyholds* are of ſo baſe a nature that a writ of right will not lie of them; per Cur. 1 Salk. 186. pl. 4. 7 W. 3. C. B. in caſe of Brittle v. Dade, cites F. N. B. 12. *(A).

* This is miſprinted, and ſhould be 12 (B)

11. A writ of right does not lie of *rent*. And. 16. in pl. 3. Mich. 10 & 11 Eliz. Bendl. 194. pl. 231. S. C. &

S. P.——But ibid. Marg. cites Trin. 3 E. 3. [35]. Fitzh. Hors de ſon Fee, pl. 2. that writ of right of a *rent-charge* is maintainable.——Co. Litt. 160. a. obſerves that ſome have inferred from Litt. ſ. 236. that it lies of a *rent-ſeck*, or a rent-charge, though they are againſt common right; but that in thoſe actions there mentioned, (as aſſiſe of mortdanceſtor, writ ayel and coſinage, and all other manner of real actions,) it is to be underſtood *after ſeiſin had* by ſome of the demandant's anceſtors; for without an actual ſeiſin or ſeiſin in deed, none of theſe are maintainable.——Fitzh. Hors de ſon Fee, pl. 27. cites Paſch. 15 E. 2. where it was agreed, that in writ of right of a rent-charge, the demandant ſhall be received to have his writ *without ſhewing ſpecialty*; [which is an admiſſion that it lies of a rent-charge].—But Fitzh. Droit, pl. 31. cites 4 E. 3. It. Nott. that it lies not of a rent-ſeck, or rent-charge, nor of any rent unleſs of rent-ſervice. Per Herle.

12. If the *guardian of the college which now is*, was ever ſeiſed, he ought to *count upon a ſeiſin within* 30 *years*; but upon the *ſeiſin of his predeceſſor* he ought to count of a ſeiſin *within* 60 *years*, as another common perſon; for the change of the teſte of ſuch a ſeiſin is as the dying ſeiſed, and deſcent of a common perſon. Le. 153. pl. 212. Trin. 31 Eliz. C. B. All Souls Scholars in Oxford v. Tamworth.

13. A writ of right does *not* lie *of an office*; for at the common law an aſſiſe did not lie of it, but now it doth by the ſtatute of Weſtm. cap. 25. for it was not liberum tenementum, but the party grieved was put to his quod permittat; and of this opinion was the whole Court. Le. 169. pl. 236. Mich. 30 & 31 Eliz. C. B. Salway v. Luſon.

14. A writ of right was brought by cuſtos & collegium of All-Souls in Oxon; and the *writ was quod clamant tenere de nobis in liberam puram & perpetuam elemoſinam, & quod clamant eſſe jus & hæreditatem ſuam*, &c. And exceptions were taken to the writ. Firſt, It ought to be in liberam elemoſinam, and not puram & perpetuam. Secondly, It ought to be eleemoſinam with a double *ee*. Thirdly, They ought not to ſhew any tenure in ſpecial, but generally tenent de nobis. Fourthly, For they *ſay not in jure collegii*; ſed non allocatur. For the firſt is but ſurpluſage, and not material; the ſecond, the common courſe is ſo, and therefore it is good. Thirdly, they did well to expreſs the tenure; for otherwiſe it might be taken for a tenure in capite, which they do well to avoid. Fourthly, when the writ is by cuſtos & collegium, this cannot be but in jure collegii, as in their incorporation; for they have no other capacity, and the precedents are both ways. Cro. E. 232. pl. 1. Paſch. 33 Eliz. C. B. The Warden of All-Souls College in Oxon v. Tamworth.

15. *Lands are let to A. for life*, the *remainder to B. for life*, the remainder *to the right heirs of A.* A. dies, B. enters and dies, a *ſtranger intrudes*; the heir of A. ſhall have a writ of right of the ſeiſin which A. had as tenant for life. Co. Litt. 281. a.

16. *Lands are let to A. and B. and to the heir of A. A. dies, a recovery is had againſt B.* the heir of A. ſhall have a writ of right of the whole; for every jointenant is ſeiſed per my & per tout. Co. Litt. 281. a.

17. If *lands* be *given in tail*, the *remainder to A. in fee*, the *donee dies without iſſue*, his *wife privement enſeint*, *A. enters*, the
[309] *iſſue is born*, and *enters upon him and dies, without iſſue.* A. ſhall have a writ of right of the ſeiſin which he had. Co. Litt. 281. a.

18. If *lands* be given *in tail to A.* the *remainder to his right heirs*, *A. dies without iſſue*, the *collateral heir of A. ſhall have a writ of right of the ſeiſin of A.* Co. Litt. 281. a.

(D) Proceedings. And of joining the Miſe, and by what Perſons.

1. NOTE, that *the four knights choſe 16 of themſelves and of others to try the great aſſiſe*, and the *ſheriff returned, that there were not ſo many knights there*, by which *proceſs was directed to the four knights to chooſe of the county next adjoining.* Br. Droit de Recto, pl. 40. cites 33 E. 1. and Fitzh. Trial, pl. 97.

2. *Right of advowſon was brought by the king*, the *tenant ſhall not tender the half mark*, nor ſhall judgment final be given againſt the king. Br. Droit de Recto, pl. 43. cites 20 E. 3.

3. *Releaſe of the demandant himſelf, or of other anceſtor collateral*, is a good bar without joining the miſe, and judgment final ſhall be given. Br. Droit de Recto, pl. 43. cites 20 E. 3. and Fitzh. Droit, 21.

4. The *tenant before any iſſue may tender the half mark* to have the ſeiſin inquired. Br. Droit de Recto, pl. 37. cites 34 E. 3. and Fitzh. Judgment, 256.

5. In writ of right the *tenant joined the miſe*, and *writ iſſued to make four knights to come to chooſe the grand aſſiſe returnable quindena Martini*, and *at the fourth day one of the four knights came and had day over*. Br. Droit de Recto, pl. 3. cites 42 E. 3. 14.

6. Droit *by two againſt the baron and feme, of a houſe, ſix acres*, &c. and the *baron and feme came in proper perſon and defended tort and force, and the right of the demandant all* * *attrenched, and their ſeiſin*, &c. *all entered as of fee and of right*, &c. *and namely of a houſe*, &c. *and put himſelf in God and the grand aſſize of our lord the king, the which of them have the beſt right to hold the houſe*, &c. *to them and to their heirs in jure uxoris as they held, or the demandants to have as they demanded*, and after the *baron made default*, and the *feme was received and joined the miſe*, ut ſupra; and after *ſhe made default*, and *judgment final was given* againſt him, *that the demandants recover ſeiſin*, &c. *to hold in common to them and their heirs for ever*, quit of the baron and feme and their heirs. And it is ſaid there that the feme in this caſe is ouſted of all actions. Br. Droit de Recto, pl. 4. cites 44 E. 3. † 24.

* Quære the meaning of the word.
† This ſeems miſprinted, for 44 E. 3. 28. a. pl. 7— Fitzh. Judgment, pl. 99. cites 44 E. 3. 28. S. C.

7. Droit; the *defendant made default*, by which *came two at the ſecond default and were received and vouched*, which *vouchee* came and *pleaded at the grand aſſize*, and the *writ iſſued to the ſheriff to return four knights, returnable at a certain day, at which day the vouchee and one of the prayees were dead*, by which *reſummons iſſued to the other returnable at a certain day, at which day he was eſſoined*; per Culpepper, the proceſs is diſcontinued; becauſe the death does not come in by return of the ſheriff, and yet he was awarded to anſwer; by which he joined the miſe, and the *writ iſſued to make the four knights come*, and it was returned that there were not four knights but burgeſſes; and for inſufficiency of the return, he was amerced, and other iſſued ut ſupra, returnable, &c. at which day the ſheriff returned it, by which *they were demanded and came to the bar with their ſwords by their ſides, and were charged well and lawfully to be twelve knights gladio cinctos of themſelves, and of others who beſt knew and could ſay true between the demandant and the vouchee, and* was commanded by the juſtices *that the parties go into a chamber with the knights to elect and declare their challenge to the other choſen by the four knights*; for after the return of the panel made by the four knights, the parties ſhall not have challenge to the panel nor to the polls before the juſtices. Br. Droit de Recto, pl. 6. cites 7 H. 4. 3. 20. and 39 E. 3. accordingly. [310]

8. In writ of right upon diſclaimer, *acceptance of right in pais after the diſclaimer* is a good bar; agreed arguendo. Br. Droit de Recto, pl. 47. cites 21 H. 6. 25.

9. *Warrant of attorney* in writ of right offered to Littleton *was refuſed, becauſe the party himſelf did not come in perſon to record it*; for he ſaid that writ of right was ſtronger than a fine; for it was in writ of right. Br. Garrant. de Attorney, pl. 32. cites 7 E. 4 9.

10. *Tenant for life may join* ſpecially, viz. *that he has better right to hold for term of life, the reverſion regardant to W. S.* &c. *than the demandant has to demand*, &c. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36. Per Littleton.

11. A man brought a writ of *droit cloſe in ancient demeſne*, and *made proteſtation to ſue in nature of a writ of right at the common law*; the *tenant joined the miſe upon the mere right*, and upon that *removed the record by accedas ad Curiam*; but becauſe that is no cauſe, a procedendo was awarded to the bailiffs. Dy. 111. pl. 47. Hill. 1 & 2 P. & M. Abbot v. Stafford.

Dal. 68. pl. 36. S. C. in totidem verbis

12. It was holden by the juſtices in this caſe, that it is a good *challenge* in a writ of right *to the four knights, that they are not gladiis cincti*; and a challenge to them *muſt be made upon their appearance*; for after they are once ſworn they are not challengeable; alſo the four knights are to make the panel, and they need not put their names to the return of it, as the ſheriff ſhall do, for this is not within the ſtatute of York; and they ought to return but twelve perſons beſides themſelves to be of the grand aſſiſe. Mo. 67. pl. 181. Trin. 6 Eliz. Squire v. Read.

D. 247. b. pl. 75. Hill. 8 Eliz. S. P. becauſe the miſe is joined and prayed by him firſt. Spyrce v. Read. —— Ibid. ſays the ſame order was obſerved between Newburgh and Thornhill in com' Dorſet, 9 Eliz. —— Ibid. Marg. cites the ſame order obſerved for land in com' Hereford, Trin. 28 Eliz. in caſe of Haydon v. Ibgrave.

13. In writ of right it was ruled per Cur. 1ſt, That the *demy-mark ought to be tendered at the joining of the miſe*, and yet the judges in the preſent caſe took it at the appearance of the jury. 2dly, The *tenant ought to commence in the giving of evidence*. 3dly, The *jury cannot give a ſpecial verdict*. Mo. 762. pl. 1057. Trin. 3 Jac. C. B. Andrews v. Ld. Cromwell.

14. A writ of right of advowſon a purchaſor cannot have, without *alleging a preſentation* in his own time. 2 Inſt. 356.

[311]

(E) Pleadings.

1. ASSISE; it was ſaid, that in writ of right *of ſeiſin of his anceſtor, laſt ſeiſin* is a good plea. Quære if it ſhall be pleaded, or if the half mark ſhall be tendered to inquire of it. Br. Droit de Recto, pl. 49. cites 5 Aſſ. 1.

2. Recto; præcipe in capite *of* 20 *acres of land quas clamat tenere de rege in capite*, the *tenant ſhall not have pleas that the land is held of J. N. and not of the king*; but the lord, if he be preſent, may demand his count; but the tenant may take it by proteſtation and anſwer. Br. Droit de Recto, pl. 9. cites 38 E. 3. 13.

3. Writ of right *præcipe in capite quam clamat tenere de nobis in capite*, and *does not expreſs by what ſervices*, and exceptions taken; & non allocatur. Br. Droit de Recto, pl. 50. cites 39 E. 3. 20.

4. In a writ of right, if the *tenant pleads a releaſe of anceſtor by whom the demandant claims*, this is only to the aſſiſe or battle; but if it be of an anceſtor collateral, this is a bar; but it ſeems that this

this is intended where the *releaſe* is *with warranty*, for otherwiſe there is no caſe ex parte of a collateral anceſtor which never has right. Br. Droit de Recto, pl. 6. cites 7 H. 4. 19.

5. In writ of right there are *ſeveral defences, one at firſt*, and then may *demand oyer of the writ*, and then *defence after the count*, and may *vouch or plead in bar*, and *after the replication made, to make defence and anſwer* to it; nota, per Newton. Br. Droit de Recto, pl. 11. cites 21 H. 6. 26. Br. Defence, pl. 7. cites S. C.

6. Præcipe in capite, the tenant ſhall not ſay by *plea that the land is held of another, and not of the king*, but *ſhall take it by proteſtation*, and plead other matter. Br. Droit de Recto, pl. 19. cites 27 H. 6. 27.

7. Debt in writ of right the *miſe is joined*, and the *tenant gave in evidence a releaſe made in another county*, the *grand aſſiſe ought to find it*; for it is ſaid elſewhere that *nothing may be pleaded in this action but collateral warranty*, but all others ſhall be given in evidence. Br. Droit de Recto, pl. 48. cites 9 E. 4. 40. Br. Enqueſt, pl. 59. cites S. C.

8. In writ of right, the *demandant counted of the ſeiſin of his anceſtor, or of himſelf*, this *ſhall not be traverſed, but the tenant may tender the half mark to inquire of the ſeiſin*. Br. Droit de Recto, pl. 32. cites 10 E. 4. 9.

9. *But* if *ſuch recovery* in writ of right be *pleaded in bar in other action*, there the *demandant may traverſe the ſeiſin by way of falſifying*; quære inde if it be againſt privies. Br. Droit de Recto, pl. 32. cites 10 E. 4. 9.

10. *But* at this day *iſſue may be tendered upon the ſeiſin by* the new ſtatute of limitation, 32 H. 8. cap. 2. Br. Droit de Recto, pl. 32. cites 10 E. 4. 9.

11. *Collateral warranty* is a good bar in writ of right, and it ſhall not be tried by grand aſſiſe, but by jury; for it is not upon the right, but upon the deed. Br. Droit de Recto, pl. 42. cites F. N. B. fol. 1.

12. Error upon a judgment in Wales, in a quod ei deforceat, in nature of a writ of right. Error aſſigned was, that the iſſue is not well joined, becauſe he *pleaded he has majus jus tenendi tenementa predicta than the plaintiff*, and he does *not ſay ſibi & hæredibus ſuis*, according to the uſual courſe; for it may be that he was [312] tenant for life, or tenant in tail, and therefore becauſe he did not ſhew in certainty que eſtate, it was ill; ſed non allocatur; for the Court would not intend he had a leſſer eſtate than in fee, and if he were but tenant for life, it was at his own peril to plead in that manner, for it is a forfeiture of his eſtate; and it was held to be no error. Cro. C. 178, 179. pl. 2. Hill. 5 Car. B. R. Griffith v. Jenkins.

13. In a writ of right there *ought to be a double defence*, viz. [*againſt*] *the plaintiff's right, and to maintain his own right*: Arg. and ſeems admitted. Cro. C. 310, 311. Trin. 9 Car. B. R.

(F) Neceſſary or not. In what Caſes.

1. MOrtdanceſtor; note by award, that *where the father dies ſeiſed*, the *heir enters*, and a *ſtranger recovers againſt him by writ of entry ad terminum qui præteriit by default*, the *heir may have mortdanceſtor though the recovery was by default, and ſhall not be put to writ of right*; and ſo ſee that upon every recovery by default a man is not put to his writ of right. Br. Droit de Recto, pl. 23. cites 11 Aſſ. 17.

2. If *præcipe quod* reddat be brought *againſt tenant for life who vouches a ſtranger*, and the *demandant counterpleads*, and it is *found for the demandant*, he in the *reverſion has no remedy but* by writ of right. Br. Droit de Recto, pl. 30. cites 5 E. 4. 2.

3. *So* where the *vouchee enters into the warranty and loſes* by action tried or by default. Br. Droit de Recto, pl. 30. cites 5 E. 4. 2.

(G) Judgment Final.

1. *RIGHT of advowſon brought by the king*; judgment final ſhall not be given againſt the king. Br. Droit de Recto, pl. 43. cites 20 E. 3.

2. Where the *defendant joins the miſe*, and *day is given to him till the next week*, and *he makes default at the third day after*, &c. Judgment final was given upon the default. Br. Droit de Recto, pl. 43. cites Fitzh. Droit, pl. 15.——And this ſee in Droit in Fitzh. 27. Itin. Northt. but judgment ſhall be that he ſhall recover. 33 E. 3. Ibid.

3. Judgment final was given *againſt a feme covert after ſhe was received and joined the miſe and made default*, and ſhe was barred of action for ever. Br. Judgment, pl. 45. cites 44 E. 3.

Ibid. pl. 35. cites S. C. Ibid. pl. 55. cites S. C.

4. Droit, the Court was informed that the *tenant had only in tail*, and therefore they would not give judgment final. And from hence it ſeems that judgment final ſhall bind the tenant in tail and his iſſue. And it was ſaid, that it was for fear of barring the iſſue in tail; and they took adviſement. Br. Droit de Recto, pl. 46. cites 3 H. 6. 55.

5. In writ of right, the *tenant vouched one who was taken and entered into the warranty*, and the *demandant counted*, and *he made defence and joined the miſe*, and the *demandant imparled till the next* [313] *day*, at which day the *vouchee did not come*, by which, upon good argument, *judgment final* was given for the demandant againſt the vouchee *to hold quit, but common judgment in value* was given *for the tenant againſt the vouchee*, and not judgment final. Br. Droit de Recto, pl. 57. cites 10 H. 6. 2.

6. Writ of right, if the *demandant* be *nonſuited after appearance, or after miſe joined*, judgment final ſhall be given; 18 E. 2. and

and 10 E. 2. and 1 E. 3. & concordat 13 H. 4. 8. Fitzh. Judgment, 245. and *in other caſes, judgment final ſhall not be given unleſs they be joined*, unleſs in ſpecial caſes as here. Br. Droit de Recto, pl. 60. cites 11 H. 6. 9.

7. Judgment final ſhall *not* be given *againſt an infant* within age, per Danby and Yelverton, but Choke and Littleton contra. And Littleton ſaid that the opinion of him and his companions was, that if a *feme covert* be *received* in writ of right in default of her baron, and joins the miſe, and it is found for the demandant, yet the demandant ſhall not have judgment, and this for the advantage of the baron. Br. Judgment, pl. 46. cites 9 E. 4. 16.

8. Writ of right *againſt an infant within age, who appeared by guardian, and vouched one who entered into the warranty and joined the miſe, and after made default.* Cateſby prayed judgment final againſt the tenant, and had it upon great debate. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

9. *But* it is ſaid that *if he had joined the miſe himſelf*, judgment final ſhould not be given againſt him. And per Choke J. *when he vouches* he *loſes the benefit of his age*, as if he had pleaded in bar. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36

Note per Danby and Yelverton, Judgment final ſhall not be given *againſt an infant*; contra per Choke and Littleton. Br. Droit de Recto, pl. 17. cites 9 E. 4. 16.

10. The *tenant ſhall have judgment final againſt the demandant if* it paſs for him. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

11. Droit, *iſſue was joined upon the mere right upon the grand aſſiſe, and niſi prius iſſued, and at the day the tenant made default*, and the *demandant prayed judgment final.* Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

12. *For if* the demandant be *nonſuited after the miſe joined*, the tenant ſhall have judgment final. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

13. *And if* the tenant *has day to imparl to another day in the ſame term, and makes default at the day*, the demandant ſhall have judgment final. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

14. *But by default of the tenant at the niſi prius, the demandant cannot have but only petit cape*, by which he ſued petit cape. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

15. *And if the tenant joins the miſe by champion, and at the day appears, and his champion not*, judgment final ſhall be given. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

16. And *if the tenant at the day of the return of the petit cape cannot ſave his default*, judgment final ſhall be given. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

17. And per Vaviſor *if the demandant makes default after the miſe joined*, he ſhall be barred for ever. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

18. Note, per Fitzherbert J. judgment final *ſhall not be given* in writ of right, *but after the miſe joined.* Br. Droit de Recto, pl. 16. cites 26 H. 8. 8.

Br. Judgment, pl. 44. cites S. C.

19. *And*

Br. Judgment, pl. 44. cites S. C.

19. *And* by him and Shelly J. *where the tenant vouches* in writ of right, *and the demandant recovers againſt the tenant, and the tenant over in value*, the *judgment ſhall not be final for the tenant againſt the vouchee;* quod nota. Br. Droit de Recto, pl. 16. cites 26 H. 8. 8.

Bendl. 199. pl. 228. Low and Kyne v. Paramour, S. C. and the pleadings and judgment.

20. In a writ of right the *tenant choſe trial by battle*, but when every thing was prepared and performed, and the day and place appointed for the battle, the *demandants being ſolemnly called, made default*, whereupon final judgment was againſt him. D. 301, 302. a. Trin. 13 Eliz. Thevin v. Paramour.

The reporter ſays he was of counſel with the demandant, and that the nonſuit was by reaſon of an agreement made between the parties by the juſtices.

21. In writ of right the *iſſue was joined on the mere right, and when the jury came to the bar to give their verdict*, the *demandant was called, but did not appear*, whereupon the tenant prayed the Court to record the nonſuit, and ſo it was done. Per Cur. all is one as if he had appeared; for *this nonſuit is peremptory* for ever, by reaſon that the iſſue is joined upon the mere right; but had the iſſue been joined upon any *collateral point* it had been otherwiſe. Gouldſb. 90. pl. 1. Trin. 30 Eliz. Heiden v. Smithwick.

Mo. 403. pl. 536. Ap-Richard v. Penry, S. C. The opinion of the Court upon conference with ſeveral of the juſtices of England was, that the judgment ought to be affirmed.—Jenk. 259. pl. 56. S. C. accordingly. And ſays that a writ of error ſhould have been brought to reverſe the firſt judgment, and if it had been reverſed, yet it had not reverſed the ſecond judgment; for the ſecond judgment was collateral and independent, and it is executed. And in a writ of right, if the tenant before the miſe joined loſes by default, he may have a writ of right againſt the demandant, who has execution againſt him upon the ſaid judgment by default.

22. In *quod ei deforceat in Wales*, in the nature of a writ of right, according to the courſe there, the *miſe was joined upon the mere right*, and *venire facias returned*, and 12 *were ſworn, and before verdict the demandant was nonſuited*, and *thereupon judgment final* was given. The demandant afterwards brought another quod ei deforceat. The tenant pleaded the firſt judgment in bar. The demandant demurred, and judgment was given againſt him; whereupon demandant brought writ of error, but judgment was affirmed. Reſolved, 1ſt, That though by the ſtatute of Rutland 12 E. 1. trial in Wales in writ of right ſhall be by 12 common jurors, yet judgment final ſhall be given as before the ſtatute, and though the manner and dignity of the trial be altered, yet the judgment remains. 2dly, If *judgment final* be *given in writ of right where it ought not, yet it ſhall bind till it be reverſed.* 3dly, If the *tenant after the miſe joined makes default*, judgment final ſhall not be given, (as F. N. B. 6. holds,) but *petit cape ſhall iſſue;* for peradventure he may ſave his default. 5 Rep. 85. b. Trin. 38 Eliz. B. R. Penryn's Caſe.

23. Seeing the miſe is joined upon the mere right, though the *verdict of the grand aſſize be given upon another* point, yet judgment final ſhall be given. Co. Litt. 295. b.

But ſee Penryn's caſe, the third reſolution, e contra.

24. So if after the miſe joined the *tenant makes a default, or confeſſes the action*, or if the *demandant* be *nonſuit*. Co. Litt. 295. b.

25. The

25. The form of the final judgment is *quod tenens teneat terram illam ſibi & hæredibus ſuis in pace verſus petentem & hæredes ſuos in perpetuum.* Co. Litt. 295. b. 9 Rep. 85. b. Trin. 38 Eliz. Penryn's caſe. S. P.

* 26. The ſtatute of 34 E. 1. nor the ſtatute of 4 H. 7. as to fines extends to nonclaim upon a judgment in a writ of right, and ſo the *common law, in this caſe, remains to this day*, viz. that claim muſt be made within a year and a day after judgment. Co. Litt. 262. a. Co Litt. 254. b. S. P.

For more of Droit de Recto, in general, ſee other proper titles.

Dureſs of Impriſonment.

(A) *What* Things may be *avoided by* Dureſs.

Fol. 687.

[1. *A Statute-merchant* may be avoided by audita querela, becauſe it was made by dureſs of impriſonment, 20 E. 3. Audita Querela, 27.] See tit. Audita Querela (E), pl. 53. S. C. and the notes there.

2. A man ſhall avoid *outlawry* by dureſs of impriſonment at the time of the outlawry pronounced. Br. Dureſs, pl. 21. cites 38 Aſſ. 17.

3. *Formedon in deſcender;* the *tenant ſaid that he made the ſame gift by dureſs of impriſonment done to him by the father of the demandant to make the gift.* Judgment, &c. and a good plea, by which the other ſaid, that at large and not by dureſs. Priſt. Br. Dureſs, pl. 3. 3. cites 41 E. 3. 9.

4. *Feoffment by dureſs* or menace is not void, but voidable. Br. Feoffment de Terre, pl. 48. cites 18 E. 4. 27.

5. A man may avoid a *bond made upon the ſtatute* 23 *H.* 8. *cap.* 6. *of recognizance by dureſs*, and yet this is matter of record. Br. Dureſs, pl. 19. cites F. N. B. fo. 120.

6. *Declaration of uſes (on a fine)* by a man in dureſs, denied to be good. Per Anderſon. 2 Le. 159. pl. 193. 21 Eliz. in the Star-chamber. Anon. And if men compelled by threatenings or impriſonment ſhould be *admitted to levy fines*, they ſhould thereby be barred, becauſe the law intends ſuch perſons are at liberty when they acknowledge fines, 17 Ed. 3. 52. 78. 17 Aſſ. 17. Weſt's Symb. ſ. 11.

7. *Feme covert* by dureſs in a *leaſe* with her huſband, the ſame ſhall bind her. 3 *Le.* 72. Per Manwood J. pl. 110. Hill. 20 Eliz. C. B. Northampton's caſe.

8. N. brought *debt upon arrearages of accompt*; the *defendant ſhewed that before the accompt, the plaintiff, of his own wrong, did impriſon the defendant, and aſſigned auditors to him* being in priſon, and ſo the account was made by dureſs of impriſonment, and the
[316] ſame was holden a good plea by all the juſtices of both the benches; and judgment was given accordingly. Le. 13. pl. 17. Hill. 25 Eliz. B. R. Northumberland's caſe.

Againſt a deed inrolled a man ſhall not take averment that it was by dureſs; for this is contrary to the record. Roll. Abr. 862. Eſtoppel (A), pl. 3. cites 16 H. 7. 5. b. ——— Br. Faits Enroll, pl. 17. cites 16 H. 7. 5. S. P. per Curiam.

9. *J. S. by deed inrolled* in Chancery, *bargained and ſold a houſe and certain lands to the plaintiff, and after took the goods again, and would avoid this bargain*, and ſale inrolled, *by dureſs of impriſonment*. Godfrey ſaid, it cannot be avoided by ſuch nude matter in fact, cited 7 Ed. 4. 5. 39 Hen. 6. 32. 13 Ed. Eſtoppel, 18. 48 E. 3. 33. For, being inrolled, it is a thing of record. Morgan contra; and he ſaid a deed inrolled is no record, but a thing recorded, 16 H. 7. 5. and cited Browne and Weſton's opinion in one Morley's caſe accordingly. The Court ſaid the caſe was doubtful, and they would adviſe; but afterwards they conceived it would be hard to avoid the deed by dureſs, but no judgment was given, becauſe the parties agreed. Cro. E. 88. pl. 12. Hill. 30 Eliz. B. R. Hamond v. Barker.

10. If a party menace me, except I will *make unto him a bond of* 40*l. and I tell him that I will not* do it, *but I will make* unto him a *bond of* 20*l.* the law ſhall not expound this bond to be voluntary, but ſhall rather make conſtruction that my mind and courage is not to enter into the greater bond for any menace, and yet that I enter by compulſion notwithſtanding in the leſſer. Bacon's Elements, 81.

11. If I will *draw any conſideration to myſelf*, as if I had ſaid I will enter into your bond of 40*l. if you will deliver me that piece of plate.* Now the dureſs is diſcharged, and yet if it had moved from the dureſſor, who had ſaid at the firſt you ſhall take this piece of plate and make me a bond of 40 l. now the gift of the plate had been good, and yet the bond ſhall be avoided by dureſs. Bacon's Elements, 81.

12. A *feoffment*, if made by dureſs, and the *party himſelf delivers ſeiſin*; or in caſe a *gift of goods* be made, *and he himſelf delivers them*, the ſame are avoidable at any time by entry, action, &c. but if they deliver it not with their hand, as in a *feoffment, by letter of attorney*, or in a *grant of a rent, advowſon*, &c. nothing at all paſſeth. Finch's Law, 102, 103.

13. A *feoffment* by one *by dureſs is* not void, *but voidable by entry or action, and that only by privies in blood inheritable*, and not by privies in law or eſtate. A *bond* made by him cannot be avoided by dureſs on non eſt factum. A *feoffment by letter of attorney* by dureſs is void, and the feoffee a diſſeiſor. 2 Inſt. 482, 483.

14. If *agreement be compelled by threats* it ſhall not bind. 3 Car. Toth. 67. Plowden v. Marſham.

15. If the defendant is arreſted, and in execution, and A. becomes bound for him to the plaintiff, and the *defendant gives A. a judgment*

judgment for his counter-ſecurity, it is good though *no attorney be preſent*, and it is not within the common rule of Court, becauſe not given to the perſon himſelf but to a third perſon; per Holt Ch. J. 5 Mod. 144. Mich. 7 W. 3. Churchy v. Roſſe.

16. In caſe of a pretended real *diſcharge of the bailiffs before a warrant of attorney executed* by one under an arreſt for a juſt debt, Holt Ch. J. declared he would be well ſatisfied by *affidavits* that the bailiffs were ſo diſcharged, as that if the defendant had refuſed to execute the warrant they would not come again and ſeiſe on him, and that he would have reaſon to believe before he would let the judgment ſtand. 7 Mod. 139. Hill. 1 Ann. B. R. Gidden v. Drury.

17. If A. be arreſted on proceſs out of C. B. or any inferior court, and gives a warrant *to confeſs a judgment* in this court while *in cuſtody*, no attorney being there preſent, we can examine and ſet aſide this judgment; otherwiſe where it is to confeſs a judgment in another court. 1 Salk. 402. Mich. 2 Ann. B. R. Anon. [317]

(B) *What* ſhall be *Dureſs*.

To avoid a Thing.

[And though made on another Perſon.]

[1. IF a man be *lawfully in priſon*, yet if he *makes an obligation againſt his* agreement and *will*, he may avoid it by dureſs. 43 E. 3. 10. b. 6.]

Debt upon obligation, the *defendant* pleaded that it was made *by dureſs*, and the *plaintiff ſaid that he was his receiver, and aſſigned auditors to him to bear his account, who committed him to gaol for arrears, and there he made this obligation for his deliverance of his own will*; and held a good plea; by which the defendant pleaded other iſſue, for this is not by dureſs. Br. Dureſs, pl. 4. cites 43 E. 3. 10.

[2. *Otherwiſe if* he does it *of his good will*. 43 E. 3. 10. b. 11 H. 4. 6. b.]

[3. If a man makes a deed by dureſs done to him *by taking of his cattle*, though there be no dureſs done to his perſon, yet this ſhall avoid a deed. 20 Aſſ. 14. adjudged.]

S. P. awarded before the king's council. Br. Dureſs, pl. 12. cites S. C. ——— S. C. cited Arg. 11 Mod. 202, 203.

[4. A *ſervant* ſhall not avoid a deed made *by dureſs to his maſter*. M. 7 Jac. B. per Coke.]

Nor ſhall a man avoid a deed by dureſs to his ſervant. 2 Brownl. 276. Mich. 7 Jac. C. B. Anon.

[5. *But* a *ſon* ſhall avoid his deed *by dureſs to his father*. M. 7 Ja. B. per Coke.]

So a father ſhall avoid a deed by dureſs of impriſonment of his ſon. 2 Brownl. 276. Anon. ——— Per Wylde, if the *dureſs* be *to a father or brother*, and a ſon enters into bond, this is a dureſs to the ſon, and he may plead it; but per Twiſden, a man ſhall in no caſe avoid his deed by a dureſs to another, let him be related how he will. Freem. Rep. 351. pl. 440. Mich. 1673. in caſe of Wayne v. Sands.

[6. The

S. P. per Collowe, quod fuit conceſſum.

[6. The *baron* ſhall avoid a deed made *by dureſs to his wife.* M. 7 Ja. B. per Coke.]

For baron and feme are one and the ſame body and perſon in the law. Br. Dureſs, pl. 18. cites 21 E. 4. 8. 14 & 15.——2 Brownl. 276. Anon. S. P. accordingly.——Sid. 123. S. P. cited per Cur. as adjudged 7 Jac. in caſe of Luntrell v. Witherington.

A man cannot avoid an obligation by impriſonment

[[6.] A man ſhall not avoid a deed by dureſs *to a ſtranger.* M. 7 Ja. B. per Curiam. M. 13 Ja. B. where the obligation is joint and ſeveral.]

of any other friend than his wife. Br. Dureſs, pl. 18. cites 21 E. 4. 8. 14 & 15.——Ld. Raym. Rep. 357. Arg. S. P.

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[7. If *A. and B. make an obligatisn by* reaſon of *dureſs done to A.* B. ſhall not avoid this obligation, though A. may, becauſe he ſhall not avoid it by dureſs to a ſtranger. M. 7 Ja. B. per Curiam, between MONTALL AND WOOLLINGTON.]

[8. If a *purſuivant of the high commiſſion,* upon a ſuit, an by their command *impriſons a man until he enters into a bond to appear in the court of audience,* this obligation may be avoided by dureſs, becauſe the ſuit there was *upon a contract, of which they had not original conuſance,* and therefore the impriſonment wrongful. H. 8 Ja. B. between CLIFFORD AND HUNTLY, per Curiam reſolved.]

9. In aſſiſe it was found that the *conuſor upon ſtatute merchant after execution ſued againſt him takes the conuſee by force, and ſwears him that he ſhall render him the land,* and *of his own will he releaſes all actions of debt and treſpaſs, and after he of his own will ſurrendered the land,* and this oath he took for fear of death; and therefore notwithſtanding the ſurrender was made at large, yet becauſe it was done by reaſon of dureſs before, therefore Perning adjudged it a diſſeiſin, when the conuſee entered by ſuch ſurrender. Br. Dureſs, pl. 11. cites 14 Aſſ. 20.

10. If a *releaſe be made at D.* it is a good plea *that a ſtranger menaced him at S.* by reaſon whereof he menaced him at D. Br. Faits, pl. 81. cites 43 E. 3. 19.

11. A writing *made by dureſs,* and *delivered at large* was adjudged void, anno 6 R. 2. Per Rolf. Br. Dureſs, pl. 20. (bis) cites 8 H. 6. 7.

12. Dureſs cannot be to a *body politic,* but may be *to a mayor,* to do a thing belonging to his office, by the beſt opinion; for he is head of the corporation. [And] Impriſonment of the natural body in a pillory is impriſonment of all the body; for intire. Br. Dureſs, pl. 18. cites 21 E. 4. 8. 14, 15.

13. Where a man is *impriſoned by capias,* &c. by the law, *and makes an obligation for his deliverance,* this is good, and not by dureſs. Br. Dureſs, pl. 15. cites 4 E. 4. 17.

14. In replevin, if a *man be condemned to me and in execution,* and *makes to me an obligation for his deliverance,* this obligation is not by dureſs. Br. Dureſs, pl. 17. cites 12 E. 4. 7.

15. If I *menace* you *in one county* to make an obligation of 20 l. *and after at another day* I find you *in another county,* and I demand if

if you will make the obligation to me, and you make the deed according to my firſt requeſt in the firſt county, this obligation is avoidable, becauſe it has its reſpect, and *was made by reaſon of the firſt menace in the other county.* Per Frowike Ch. J. Kelw. 52. b. pl. 7. Trin. 19 H. 7. in caſe of Keble v. Vernon.

16. A. is *impriſoned till he promiſes to enter into an obligation, who does it when he is at large*, yet he may plead this to be per dureſs. D. 143. b. Marg. pl. 56. cites Mich. 23 Eliz. per Meade.

17. Debt upon an obligation was brought by B. againſt U. and H. who pleaded the ſtatute of 23 H. 6. and ſhewed that *U. was in execution*, and that *the bond was made for his deliverance* againſt the ſtatute; the plaintiff *replied*, and ſaid, *that at the time of the making* of the ſaid bond, *the ſaid U. fuit ſui juris, and at large, abſque hoc that he was in priſon tempore confectionis ſcripti prædict' modo & forma*, &c. Egerton ſolicitor moved, that the traverſe was not good; for if a man be in priſon in execution, and makes a promiſe to make a bond for which he is enlarged, and within an hour after he makes the bond, the ſame is within the ſtatute; and therefore this iſſue is not well joined, but it ought to be *abſque hoc, that it was pro deliberatione*, &c. And of ſuch opinion was Fenner and Gawdy juſtices. 2 Le. 107. pl. 136. Paſch. 32 Eliz. B. R. Bows v. Vernon. See Dive v. Manningham, 4 E. 6. Plo. Com. 68, 69. Acc. [319]

18. Debt upon obligation, the caſe was, A. *ſheriff* of C. *by* virtue of *an attachment under the ſeal of the Court of Requeſts, took the defendant, and for his enlargement he made* this *obligation to appear before the queen's council attending the Court of Requeſts* at Weſtminſter; it was the opinion of the Court, that this was not lawful, but taken by dureſs, and ſo avoidable, becauſe *that court had not any power by the ſtatute, or by the common law*; it was adjudged for the defendant. Cro. E. 646. pl. 58. Mich. 40 & 41 Eliz. Stepney v. Lloyd. 2 And. 122. pl. 66. S.C. adjudged.— 4 Inſt. 97. cap. 9. S.C.

19. Debt by a ſheriff on a *bond for the appearance of T.* &c. the defendant *pleaded, that W. ſued out a capias which was delivered to the plaintiff (ſheriff of Oxford), who made a warrant to the bailiff* of the liberty of H. to arreſt the ſaid T. *and that one J. S. put his own name in as a ſpecial bailiff to arreſt him; and* that he *did arreſt him at D. in the ſaid county, and carried him to R.* in the county of Berks, *and there kept him till he and T. gave the ſaid bond*; adjudged an ill plea, for though the bond was made by dureſs as all the Court agreed, and that the defendant might well have pleaded it and relied upon it, yet it is not within the ſtatute 23 H. 6. nor is the defendant aided thereby. For T. never was in the ſheriff's cuſtody after the arreſt; and the bond taken out of the county is by dureſs, but not within the ſtatute. Cro. E. 745, 746. pl. 23. Hill. 42 Eliz. B. R. Brown v. Adams.

20. If a man menace me, that he will impriſon or *hurt in body my father*, or my *child, except I make ſuch an obligation*, I ſhall avoid this dureſs as well as if it had been to my own perſon. Bacon's Elements, 66. Becauſe *perſona conjuncta æquiparatur intereſſe propriæ.*

21. An-

21. Anciently there was a writ of *dum fuit in priſona*, where an alienation was made by dureſs, and that for the party himſelf. 2 Inſt. 482.

22. *Every reſtraint of a man's liberty* is an impriſonment, though he be not within the walls of any common priſon. 2 Inſt. 482.

23. Dureſs *per minas aut cauſa metus* are ſufficient to avoid a man's own act in four caſes, viz. 1ſt, For fear of loſs of life. 2dly, Of loſs of *member*. 3dly, *Of mayhem*; and, 4thly, *Of impriſonment*; otherwiſe it is for fear of *battery*, which may be very light, or *burning of his houſes*, or *taking away or deſtroying of his goods*, or the like, for there he may have *ſatisfaction* by recovery of damages. 2 Inſt. 483.

24. Dureſs is where a man is compelled to do a thing by impriſonment, or *fear of ſome bodily hurt threatened to himſelf**, *not to his father, mother*, &c. as loſs of life and member, or though it be but of *impriſonment*; for impriſonment is a corporal pain, and one may be impriſoned that he may die of it. Otherwiſe it is of a *menace to break or burn down one's houſe*, for that is but the loſs of one's goods. Finch's Law, 102.

* See pl. 5.

25. If a man be *impriſoned by order of law*, the *plaintiff may take a feoffment* of him, *or a bond for his ſatisfaction, and for the deliverance of the defendant* notwithſtanding that impriſonment, for this is not by dureſs, becauſe he was in priſon by courſe of law; for it is not † accounted in law dureſs, but where either the impriſonment, or the dureſs that is offered in the priſon, or at large, is tortious and unlawful, for *executio juris non habet injuriam*. 2 Inſt. 482.

S. P. as to a bond obtained; and if in ſuch caſe dureſs be pleaded, the other may ſay that of his own accord fine duritia impriſonamenti, without ſaying abſque hoc that it was per duritiam impriſonamenti. 3 Le. 239. pl. 330. Mich. 32 Eliz. C. B. Knight v. Norton. And Ibid. ſays it was ſo holden in B. R.

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In debt on an obligation, the defendant pleaded *that one R. was bound with him, and that R. entered into the bond by dureſs*, but it ſeemed to the Court that it was no plea; for a man ſhall *not avoid his own bond by a dureſs to another*, though he be but a ſecurity. Freem. Rep. 351. pl. 440. Mich. 1673. Wayne v. Sands.

26. Debt on an obligation of 40 l. conditioned to pay 24 l. the defendant pleaded, that W. R. was impriſoned by covin of the plaintiff, and detained there in danger of his life, againſt law, until the ſaid W. R. ſhould pay the ſaid 24 l. or become bound with a ſurety for payment thereof; whereupon, to inlarge the ſaid W. R. and to avoid danger of his life, he and the ſaid *defendant as ſurety* for the ſaid W. R. *entered* into *the ſaid bond*, &c. Adjudged to be *no plea for the ſurety*, though it had been a good plea for W. R. For none ſhall avoid his own bond for the impriſonment or danger of any but of himſelf only. Cro. J. 187. pl. 8. Mich. 5 Jac. B. R. Huſcombe v. Standing.

27. *Mayor and commonalty* may avoid a deed ſealed, by dureſs of impriſonment of mayor. 2 Brownl. 276. Mich. 7 Jac. C. B. Anon.

28. A man may avoid ſeiſin for payment of *rent* by coertion *of diſtreſs*, but not his deed. 2 Brownl. 276. Mich. Jac. C. B. Anon.

And the impriſon-

29. If a man be impriſoned upon a formal ſuit, though there was no juſt cauſe of ſuit, yet if he give a bond for his releaſe he ſhall

ſhall not avoid it by a dureſs; for it is *incarceratio legitima*, that is, by law, though the plaintiff did untruly procure it. Hob. 266. pl. 352. in caſe of Waterer v. Freeman.

ment in ſuch caſe to avoid the deed *muſt be ſuch as was made for the making the deed*, &c. See Perk. 9. ſ. 17, 18. cites 8 Aſſ. pl. 25.

30. An agreement for *ſurrendering of a copyhold* (though *made* when the party was *in priſon*) upon bonds for performance thereof. Toth. 66. 3 Car. Wadbroke v. Cheeke.

31. In debt upon a bond of 10l. and by dureſs pleaded, the caſe upon evidence was, that the plaintiff *charged the defendant with felony* for ſtealing a horſe, and procured a warrant to a conſtable, whereby he was taken, and being in cuſtody, upon promiſe of the plaintiff to diſcharge him, ſealed the bond, and was thereupon immediately diſcharged, and it appeared that the horſe was the defendant's horſe; and Roll directed the jury, that theſe proceedings being but to *cover the deceit*, the bond was gotten by dureſs, whereupon the plaintiff was nonſuited. All. 92. Mich. 24 Car. B. R. Anon.

32. A *man having no good cauſe of action, cauſes another to be arreſted, and to be detained in priſon until he made a releaſe, with menaces that he ſhould lie there and rot if he would not ſeal* a releaſe, upon which a releaſe was executed, and the man was diſcharged. On evidence at Guildhall, Bridgman Ch. J. held, that the party here being in cuſtody by the king's writ, this was no dureſs to be pleaded in avoidance of a deed, and being arreſted without cauſe he may have an action, but he offered to have it found ſpecially if Baldwin the counſel would pray it, but he did not, and ſo the jury gave their verdict that it was a good releaſe. Lev. 68, 69. [321] Trin. 14 Car. 2. at Guildhall. Anon.

33. If a *bond* be *given by force or terror, though not ſo as to make it to be per dureſs*, it ought to be ſet aſide, or at leaſt not carried into an execution; per Wright K. 2 Vern. 497. pl. 447. Paſch. 1705. in caſe of Attorney Gen. ad relationem Coſſart & Dutrie Sothon.

34. A man cannot avoid a bond by dureſs of *impriſonment of a ſtranger*; Arg. Ld. Raym. Rep. 357. Trin. 10 W. 3.

35. A man arreſted and under confinement of the bailiff, gives a warrant of attorney to confeſs a judgment, and *no attorney by*, it is always taken to be by dureſs; but if a man that has been *long in gaol*, voluntary confeſſes a judgment to his creditor that comes to him, that judgment is good, though no attorney is by; and if one *impriſoned in B. R.* confeſs judgment or action to another, it is good, as if declaration be delivered to one in cuſtody of the marſhal, and he confeſſes the action and gives judgment, though no attorney by, yet it is good; per Holt Ch. J. 7 Mod. 115. Mich. 1 Ann. B. R. Anon.

36. A *barge was attached on the Thames by proceſs out of Windſor Court*, and the manager or *governor of the barge gave a bail-bond for his maſter to appear* in Windſor Court, to anſwer in a plea of treſpaſs. The queſtion was, whether this was a bond obtained by

dureſs, and therefore void, but the bond was adjudged good. 11 Mod. 201. Hill. 7 Ann. B. R. Sumner v. Ferryman.

* Becauſe he may have an action for them if taken. Perk. ſ. 18.

37. A bond ſhall never be avoided by dureſs but when the *perſon is put in ſome terror*, and ſo when his goods and chattels are taken illegally or irregularly, but in ſuch caſes he may avoid his bond; Arg. 11 Mod. 202. Hill. 7 Ann. B. R. But ibid. Powell J. ſaid, that a man cannot avoid a bond by dureſs to his * goods, but only to his perſon; but the reporter adds a quære.

Fol. 688.

(C) *By whom* being *made.*

A *Stranger.*

Br. Dureſs, pl. 20. cites S. C. —— S. P. but the opinion of Rede and others was, that this is no plea without making the obligee a party to this dureſs. Keilw. 154. a. pl. 3. Mich. 1 H. 8.

[1. DURESS *by a ſtranger by procurement of the party that ſhall have the benefit*, is a good cauſe to avoid, &c. 43 E. 3. 6.]

[2. Dureſs of impriſonment *by the maſter to his ſervant, to make an obligation to the obligee*, is good cauſe to avoid the deed. 6 H. 4. 5. adjudged.]

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(D) Pleadings.

Br. De ſon tort, &c. pl. 8. cites S.C.

1. WRIT *of error upon a judgment in re-diſſeiſin given againſt him at the ſuit of the father of the defendant*, and the *defendant pleaded a releaſe of all the right, and of all actions and demands made to his father*; and the *plaintiff ſaid, that this was made by dureſs of impriſonment*; and the *defendant ſaid, that he was impriſoned by virtue of the ſame condemnation, and made the releaſe for his deliverance, abſque hoc that he was otherwiſe impriſoned*; priſt; judgment, &c. and the *other ſaid, he impriſoned him de ſon tort demeſne, and without ſuch cauſe till he made the releaſe, &c.* priſt, and the other e contra. Br. Dureſs, pl. 6. cites 11 H. 4. 6.

2. Where a man *avoids a deed by dureſs at D. in another county*, it is no plea nor evidence for the party to *ſay that he never came to D.* for the place is [not] traverſable there; for if it be by dureſs *in any place it is ſufficient.* Br. Traverſe, per, &c. pl. 53. cites 14 H. 4. 35.

3. If a man *makes writing by dureſs or menace*, and *makes defeaſance of it at large*, there the defeaſance eſtops him to ſay that it was made by dureſs, &c. by the beſt opinion. Br. Defeaſance, pl. 17. cites 3 H. 6. 16. and 35 H. 6. 18.

4. Debt upon obligation; Chock ſaid, the plaintiff *took and impriſoned him at T. and from thence brought him in priſon to C. by force of which* impriſonment he made the obligation, &c. Thoſe two impriſonments are double; quod Curia conceſſit. Br. Dureſs, pl. 7. cites 38 H. 6. 13.

5. *By which he ſaid, that he took and impriſoned him at T.* ut ſupra, *till he agreed to make to him the obligation, by force of which impriſonment, he made the obligation at C.* and a good plea; per Moile. Br. Dureſs, pl. 7. cites 38 H. 6. 13.

S. P. per Moile, but per Laicon contra; for impriſonment was determined before. Br. Double Plea, pl. 79. cites S. C.

6. *Debt upon obligation upon a covent ſeal*, it is no *plea that A. B. C. D.* &c. *eight perſons, chanons*, &c. *made the covent tempore*, &c. *who were impriſoned by the abbot at D. till they ſealed it, and ſo by dureſs*, &c. For this is double; for it is ſeveral impriſonments in each of them; *but* it is a good plea *to ſay that the abbot impriſoned the covent till they made the deed, and* if they ſealed it againſt their will, or not knowing, this is not the deed of the covent; and the *other ſaid that they ſealed it at large, and not by dureſs*; quære as to the doubleneſs, if there be a diverſity between menace by ſpeaking of one and the ſame words to them altogether, and impriſonment of them in one and the ſame place. Br. Dureſs, pl. 8. cites 38 H. 6. 27.

7. Debt upon obligation; the *defendant ſaid, that the plaintiff impriſoned him at D. and the defendant ibidem per duritiam impriſonamenti fecit obligationem*, and the plaintiff challenged it, inaſmuch as this word *(ibidem)* is not certain, but becauſe this ſhall have relation to D. and alſo this is the uſual entry, therefore well. Br. Dureſs, pl. 15. cites 4 E. 4. 17.

Br. Expoſition, pl. 27. cites S. C. that (ibidem) ſhall be intended at D. quod nota bene.

8. In replevin, if a *man condemned to me, and in execution*, and *makes to me an obligation for his deliverance*, this obligation is not by dureſs, per Brian. Per Littleton, if the *defendant pleads that it was by dureſs*, and the *plaintiff traverſes it*, it ſhall be found againſt him, but *he ſhall ſhew the matter by replication*, that the obligation made for his deliverance, &c. and then well. Br. Dureſs, pl. 17. cites 12 E. 4. 7.

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9. Where it is alleged in count or bar that obligation or deed was made at D. in com' M. yet the other may allege that it was made at N. in com' E. by dureſs, &c. Br. Dureſs, pl. 18. cites 21 E. 4. 8. 14, 15.

10. If a man ſeals and delivers a deed by dureſs, he *cannot plead non eſt factum*; for it is his deed at the time of the action brought, and *ought to be avoided by ſpecial pleading, and conclude judgment ſi actio.* 5 Rep. 119. a. reſolved per Cur. Trin. 2 Jac. C. B. in Whelpdale's caſe.

Where a marriage may be avoided by dureſs, ſee Baron and Feme (A), pl. 5. and the notes there, and ſee tit. Marriage (H. a), per totum.

Ejectment.

(A) How conſidered.

1. SOLICITOR and agents in ejectment were committed till they *find a plaintiff able* to pay the coſts, or pay the coſts themſelves. 2 Lev. 66. Mich. 24 Car. 2. B. R. Henloe v. Peters.

2. Ejectment *is a mixt action;* it is real in reſpect of the lands, and perſonal in reſpect of the damages and coſts; per Holt J. Cumb. 250. Paſch. 6 W. & M. in B. R. Barwick v. Fenwood.

3. The Court will take notice that an ejectment *is only a fictitious proceeding* for recovering the poſſeſſion which cannot be well obtained otherwiſe, and the entry laid in the declaration, or confeſſed by the defendant, is not an entry that is real, for it ſhall neither avoid a fine nor be ſufficient evidence to ſupport treſpaſs for the mean profits. 1 Salk. 246. Paſch. 6 W. & M. in B. R. Smart v. Williams.

4. It is a *great abuſe* in ejectments that people make *nominal leſſees*, perſons *not in rerum natura*, or at beſt not known to the defendant, ſo that thereby he may loſe his coſts; and per omnes, the attorney that does ſo ought to pay *coſts*, and in the principal caſe an *attorney* was put to anſwer interrogatories for ſuch practice; per Cur. 6 Mod. 309. Mich. 3 Ann. B. R. Anon.

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(B) What is, or ſhall be ſaid to be an Ouſter.

1. TAKING the whole profits by one *tenant in common* is no ejectment, but if he drive out of the land any of the cattle of the other tenant in common, or not ſuffer him to enter or occupy the land, this is an ejectment or expulſion, whereupon he may have an ejectione firmæ for the one moiety, and recover damages for the entry, but not for the mean profits. Co. Litt. 199. b.

Noy, 77. Cally v. Fiſh, S. C.

2. Ejectment of *part* of a *great cloſe* is ejectment of *all*. Lat. 82. Paſch. 1 Car. Cally v. Fiſher.

3. Where a leaſe is to try a title, if my *cattle come upon the ground* and are permitted by me to *reſt there* a long time, I ſhall be an ejector, otherwiſe if a ſmall time. Clayt. 29. pl. 50. Aſſiſa Mar. 10 Car. Vernon Judge. Rawcliff v. Booth.

4. *One room*, or *a third part of a manor*, is good finding enough. Mar. 98. pl. 168. Trin. 17 Car. C. B. Juxon v. Andrews.

5. *Ejectment*

5. *Ejectment by mortgagee* was argued to be an admitting himself to be out of poſſeſſion, for the ejectment *complains of a tortious entry and an ouſter*, and this being a matter of record, he is eſtopped to ſay e contra; non allocatur; for firſt, per Cur. an ejectment as it is in common practice, *is but a feigned action*, to which the *leſſor* of the plaintiff, who is a principal perſon, is *not a party*; and not being a party, this cannot be given in evidence as an *eſtoppel* againſt him; and therefore he cannot maintain an action for the mean profits, without an actual entry, but the leſſee may. Skinn. 424. Paſch. 6 W. & M. in B. R. Andrew Newport's caſe.

(C) Of bringing Ejectment by Way of Leaſe.

1. WHEN a *leaſe* is made to bring an ejectment *of land in divers men's hands*, they muſt enter into one of the parcels, and leave one in that place; then he muſt go to another, and leave one there; and ſo on; and when he has made the *laſt entry*, he *ſeals and delivers the leaſe*; and then thoſe that were left there muſt come out of the land; and this is a good executing the leaſe. Brownl. 128. Weeks v. Meſey.

See Clayt. 6. Braadhead v. Beamond. ——But entry into two of the ſeveral parcels of lands, or into two ſeveral houſes, *and leaving the former occupiers upon the land*, &c. and then entering into the third houſe, &c. and there ſealing a leaſe for years unto another man of that *third houſe, and naming the two other houſes, &c.* this is good only for the third, and not for the two other houſes in which the leaſe was not delivered; for the entry or continuance of the occupier defeated the entry of the leſſor. Godb. 72. pl. 87. Mich. 28 & 29 Eliz. B. R. Earl of Kent's caſe.

2. Leaſe by *copyholder* for more than one year, without licence or cuſtom, is not good to try a title in ejectment, but he will be nonſuit on his own evidence, and ſuch leſſor will be taken to be a diſſeiſor; per tot. Cur. Brownl. 133. Paſch. 8 Jac. Cramphorn v. Freſhwater.

3. *Leaſe by two huſbands and their wives* to try a title in ejectment, and the ſame executed by letter of attorney, &c. they muſt be ſealed by the wives as well as the huſbands, and the entry by the attorney ought to be in all their names. 2 Bulſt. 13. Mich. 10 Jac. Chamberlain v. Ewer. [325]

4. When a *leaſe is to be executed by letter of attorney*, the courſe is this, that the leſſor do ſeal the leaſe only and the letter of attorney, and delivers the letter of attorney but not the leaſe, for the attorney muſt deliver that upon the land. Brownl. 130. Paſch. 12 Jac. Pettiſon v. Reel.

5. By the *ancient law*, lands and tenements were never recovered in any perſonal action, but anciently the writs of *entry* and *aſſize* were the uſual means for the recovery of the *poſſeſſion*, and theſe lay only againſt the *freeholder*, becauſe the eſtate for years was heretofore only a precarious poſſeſſion, and therefore to have actions againſt ſuch perſons was to no purpoſe, becauſe ſuch *terms* were generally defeated or determined before any intricate title could be decided, beſides theſe poſſeſſions being ſo precarious,

the *poſſeſſors* were not truſted with the defence of the intereſt of the land, and if they were ouſted, they could only have recovered damages for the loſs of their *poſſeſſions*, and if ouſted by their leſſors, they could ſeek only a remedy from their *covenants*.

Thus the law continued till the 14 H. 4. and then it began to be reſolved that an *habere facias poſſeſſionem* would lie to recover the *term* itſelf.

It ſeems that the long terms about this time had their beginning, and that ſince ſuch leſſees could not by law recover the land itſelf, therefore they uſed to go into equity againſt the *leſſors* for a *ſpecific performance*; and againſt ſtrangers, to have *perpetual injunctions* to quiet their poſſeſſions; this drawing the buſineſs into the courts of *equity* obliged the courts of *law* to come to a reſolution, that they ſhould recover the land itſelf in an *habere facias poſſeſſionem*.

But this reſolution brought on a new method of *trial* unknown before to the *common law*, for then it became uſual for a man that had a right of *entry* into any lands to ſeal *leaſes of ejectment* on the lands, and then any perſon that next entered on the freehold was an ejector; and the conveniency that aroſe from this method was, they could try the title *tales quoties*; whereas, if the plaintiff was barred in an aſſize, he was put to his writ of right, but this was a means of turning a man out of poſſeſſion, becauſe ſuch plaintiff would recover his term without any notice to the *tenant in poſſeſſion*, and therefore the courts of juſtice would not ſuffer that they ſhould loſe their poſſeſſions without any opportunity to defend them; wherefore, the Court made it a ſtanding rule, that no plaintiff ſhould proceed in ejectment to recover his lands againſt ſuch a *caſual and titular ejector*, without delivering the tenant in poſſeſſion a declaration, and making him an ejector and proper defendant, if he pleaſed.

This was a proper rule of Court, and in its power to form; for, otherwiſe, the Court would be made inſtrumental in doing an injury to a third perſon, becauſe a declaration might otherwiſe be delivered to a ſtranger, a faint defence be made, and a verdict, judgment, and execution, obtained, without the tenant's having any notice of it. But it is not to be doubted but that ſuch actions were brought at firſt againſt the real ejectors that reſided in the poſſeſſion; but becauſe any perſon that came into the land *animo poſſidendi*, was equally an ejector with him that reſided, the action, in ſtrictneſs of law, might be brought againſt him; but becauſe this (as has been ſaid) turned to the injury of
[326] the reſiding poſſeſſor, the rule was made that he ſhould have notice of it, and therefore they would not give judgment in ejectment, unleſs an affidavit was made that the tenant in poſſeſſion was ſerved with a copy of the declaration. But the ancient cuſtom was, that ſuch leaſes were actually to be ſealed and delivered, becauſe otherwiſe the plaintiff would maintain no title to the term; and were alſo obliged to be ſealed on the land itſelf, becauſe it was maintenance to convey out of poſſeſſion, and therefore, in relation to the quickneſs of the remedy, the *aſſize* had the advantage,

advantage, becauſe none of this preparation was required beforehand, for the writ of *aſſize* came down to the aſſizes, and the jury was there warned, the *cauſe* tried, and *judgment* given; yet the method in ejectment, from the conveniency of the repeated trials, notwithſtanding the previous preparations, was generally preferred.

Thus it ſtood till the time of the Lord Ch. J. Rolls, and he invented the rule now in uſe, which is, that if the defendant comes into the room of the *caſual ejector*, he ſhould enter into a rule to confeſs *leaſe*, *entry*, and *ouſter*, and ſhould ſtand upon the *title* only. This rule was reaſonable, becauſe when the plaintiff had made his *leaſe* upon the *land*, any third perſon that came upon the land, *animo poſſidendi*, in ſtrictneſs of law was an ejector; therefore when any other ejector was placed in his ſtead, it was very reaſonable in the Court to impoſe terms upon him; and therefore the proper terms were, that he ſhould not ſtand on the proof of an *actual entry*, *demiſe*, *and actual ouſter*, becauſe this was no more than a form of bringing the title in queſtion, it was not fit that the plaintiff ſhould be nonſuited for want of proving the formal demiſe ſet forth in the declaration, when the caſual ejector would have let the judgment go by default. Ld. Ch. Bar. Gilb. Law of Ejectments, 2.

(D) Rules.

1. EXCEPTION taken in ejectment, becauſe the *original bore teſte the ſame day the ejectment was made*, and adjudged good per tot. Cur. Brownl. 129. Trin. 13 Jac. Beamont v. Coke.

2. In ejectment we rarely grant a *new trial*, for they may try the title over again. Per Withens J. Cumb. 18. Paſch. 2 Jac. 2. B. R. Eſpecially after a trial at bar. 7 Mod. 156. Hill. 1 Ann. B. R. Grovenor v. Fenwick.

3. Fifteen days between *teſte and return* need not be in a *ſcire facias* on a judgment in ejectment, becauſe an ejectment is a mixt action. Cumb. 68. Mich. 3 Jac. 2. B. R. Cart v. Mogg.

4. In caſe of ejectment it is always denied to *amend the memorandum*. Per Thomſon. Cumb. 74. Hill. 3 & 4 Jac. 2. B. R.

5. The demiſe being laid before the leſſor of the plaintiff had any title, the Court was *moved for leave to* amend the declaration and *alter the time of the demiſe*, ſed non allocatur; for the altering the time will make it a new demiſe. Carth. 178. Hill. 2 & 3 W. & M. in B. R. Bennet v. Gandy. S. P. Carth. 401. Puleſton v. Warburton. —— 1 Salk. 48. S. C. —— 5 Mod. 332. S. C.

6. *But* where a demiſe was made *by the rector and ſcholars of Exeter college* generally, which was to try the right of the rectorſhip, but which could not be done upon that declaration, and ſo not good, it was ordered, upon motion, *to alter the demiſe* in the declaration, *and lay it to be made by Painter, rector of Exeter, and the ſcholars of the ſame*. Carth. 180. Hill. 2 & 3 W. & M. in B. R. Philips v. Bury. [327]

7. Though the *leſſor* is principal by the courſe of the Court, yet legally he *is a ſtranger to the record*, and therefore cannot be *eſtopped*; per Holt Ch. J. Cumb. 249. Paſch. 6 W. & M. in B. R. Smartle v. Williams.

8. In ejectment for *empty houſes*, a leaſe was ſealed upon the land, and a declaration delivered to the caſual ejector, and judgment and execution had; yet, becauſe they had *not moved for a peremptory rule to plead*, the judgment was ſet aſide; and in ſuch caſe there *muſt be affidavit of the ſealing of the leaſe, entry*, &c. 1 Salk. 255. pl. 3. Hill. 8 W. 3. B. R. Smartley v. Henden.

9. *And* where a judgment in ejectment was *by confeſſion*, an amendment of the time of the demiſe was made in the declaration cited Carth. 401. Paſch. 9 W. 3. B. R. as the caſe of PARR v. CAWLEY; but that being a judgment by conſent of parties, was held no authority in the principal caſe of Puleſton v. Warburton.

10. *Ligni* was denied to be *amended and made boſci*; cited by the reporter. Carth. 402. Paſch. 9 W. 3. B. R. as the caſe of Thompſon v. Leech.

11. After a whole *term elapſed* without doing any thing, the plaintiff muſt give *new notice*, 1 Salk. 257. pl. 9. Trin. 10 W. 3. B. R. Anon.

12. Nobody can complain of an *irregularity* in an ejectment but the tenant in poſſeſſion, or the landlord. 1 Salk. 256. pl. 7. Hill. 11 W. 3. C. B. Hollingworth v. Brewſter.

13. The Court will not make a *rule for naming a good leſſor* in ejectment, unleſs there were a nonſuit or verdict againſt plaintiff in a former trial. 12 Mod. 445. Hill. 12 W. 3. Anon.

(E) As to the Delivery.

1. IT is ſufficient upon an action of treſpaſs and ejectment brought to try the title of land, if the *tenant in poſſeſſion of the land have a copy of the declaration in* ejectment *delivered to him or his wife*, although he be but an under-tenant of the land, and although no notice thereof is given to the proper tenant, or to the owner of the land, whoſe title is concerned. Hill. 23 Car. B. R. and Paſch. 24 Car. B. R. For the *poſſeſſion of the land is only recoverable in this action*, and that doth chiefly concern the tenant in poſſeſſion of it; and it is the property in law that is to defend the title. L. P. R. 237.

2. *Declaration* in ejectment *delivered to a ſervant* is ill in B. R. but it is allowed in C. B. Cumb. 47.—Such ſervice and *acknowledgment* of the tenant that he received it, is ſufficient. 1 Salk. 255. Hill. 10 W. 3. B. R. Anon.

3. Declaration in ejectment had been delivered *to one to whom the keys were given to let the houſe*, and per Cur. not good, becauſe it ſhould be to the tenant in poſſeſſion, and he is only a ſervant; and plaintiff is not without remedy, for he may ſign a leaſe on the land. 12 Mod. 313. Mich. 11 W. 3. Anon.

(F) As to the Term expiring.

1. IN ejectment, if the term *expires, pending the ſuit*, the plaintiff ſhall go on to *recover damages*; for, though the action is at an end quoad the poſſeſſion, yet it continues for the damages after the term ended; Arg. 3 Mod. 249. cites 1 Inſt. 285.

2. Tenant for years has judgment in ejectment, and the term incurs; then he brings a *ſcire facias quare executionem habere non debet of the land and his damages and coſts*, and a demurrer to the ſcire facias, and the Court held the ſcire facias ill; for, though he may have a ſcire facias for damages and coſts, yet this being for the term likewiſe which was incurred, it was ill, and a *new ſcire facias* ought to be; afterwards, in the next term, it was argued by Holt, that the ſcire facias was good for the damages, but not allowed. A new ſcire facias was granted. Skin. 161. pl. 10. Hill. 35 Car. 2. B. R. Sedgwith v. Groſton.

3. The Court compelled the defendant to conſent to the *enlargement of a term* in an ejectment leaſe. Comb. 50. Paſch. 3 Jac. 2. B. R. Dighton v. Greenvill. Carth. 3. Dickens v. Greenvill, S. C. ruled accordingly.

——S. C. cited Carth. 400.——Denied to be enlarged without parties conſent, where the party was hung up by injunction, ſo that the term expired. 1 Salk. 257. pl. 8. Paſch. 12 W. 3. B. R. Anon.
——After a ſpecial verdict in ejectment, the term expired, and the Court refuſed to enlarge it without the defendant's conſent. Carth. 402. Paſch. 9 W. 3. B. R. cites it as the caſe of Hutchins v. Baſſet, but that in the caſe of Dighton v. Greenvill, the term was enlarged, though the defendant refuſed to conſent.

4. Leaſe for five years, and verdict for plaintiff; but he was delayed of judgment and execution by *injunction*, out of Chancery, till the *term expired*. Upon motion to *renew the term*, it was ſaid to have been done in the caſe of DANGDELL v. GREENVILL, and it was frequently done in the Exchequer, and Gould J. ſaid, that in SIR JOHN ROLL'S CASE they held it might be done by conſent, but not otherwiſe; but the motion was denied. 6 Mod. 130. Paſch. 3 Ann. B. R. Anon.

(G) Where a ſecond, &c. Ejectment is brought.

1. MOTION to ſtay proceedings on a *ſecond ejectment*, the coſts of the firſt not being paid. Per Cur. we never grant this without an affidavit that it is the ſame land, the ſame leſſor, and the ſame title. Comb. 59. Trin. 3 Jac. 2. B. R. Ibid. 106. Tredway v. Herbert, S. P.—— Plaintiff recovered, but had no *coſts*; then defendant brought ejectment. The plaintiff in the firſt action prayed his coſts before he pleaded, but denied, becauſe he had no vexation, the verdict being for him; but had the verdict been againſt him, or he had been nonſuited, he muſt have paid coſts before he brought a new action. 4 Mod. 379. Hill. 6 W. & M. in B. R. Roberts v. Cook.

2. It is a known maxim in law, that *a man may try his title as often as he pleaſes in an ejectment*, and therefore Lord Cowper denied [329]

nied to grant a perpetual injunction (after ſeveral trials) to ſtop all further proceedings in law. 10 Mod. 1. Trin. 8 Ann. in Canc. Anon.

3. Where a plaintiff *brought a ſecond ejectment*, it was ordered he ſhould not proceed unleſs be paid the *coſts of the firſt*. 8 Mod. 226. Hill. 10 Geo. Crundell v. Bodily.

(H) Of altering the Defendant or Plaintiff.

1. IF *one moves* that the title of land belong to him, and that the plaintiff made an ejector of his own, and thereupon prays that giving ſecurity to the ejector to ſave him harmleſs, *he may defend the title*, this Court of C. B. will grant it, but not compel the plaintiff to confeſs leaſe, entry, and ouſter, except he will be ejector himſelf; but it is otherwiſe in B. R. for there in both caſes they will *compel* him to confeſs leaſe, entry, and ouſter; per Pinſent Prothonotary. But quære, &c. Sty. 368. Hill. 1652. C. B. Anon.

2. After declaration delivered, and *before plea pleaded*, he that had the title moved the Court to *alter the plaintiff*, he being a witneſs in the cauſe; and the Court agreed, on payment of coſts, and giving ſecurity for new coſts, and this as it ſeems without imparlance. Sid. 24. pl. 5. Hill. 12 Car. 2. C. B. Anon.

3. No man is to be *admitted tenant* or defendant in ejectment, by the common rule, unleſs he has been in poſſeſſion, or received rents, and not a mere ſtranger; per Holt Ch. J. Cumb. 209. Trin. 5 W. & M. in B. R.

4. *Landlord* may be joined a defendant if he requires it, but is not compellable. 1 Salk. 256. pl. 6. Trin. 11 W. 3. B. R. Underhill v. Durham.

5. It is due of right to *tenant in poſſeſſion*, or landlord, to be made defendant, and ſo a *pretended wife*, but who denied the marriage, was made defendant. 7 Mod. 70. Mich. 1 Ann. B. R. Fenwick v. Gravenor.

6. *Truſtees* are not to be joined with the tenant as defendants in ejectment without their conſent. Cumb. 332. Trin. 7 W. 3. B. R. Jones, leſſee of Pride, v. Carwithen.

7. A *peer intereſted* made defendant in ejectment with tenant in poſſeſſion, which the Court thought reaſonable, and ſaid there may be ſeveral coſts notwithſtanding. Cumb. 339. Trin. 7 W. 3. B. R. Jones, leſſee of Pride, v. Carwithen.

Where the act ſays, that in caſe judgment in ejectment be had againſt the tenant in poſſeſſion, on his refuſing or neglecting to

8. 11 *Geo.* 2. *cap.* 19. *ſ.* 13. *Landlord may make himſelf defendant by* joining with the tenant *to whom ſuch declaration in ejectment ſhall be delivered, in caſe he ſhall appear; but in caſe ſuch tenant ſhall refuſe or neglect to appear, judgment ſhall be ſigned againſt the caſual ejector for want of ſuch appearance; but if the landlord of any part of the lands, tenements, &c. for which ſuch ejectment was brought, ſhall deſire to appear by himſelf, and conſent to enter into the like rule that, by the courſe of the Court, the tenant in poſſeſſion, in caſe he had appeared,*

ought

ought to have done, then the Court where ſuch ejectment ſhall be brought, ſhall and may permit ſuch landlord ſo to do, and order a ſtay of execution upon ſuch judgment againſt the caſual ejector, until they ſhall make further order therein.

appear, (no notice being given to the landlord,) the landlord may move,

that execution may be ſtayed on entering into a rule to become defendant himſelf in another * ejectment, &c. yet in caſe *judgment is ſigned ſo late in the term that the landlord cannot apply for a ſtay of execution*, yet upon application by the landlord as ſoon as may be, the Court will ſet aſide the execution, upon this judgment, although the words are only (ſtay execution). M. 12 Geo. 2. in B. R. in caſe of Sir William Clayton v. Boone.

Before this act the rule of Court upon the *tenant's, in poſſeſſion, refuſing or neglecting to appear* was, that the landlord might be made *defendant una cum the tenant, but not alone*, till this act, and the caſe in 12 Mod. 211. cited to the contrary was denied to be law; per Cur. M. 12 Geo. 2. B. R. in caſe of Sir Wm. Clayton v. Boone.

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(I) Ejector. Who.

1. IF a *feme covert* eject one, and after the *huſband aſſents*, yet the huſband is no ejector; for an ejectment *is made in an inſtant*, and hath not a continuance. Otherwiſe of a diſſeiſin; per Anderſon J. Noy, 52. Broth v. Archer.

2. *A ſervant dwelling with the pretended owner* of a houſe, of which ejectment is brought, is a ſufficient treſpaſſor or ejector againſt whom to bring the ejectment. Brownl. 143. Mich. 6 Jac. Wilſon v. Waddell. Yelv. 145. S. C.

(K) Of what it lies.

1. EJECTMENT *does not lie of the heir*, but raviſhment of ward. Br. Ejectione, &c. pl. 13. cites 30 E. 3. 11.

2. Ejectment lies *de paſtura ad centum oves*; per Wray and Southcote; for if præcipe quod reddat lies as is held in 27 H. 8. he may have ejectment. Dal. 95. pl. 20. anno 15 Eliz. B. R. Anon. Hardr. 58. Arg. cites 16 E. 2. Warrantia Chartæ.

[Garrante de Chartres, pl. 31.] that ejectment lies not de paſtura.

3. Leſſee, for years, of tithes, ſhall have ejectment of *tithes ſet out and afterwards carried away*; for by the ſetting out, the property is in the parſon. Ow. 84. Mich. 14 & 15 Eliz. Tottenham v. Bedingfield.

4. A leaſe was of a *garden containing three roods of land.* Leſſee brings ejectment, and *declares for three roods of land.* Meade and Windham J. but Dyer, e contra, held the declaration good; for that this action is in nature of treſpaſs, and the party may elect to declare, as here he does, or of the ejectment of a garden; for a garden may be uſed at one time for a garden, and at another time be ploughed and ſown with corn; but they conceived the better order of pleading had been to have declared, that he was ejected of a garden containing three roods of land, as in the leaſe is ſpecified. Godb. 6. pl. 7. Hill. 23 Eliz. C. B. Anon.

5. Eject-

5. Ejectment *de quadam fabrica* was held good; Hardr. 58. mentions it as a case cited by Wray Ch. J. as adjudged 29 Eliz.

Cumb. 101. S. P.—— Ejectment was brought of an house,

6. A *chamber* may be demanded by the name of a house, and part of a messuage by name of a messuage. Per Walmsley. Le. 152. pl. 210. Trin. 31 Eliz. C. B. in case of Hayes v. Allen.

the jury found the defendant guilty of two parts of it; per Manwood, judgment ought to be for the plaintiff; for omne majus continet in se minus; but, per Shute, if the count * had been of two parts of an house, and the defendant had pleaded not guilty, and the jury had found him guilty, the plaintiff should not have judgment. Sav. 27. pl. 65. Pasch. 24 Eliz. Anon. —— If a *man has title but to part of a house*, he may well declare *for the whole* in an ejectment, and the jury ought to find such part or so many feet of the house; and he shall have judgment and execution accordingly; per Pollexfen, and not denied per Cur. Comb. 101. Mich. 4 Jac. 2. B. R. Anon.

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Le. 328. S. C.

7. Ejectment doth lie of a *copyhold estate*; it lies of a lease made by a copyholder, but not of a demise made by the lord of a copyholder by copy of court roll. Cro. E. 224. pl. 9. Pasch. 33 Eliz. B. R. Cole v. Wall and Burnell.

8. It was adjudged that an ejectione firmæ lies not *of a close*, although a name be given unto it, but it ought to be demanded by a certain number of acres; and for this cause a former judgment was reversed. Cro. E. 339. pl. 3. Mich. 36 & 37 Eliz. B. R. Jordan v. Cleabourn.

9. Ejectment was brought *de una virgata terræ*, but adjudged that it does not lie. Cro. E. 339. at the end of pl. 3. in a nota, cites Pasch. 38 Eliz. in Cam. Scacc. Penn v. Merevill.

Dw. 18. S. C. and judgment reversed in the Exchequer chamber.—— Hetl. 176. has a note that it was said that an ejectione firmæ

10. Ejectione firmæ *de una pecia terræ vocat. M.* furlong. una pecia terræ vocat. Ashbrooke, *uno gardino vocat. Minching-Garden*, quæ omnes & singulæ parcellæ terræ jacent in W. It was assigned for error that pecia terræ is uncertain, and so the declaration not good. And, 2dly, because no place certain is alleged in which the garden is; and, for these causes, judgment in B. R. was reversed in Cam. Scacc. Mo. 702. pl. 976. Trin. 39 Eliz. Palmer v. Humfrey.

does not lie de una pecia terræ, although it was added, containing by estimation half an acre of land, vocat', &c. it is not good, but he ought to shew the longitude and latitude.

11. If it lies of *a park*, quære? without saying so many acres. 1 Sid. 417. D. 115. b. at 67. Marg. Trin. 43 Eliz. B. R. Merideth v. Brow.

Cottagium is a word known at common law,

12. It lies *de cottagio*; adjudged. Cro. E. 818. pl. 9. Pasch. 43 Eliz. B. R. Hill v. Giles.

Cro. C. 555. per Jones and Brampston, in pl. 10. —— An ejectment does lie of a cottage, because the description of the thing by that name is sufficient, and certain enough to shew the sheriff of what to deliver the possession of; yet it was said that a recovery lies not of a cottage. Sty. 215. Pasch. 1649. Hamond v. Ireland. —— Lev. 58. Hill. 13 & 14 Car. 2. S. P. accordingly per Cur. in Dacre's case.

Noy, 37. S. C. and adjudged well brought; for it need not be demanded by

13. Ejectione firmæ *de pomario*. After verdict it was moved, that an ejectione firmæ lies not thereof, nor more than a præcipe quod reddat. Sed non allocatur; for this action is but personal, wherein damages are the principal; and although it is usual in this case to award an habere facias possessionem, yet it is well enough, and comprises sufficient certainty. Wherefore it was adjudged

adjudged for the plaintiff. Cro. E. 854. pl. 15. Trin. 43 & 44 Eliz. B. R. Wright v. Wheatley.

the name of a garden, as a præcipe ought to be. And Popham ſaid, that 18 Eliz. an ejectment was brought de pomario, and well brought. —Cro. J. 654. pl. 3. Hill. 20 Jac. B. R. Royston v. Eccleston. S. P. adjudged accordingly; for an ejectment is but an action of treſpaſs in its nature. ——S. C. cited Roll. Rep. 55. in pl. 29. ——Lev. 58. S. P. mentioned as reſolved upon view of precedents in C. B.

14. Ejectment lies not of a *copyhold*, unleſs the plaintiff declare the cuſtom, the leaſe, and the ejectment. Mo. 679. pl. 927. Hill. 45 Eliz. C. B. Gregory v. Harriſon.

Le. 100. pl. 128. Paſch. 30 Eliz. B. R. Rumny v. Eve, e contra, for that ſhall come of the other ſide. ——In ſuch he ought to ſhew the eſtate of his leſſor, and the licence of leſſor, and the eſpecial cuſtom to warrant it. Cro. E. 469. pl. 20. Hill. 38 Eliz. B. R. Wells v. Partridge.

15. Ejectment was brought of *land, and a coalpit in the ſame land*, and though it was objected that it was *bis petitum*, yet it was held good; becauſe it is a perſonal action, and he demands nothing certainly. Cro. J. 21. pl. 1. Hill. 1 Jac. B. R. Harbottle v. Peacock. [332]

16. In error of a judgment, in Durham, of an ejectment of a *coal mine*, it was reſolved, that it well lies thereof. Cro. J. 150. pl. 9. Hill. 4 Jac. B. R. Commyn v. Kineto.

Noy, 121. Comyn v. Wheatly. S. P. accordingly, and ſeems to be S. C. ——S. C. cited 2 Roll. Rep. 483. as adjudged. ——S. C. cited Hardr. 57. in pl. 3.

17. Ejectment lies of *boyllary of ſalt*; cited by Tanfield. Cro. J. 150. Hill. 4 Jac. B. R. in pl. 9. as adjudged in B. R. in Wyld's caſe.

S. P. and there was no doubt of its lying. Noy, 132. Sanders v. Patridge. ——Sid. 161. pl. 16. Mich. 15 Car. 2. B. R. Smith v. Barret. S. P. admitted, the caſe there being of eight boylaries out of 372, and found for the plaintiff. —— Lev. 114. Smith v. —— S. C.

18. Ejectment was brought *de aquæ curſu, called Lothar in L.* and *declares upon a leaſe made by D. de quodan rivulo & aquæ curſu*; and by the opinion of the whole Court the judgment was reverſed, for rivulus ſeu aquæ curſus lie not in the demand, nor doth a præcipe lie of it, nor can livery and ſeiſin be made of it, for it cannot be given in poſſeſſion; but it appears by 12 H. 7. 4. the action ought to be of ſo many acres of land aqua cooperta. Brownl. 142, 143. Mich. 6 Jac. Challenor v. Thomas.

Ejectment lies not of a *watering-courſe*, but it lies of *terra aquâ cooperta*; Arg. Poph. 167. cites 11 H. 7. 4. and Mich. 6 Jac. Challoner v. Moor. ——Lat. 153. S. C. cited; is adjudged becauſe it is not a thing fixed but always errant. ——It lies *de aquæ curſu*. Godb. 157. pl. 213.

19. An ejectment will well lie of a *ſtange*, for a præcipe lies of them, and a woman ſhall be endowed of the third part of them, as it is in 11 E. 3. But if the land under the water or river do not pertain to the plaintiff, but the river only, then upon a diſturbance his remedy is only by action upon the caſe, upon any diverſion of it, and not otherwiſe. Quod nota. Brownl. 143. in S. C.

20. Eject-

3 Keb. 738. pl. 36. Hill. 28 & 29 Car. 2. B. R. in caſe of

20. Ejectment lies not of *common of paſture*, or of *ſheep-gate*. Brownl. 129. in caſe of Weekes v. Meſey, ſays it was ſo adjudged. Paſch. 9 Jac.

Barton v. Hampſhire, it was admitted by Twiſden and Cur. that ejectment would not lie of common alone, but it being after verdict, it ſhall be intended appurtenant, and ſo well enough.——Though an ejectment will not lie of a common by itſelf; yet when land is joined in ejectment, it ſhall be intended appurtenant to the land; Arg. and to this the Court inclined; et adjornatur. Freem. Rep. 447. pl. 608. Hill. 1676. Anon.

Palm. 337. S. C. adjudged accordingly.

21. Ejectment lies *de una domo*. Cro. J. 654. pl. 3. Hill. 20 Jac. B. R. Royſton v. Eccleſton.

——S. C. cited per Cur. 5 Lev. 97. Hill. 34 Car. 2. C. B.——Ejectment does not lie *de una domo*; agreed, becauſe it may be either a dove-houſe or a dwelling-houſe; and ſo the ſheriff has no certainty as to making execution. 2 Roll. Rep. 483. Mich. 22 Jac. B. R.——S. C. cited Arg. Hardr. 76. as the caſe of Warren v. Walker.——But ejectment de una domo *vocat. Holts*, &c. it was adjudged good and certain enough. Hardr. 76. Arg. cites Paſch. 1650. B. R. Fry v. Petchey.

* *Domus* eſt nomen collectivum contains many buildings, as barns, ſtables, &c. 4 Le. 16. pl. 36. 33 Eliz. B. R. Hore v. Briddleworth.——2 Le. 184. pl. 230. Mich. 32 Eliz. B. R. Hore v. Wriddleſworth, S. C. in totidem verbis.

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23. An ejectment lies of *underwood*, though a præcipe does not. 2 Roll. Rep. 482, 483. Mich. 22 Jac. Warren v. Wakely.

Though an ejectment lies of a manor, or of the *moity of a manor*, if

24. An ejectment cannot be of a *manor*, becauſe there cannot be an ejectment of the *ſervices*, but if they do expreſs farther *a quantity of acres*, it is ſufficient. Per Richardſon and Hutton J. Het. 81. Paſch. 4 Car. C. B. cited by them to be Hurtſton's caſe.

attornment of the tenants may be proved, yet it is not ſafe to bring ejectment of a manor. Het. 146. Mich. 5 Car. C. B. Warden's caſe.

Jo. 321. pl. 6. Badwyn v. Wine, S. C. but ſtated that the ejectment was for tithes belonging to the rectory of D.

25. Ejectione firmæ of a leaſe *of tithes appertaining to ſuch a chapel*. It was ſaid it did not lie of tithes only, but that it might of ſuch a rectory, or ſuch a chapel, and of the tithes thereunto belonging, ſo as he may be ejected from a thing in poſſeſſion whereof an habere facias poſſeſſionem may be, but not of tithes only; Curia adviſare vult. But afterwards adjudged for the plaintiff. Cro. C. 301. pl. 4. Paſch. 9 Car. B. R. Baldwin v. Wine.

in R. and A. and that after verdict for the plaintiff, it was moved that the declaration was not good, becauſe it did not allege that the tithes were appertaining to the rectory of D. and for cauſe it was adjudged per tot. Cur. quod querens nil capiat per breve.——Mar. 32. in pl. 66. Trin. 15 Car. Jones J. ſaid, it had been adjudged that an ejectment will lie of tithes.

Cro. J. 146. Hill. 4 Jac. B. R. in caſe of Molineux v. Molineux. S. P. doubted.——An ejectment will not lie

26. A judgment in B. R. in Ireland, in an ejectione firmæ, brought there *de piſcaria in ſuch a river*, was reverſed in B. R. here, becauſe an ejectione firmæ lies not thereof, no more than of a common apprendre, or a rent; Arg. and the Court held that ejectment would not lie of a fiſhery. Cro. C. 492. pl. 17. Mich. 13 Car. B. R. Herbert v. Laughluyn.

of a fiſhery, nor in any caſe but where there may be an entry and expulſion; and that cannot be of a fiſhery, eſpecially in this caſe, where it was of a fiſhery *in the river Tyne*, which cannot paſs by the name of ſo many acres aqua co-opert', becauſe it is not like a pond, where the very ſoil is the property of another; but this is only a freedom to fiſh in that river. 8 Mod. 277, 278. Trin. 10 Geo. in caſe of Waddy v. Newton.

27. In

27. In ejectment it was doubted whether it well lie *de uno crofto*, becauſe it is a word of uncertain ſignification. Sty. 30. 364. Trin. 23 Car. and Hill. 1652. Aſhworth v. Staley. But Sty. 194. Hill. 1649. Roll. Ch. J. ſaid, that ejectment would lie de uno crofto.——Per Twiſden J. though an ejectment will not lie of a croft, yet it will lie de uno crofto called Black-acre; for this is certain enough to be delivered in execution, and ſo he ſaid it was adjudged in one Fairbeard's caſe. Lev. 51. Hill. 13 & 14 Car. 2.

28. An ejectment lies not of 3000 *acres of waſte*, becauſe the word waſte is uncertain, and may contain land of any quality, and the ſheriff will be at a loſs what land to deliver; adjudged. Hardr. 57, 58. Paſch. 1658. Hancock v. Price.

29. Ejectment was brought inter alia *de uno ſtabulo*. It was moved that it did not lie; but, upon view of precedents in C. B. of recoveries ſuffered de ſtabulo, it was reſolved that it well lies. Lev. 58. Hill. 13 & 14 Car. 2. Dacres's caſe. Keb. 236. pl. 65. Whitacre v. Dacres, S. C. and held that it lies.

30. Ejectment will not lie of a *free warren*. Keb. 500. pl. 55. Paſch. 15 Car. 2. B. R. Tremain v. Sands.

31. An ejectment lies not *de pannagio*, which is but a privilege to take pannage; adjudged. Lev. 212. Hill. 16 & 17 Car. 2. Pemble v. Stern. [334]

32. Ejectment lies *of a cloſe*, if a name be given to it; per Cur. Cro. J. 654. in pl. 3. Hill. 20 Jac. B. R. Palm. 338. S. P. per Cur. that it lies of a cloſe containing 3 acres of land, and that ſo it has been adjudged here, becauſe it is ſufficient for the ſheriff to give poſſeſſion upon; but that otherwiſe it lies not.——If it does not ſay how many acres, it is ill. Sid. 229. at the end of pl. 26. cites it as adjudged. Mich. 18 Car. 2.

33. Where a *ſtatute is extended* it cannot be tried in an ejectment if it be *ſatisfied or not*, but the only remedy is by ſcire facias ad comp. or bill in Chancery; but where land is extended on an *elegit*, the debt and yearly value appears on record, and it may be well known when the debt is paid, and may come in evidence on a trial in ejectment. Vern. 50. pl. 49. Paſch. 1682. Arg. Earl of Huntington v. Greenvill.

34. Ejectment lies not *de tenemento*. Cro. E. 116. pl. 20. Mich. 30 & 31 Eliz. B. R. in caſe of Auſtin v. Courtney.

35. *De mineris carbonum* in parochia de D. &c. generally, *not ſaying how many* mines, &c. Upon error brought, the Court inclined that the judgment was erroneous; but then the plaintiff produced ſeveral precedents in Durham, and *alleged that all the entries in Durham*, in ejectments for coal mines, *were the ſame as in this caſe*; ſo the judgment was affirmed. Carth. 277. Paſch. 5 W. & M. in B. R. Andrews v. Whittingham. 1 Salk. 255. pl. 2. Whittingham v. Andrews, S. C. and becauſe it was the conſtant courſe in Durham, that judgment was affirmed. —— 4 Mod. 143. S. C. and judgment affirmed for the ſame reaſon.—Comb. 201. Ambroſe v. Whittingham, S. C. Holt Ch. J. heſitavit; but the judgment was affirmed.——Show. 364. S. C. but no judgment.

36. An ejectment was brought in the Exchequer *de minutis decimis*, and, upon not guilty pleaded, verdict for the plaintiff; and Mr. Cheſhyre, about five or ſix years ago, moved in arreſt of judgment, that an ejectment would not lie for ſmall tithes. 1ſt, Becauſe eggs are ſmall tithes, and it is abſurd to ſay, that an ejectment

ejectment would lie of an egg. 2dly, Becauſe the ſheriff does not know of what he is to deliver poſſeſſion upon an habere facias poſſeſſionem, ſed non allocatur; becauſe it has been adjudged that an ejectment lies *of wool*, being tithe, and by the ſame reaſon, for an egg; and therefore, by all the barons, judgment was given for the plaintiff, and cited 11 Rep. 25. Ex relatione m'ri Cheſhire. 2 Ld. Raym. Rep. 789. Trin. 1 Ann. Camell v. Clavering.

(L) Of what it lies. By what Name or Deſcription.

1. *EJECTMENT of ward lies not of the body, but* only of the *land*, and *raviſhment of ward and body.* Br. Ejectione, pl. 10. cites 14 E. 3.

2. An ejectione firmæ was brought *de uno cubiculo*, and exception was taken to it; but the exception was diſallowed. The declaration was ſpecial, viz. of a leaſe unius cubiculi, per nomen unius cubiculi, being in ſuch a houſe, in the middle ſtory of the ſaid houſe. And the declaration was holden good enough; and the word cubiculum is a more apt word than the word camera; [335] and ſuch was the opinion of Wray Ch. J. 3 Le. 210. pl. 275. Trin. 30 Eliz. B. R. Anon.

3. And it was ſaid that ejectione firmæ brought *de una rooma* had been adjudged good in this court. 3 Le. 210. in S. C.

3 Le. 228. pl. 306. S. C. and held that as to the four acres it is certain enough; for the words (to the ſame belonging) are merely void; and plaintiff recovered damages and had judgment. ——— Ejectment de meſſuagio ſive tenemento, is not good for the uncertainty. Poph. 197. Mich. 2 Car. Anon. ——— S. P. and a judgment in C. B. was reverſed for the uncertainty. Noy, 86. Rocheſter v. Keckhouſe. ——— Cro. J. 125. in pl. 9. cites S. P. to have been adjudged ill. ——— Sid. 295. pl. 17. Trin. 18 Car. 2. B. R. Burbury v. Yeomans. S. P. ruled accordingly. And it was ſaid per Curiam, that as this caſe is, the plaintiff cannot aid himſelf by releaſing of the party, as perhaps he might if there had been lands alſo in the declaration. But Twiſden ſaid, that if it had been de uno meſſuagio ſive tenemento vocato the Black Swan, &c. it had been good; becauſe that would have aſcertained it. ——— 2 Keb. 82. pl. 81. S. C. ——— 3 Mod. 238. Trin. 4 Jac. 2. B. R. Hexham v. Coniers. S. P. adjudged accordingly; for tenement is a word of an uncertain ſignification; it may be an advowſon, a houſe or land, but meſſuagium ſive tenementum, called the Black Swan, would be good. ——— So *de burgo ſive tenemento* is not good any more than de meſſuagio ſive tenemento; adjudged. Poph. 203. Mich. 2 Car. B. R. Rocheſter v. Rickhouſe. ——— But *pro uno meſſuagio ſive burgagio* in hay infra muros, the Court held it to be good, and that an ejectment lies well de burgagio; and that meſſuagium & burgagium ſignify the ſame thing in a borough. Hardr. 173. pl. 2. Mich. 12 Car. 2. in Scacc. Danvers v. Wellington.

4. Ejectione firmæ; the declaration was *de uno meſſuagio ſive tenemento* and four acres of land to the ſame belonging; the Court held clearly that no judgment ſhould be given for the meſſuage, and land cannot be properly ſaid to belong to an houſe; yet it was good for the four acres. The plaintiff releaſed his damages, and judgment was given accordingly. Cro. E. 186. pl. 8. Trin. 32 Eliz. B. R. Wood v. Payne.

* Cro. E. 339. pl. 3. Mich. 36 & 37 Eliz. B. R. Jor-

5. Ejectione firmæ *of ſeven cloſes, one called Green Mead, and ſo gave to the other ſeveral names;* is well enough; for when a name is given to every cloſe, although *the * contents of the acres are not mentioned*, viz. ſo many of land, ſo many of paſture, &c. it is ſufficient,

ſufficient, though it were more formal to expreſs the acres; and it is aided by the ſtatute of jeofails, and the Court is aſcertained of the truth. And Popham Attorney ſaid, he had known it thrice ſo adjudged; and the plaintiff had judgment. Cro. E. 235. pl. 1. Paſch. 33 Eliz. in Scacc. Jones v. Hoel.

dan v. Cleabourne, S. P. but the Court was divided, though the cloſe had a name given to it, & adjornatur.——Godb. 53. pl. 66. Mich. 28 & 29 Eliz. B. R. the number of acres ought to be ſet forth; and ſays, that ſo it was adjudged in a Shropſhire caſe.——In ejectment of a cloſe, if he does not give it a name, nor declare of what nature the land is, it is not good; per Roll. Ch. J. Sty. 193, 194. Hill. 1649. Meers v. French.

6. An ejectment lies not *de coquina, (Anglice, a kitchen,)* becauſe of the uncertainty; for any room by uſage may be made a kitchen. Adjudged, though a caſe in 2 Jac. was cited, where it was adjudged that it lay pro coquina. Noy, 109. Trin. 2 Jac. Ford v. Lerk.

It was ſaid at bar that 3 Jac. in C. B. an ejectment de coquina was held not good, but that it has been adjudged here by bill to be good enough; but Coke ſaid, it ſeems to be good enough by writ.——S. C. cited Roll. Rep. 55. in pl. 29. to have been adjudged not good.

7. An ejectment lies not of *a cloſe containing three acres, without ſhewing of what nature* the acres are, as land, meadow, paſture, wood, &c. becauſe the poſſeſſion is to be recovered by habere facias poſſeſſionem, and muſt follow the form of other writs of like nature, as a writ of right, of ward, ejectment de gard, &c. Adjudged, and judgment arreſted accordingly, though the name of the cloſe was inſerted in the declaration. 11 Rep. 55. Mich. 12 Jac. Savill's caſe.

Roll. Rep. 55. pl. 29. Hammond v. Savil, S. C. adjudged againſt the plaintiff.—The name and quantity will not ſerve without the quality, and certainty ought to be compriſed, becauſe the poſſeſſion is to be recovered *. Bridgm. 56. cites S. C.——S. C. affirmed for law by Holt Ch. J. 1 Salk. 254. in pl. 1. Paſch. 4 W. & M. in B. R.——Cro. J. 124, 125. in pl. 9. S. P. per Cur. that both the certainty of the land ought to be ſhewn, and in what place it lies.

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8. *De una pecia* paſturæ *continen.* 201. *Acras terræ ſive plus ſive minus jacent' inter terras B.* This, after verdict given, was held ill, & nihil capiat per billam. Jo. 400. pl. 9. Mich. B. R. Anon.

9. An ejectment did not lie *de* 50 *acris montani*, becauſe that may contain arable, wood, paſture, or other ſpecies. Upon a writ of error upon a judgment out of Ireland, it was for this reaſon reverſed. Palm. 100. Paſch. 17 Jac. Stafford v. Macdonnough.

See this caſe denied to be law, in caſe of Kildare v. Fiſher. (Sup. pl. 19.)

12. A judgment in ejectione firmæ was reverſed, becauſe the declaration was *of a meſſuage, and of* 40 *acres of land, meadow and paſture thereto appertaining*, and it was *not ſet forth how much* there was *of each* of them. Cro. C. 573. pl. 13. Hill. 15 Car. B. R. Martin v. Nichols.

13. Ejectment *de uno repoſitorio* was found for the plaintiff. Upon error brought, Crooke and Berkley held, that repoſitorium ſhould be intended a warehouſe; but Brampſton and Jones held that it was uncertain, and the greater opinion of the juſtices at Serjeant's-inn was, that it was not good; whereupon Berkley retracted his opinion, and the judgment was reverſed. Jo. 454. pl. 2. Paſch. 16 Car. B. R. Sprigg v. Rawlſon.

Mar. 96. pl. 166. Sprigg v. Rawlenſon, S. C. adjudged accordingly.—Cro. C. 554. pl. 10. S. C. it was objected, that repoſitorium is a cupboard as well as a warehouſe, and a cupboard is a perſonal thing, of which ejectment will

will not lie. The Court was divided, and would adviſe; and they continuing afterwards divided, the defendant in error commenced a new action, and conſented that this judgment ſhould be reverſed.—— S. C. cited Mar. 134. by Brampſton Ch. J. but he ſaid it would have been good if it had been ſaid, Anglice, a warehouſe.

14 Ejectment was brought *de quatuor molendinis, without expreſſing whether* they were *wind-mills or water-mills.* Hales ſaid, that it is well enough; the precedents in the Regiſter are ſo. Mod. 90. pl. 55. Mich. 22 Car. B. R. Fitzgerald v. Maſkal.

15. The ejectment likewiſe was *of ſo many acres jampnor & bruer', not expreſſing how many of each.* Cur. That has always been held good. Mod. 90. pl. 55. Mich. 22 Car. 2. B. R. Fitzgerald v. Maſkal.

16. An ejectment lies *de quodam loco vocat' the veſtry in D.* for this is a ſufficient deſcription, ſo that execution may be had thereof; adjudged. 3 Lev. 96, 97. Hill. 34 Car. 2. Hutchinſon v. Puller.

17. Ejectment *of five cloſes of arable and paſture, called containing* 20 *acres in D.* Upon not guilty pleaded, verdict was for the plaintiff; but judgment was arreſted, becauſe ejectment lies not of 20 acres of arable and paſture, *without ſhewing how much of the one, and how much of the other,* and clauſum does not help the matter; *furlinga* is a known meaſure, ſo is *bovata, hida, caruca;* but clauſum is not ſo certain in law, and the adding a name to the cloſe is nothing, and Holt Ch. J. affirmed Savil's caſe for law. 1 Salk. 254. pl. 1. Paſch. 4 W. & M. in B. R. Knight v. Syms.

18. The Court ſeemed clear of opinion, that a *church* is demandable *by the name of a meſſuage,* but ſaid they would hear the counſel again as to that. 1 Salk. 256. pl. 7. Hill. 11 W. 3. C. B. Hollingworth v. Brewſter.

19. A writ of error was brought upon a judgment given in an ejectione firmæ in Ireland, and it was aſſigned for error, that the ejectment was brought (inter alia) *of* 4000 *acres of montan',* which
[337] word, it was ſaid, was of an uncertain ſignification, and did only denote the ſituation, and not any particular ſort of land, and after divers arguments at the bar, the judges of this Court wrote to the judges of Ireland to inform them, 1ſt, Whether mountain-land ſignified only land ſo ſituated, or that it ſignified any particular ſort of land. 2dly, Whether land had uſually been demanded in a præcipe by that name, and fines uſually levied of land by that name. 3dly, Whether ejectments had been uſually brought of land by that name. To which letter the Ch. J. of B. R. and the Ch. J. of C. B. and the Ch. B. of the Exchequer, and ſeveral others of the Iriſh judges, ſent back an anſwer, and to the firſt quære ſaid, that mountain-land did not only ſignify land ſo ſituated, but alſo coarſe barren land, whether it was covered with furze, heath, or ſtony; and the Lord Chancellor of Ireland, in anſwer to a letter which Parker Ch. J. wrote to him upon this matter, ſaid, that mountain-land ſignified coarſe barren land, whether it was mountainous or not, and that he knew ſome ſuch land

land called by that name, which was no high grounds. To the ſecond quære the judges anſwered, that fines had been levied, and recoveries ſuffered of land by that name, in the reign of Jac. 1. and in every ſucceeding reign, none of which had been called in queſtion, and ſent over very many precedents of the ſame. And to the third quære they anſwered, that ejectments had been frequently brought of land by that name, many precedents whereof they alſo ſent over; upon which reaſons this Court affirmed the judgment given in Ireland, and denied the judgment of reverſal in MACDUNCOCK'S CASE, 2 Roll. Rep. 189. to be law. MS. Rep. Mich. 4 Geo. B. R. Earl of Kildare v. Fiſher.

(M) For whom it lies.

1. IF *A. ejects B.* and *after C. ejects A.* there B. ſhall not have writ of ejectment againſt C. the ſecond ejector; per Kyrk, which Thorp agreed; for the firſt owner *ſhall not have treſpaſs againſt the ſecond treſpaſſor.* Br. Ejectione, &c. pl. 8. cites 38 Aſſ. 9.

2. Ejectment of ward, where *he who ejects me aliens to another*, yet *I ſhall have ejectione cuſtodiæ againſt him who ejects me*; per Hank. quod non negatur, and yet a man ſhall recover the land by ejectment of ward. Br. Ejectione, pl. 2. cites 12 H. 4. 10.

3. If a *leaſe for years be made at Lammas to commence at Michaelmas*, the leſſee cannot have ejectione firmæ before Michaelmas. Br. Surrender, pl. 21. cites 37 H. 6. 17.

5. *Leſſee for years of copyholder* may have ejectment *before admiſſion of leſſor*, or any preſentment that he is heir. N. B. In this caſe 19 years were incurred in infancy, and after the court was not held in ſeveral years, and then the ſteward refuſed to admit. Le. 100. pl. 128. Paſch. 30 Eliz. B. R. Rumney v. Eves.

If copyholder makes a leaſe for years, his leſſee may maintain an ejectment.

Mo. 539. pl. 709. Hill. 39 Eliz. B. R. Stoper v. Gibſon. ——Ruled, that the leaſe was good before admittance, but otherwiſe of a ſurrender before admittance. Mo. 596. pl. 813. Paſch. 35 Eliz. Bullock v. Dibley.

6. If a *ſtranger enters on the queen's farmer*, he gains an eſtate for years, and if he makes a leaſe to another, his leſſee may maintain an ejectment. 3 Le. 206. pl. 265. Paſch. 30 Eliz. in the Exchequer. Anon. [338]

7. *Copyholder of inheritance* of a manor in the hands of the king *is ouſted*; it was held, that he has not gained an eſtate ſo as he may make a leaſe for years, upon which his leſſee may maintain an ejectment, but he hath but a poſſeſſion againſt all ſtrangers. 3 Le. 221. pl. 294. Paſch. 30 Eliz. B. R. Anderſon v. Heyward.

If the king's copyholder be ouſted, and the *intruder makes a leaſe for years*, this leſſee ſhall not have ejectment if ouſted, but he ſhall have action of treſpaſs againſt any ſtranger, cited per Gawdy J. Owen 16. as adjudged, 34 Eliz. in the caſe of Badington v. Hale.

8. *Leſſee of the king* may bring an ejectment, though the king be not put out of poſſeſſion; per Fenner, to which Popham agreed. Cro. E. 332. pl. 9. Trin. 36 Eliz. B. R. in caſe of Lee v. Norris.

8. A declaration of a leaſe made *by reverſioner during the life of a jointreſs*, as appeared by the ſpecial verdict, for the leaſe was made the 11th of January, *habend' from Mich. before*, and the jointreſs died after Mich. Reſolved that the declaration was good; for being by indenture (as it was found) it is good between the parties, and the jointreſs being dead, it ſhall be ſaid to begin according to the time limited by the indenture, and he cannot declare in any other manner, but if it had been without deed, peradventure it had been otherwiſe. Cro. E. 322. pl. 10. Paſch. 36 Eliz. B. R. Read and Morpeh v. Errington.

Yelv. 1. Paſch. 44 Eliz. B. R. Wilſon v. Rich, S. P. held e contra. —— *Baron* may bring ejectment of the lands of his wife. 2 Mod. 270. in caſe of Froſdick v. Sterling.

4. *Huſband and wife had right to enter* into certain lands *in the right of the wife*, and a deed of *leaſe* for years is written *in the name of the huſband and wife*, to one A. for to try the title, and alſo a *letter of attorney to P. to enter* into the land, and to deliver *the ſaid deed of leaſe* to the ſaid A. *in the name of the huſband and wife*, and as well the letter of attorney as the ſaid deed of leaſe, are ſealed by the ſaid huſband and wife with their ſeals, and entry and delivery is made accordingly; the ſaid A. enters, and upon ejectment brings an ejectione firmæ, and the whole matter aforeſaid was found by ſpecial verdict, and the plaintiff had judgment to recover, for the ſpecial matter found by verdict, i. e. the deed of leaſe, and the letter of attorney, do maintain the declaration well enough, and here is a leaſe made by huſband and wife, according to that the plaintiff hath declared. 2 Le. 200. pl. 253. Mich. 26 Eliz. B. R. Cooper's caſe.

Cro. 2. 676. pl. 74. Spark's caſe S. C. & S. P. by Popham, quod Gawdy conceſſit.

9. If *copyholder* makes a leaſe for a year warranted by the cuſtom, leſſee ſhall maintain an ejectment, and per Popham, he ſhall maintain it though the *leaſe was not warranted* by the cuſtom. Mo. 569. pl. 776. Trin. 41 Eliz. B. R. Sparke's caſe.

It was ruled by Holt Ch. J. at Ryegate in Surry, ſummer aſſiſes, 10 W. 3. upon evidence at a trial, that coparceners may join in ejectment, and Holt ſaid that this caſe in Mo. 682. pl. 939. is not law. Ld. Raym. Rep. 726. Boner v. Juner.

10. Ejectione firmæ; a leaſe was made *by two comparceners*, the declaration was, quod *demiſerunt*; ruled not good, becauſe it is a ſeveral leaſe of each of them for his part. Mo. 682. pl. 939. Mich. 42 & 43 Eliz. B. R. Milliner v. Robinſon.

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So where the deviſe was that the truſtees ſhould *have the letting and ſetting of his land during the minority of his heir*, the truſtees cannot make a leaſe to try the title; per Whitlock J. Lat. 39. cites it as reſolved 41 Eliz. Pigot's caſe ——— Cro. E. 678. 734. Piggot v. Garnis. ——— The reaſon is, becauſe they have *an authority only, and not an intereſt*. Per Whitlock J. Lat. 135.

11. Land deviſed to perſons in truſt to let leaſes, and diſtribute the profits to twenty of the pooreſt kindred of deviſor, the *twenty poor kindred* have only a *confidence, and not an intereſt*, ſo they have no power to make leaſe to try title in ejectment. Mo. 753. pl. 1040. Mich. 2 Jac. Griffith v. Smith.

12. If a *copyholder without licence* makes a leaſe for years, the leſſee which enters by colour of that is a diſſeiſor, and a *diſſeiſor* cannot maintain ejectment. 2 Brownl. 40. Hill. 8 Jac. C. B. in the caſe Petty v. Evans.

13. *Leſſee of a guardian in ſocage* ſhall have ejectione firmæ. Hutt. 16. Paſch. 16 Jac. And held good though *not ſhewn in the writ that the heir was within age at the time*, &c. But note, that the nonage of the heir *appeared in the declaration*, and judgment affirmed. Noy, 135. Simmonds v. Barham.

14. Leaſe in writing is delivered upon the land, and it was *habend' a die datus*, now when the leſſee is upon the land afterwards in the *ſame day*, it is a *diſſeiſin*, but his continuance there the next day by virtue of that leaſe *purges* the diſſeiſin, and now he is rightfully in of the leaſe only, and ſo may maintain an ejectment. Clayt. 27. pl. 47. Aug. 10 Car. Crawley J. Metcalf v. Stavely. See 8 Mod. 53. Sheers v. Lammas. —8 Mod. 54. Adjudged. Mackdonell v. Weſden.

15. Ejectment lies for *infant*; per Mallet J. Mar. 143. Mich. 17 Car. It lies for *leſſee of an infant*. Noy, 130. Rames v. Machiln.——If infant makes a leaſe to try a title it is a good leaſe; per Glynn Ch. J. 2 Sid. 110. Mich. 1658.

16. Diſſeiſee *after ſeiſure* for the king *on outlawry* of diſſeiſor may. Hardr. 176. pl. 2. Hill. 12 & 13 Car. 2. in Scacc. Hammond's caſe.

17. *Tenant at will* cannot. Raym. 137. Trin. 17 Car. 2. B. R. cites Blunden v. Baugh. Sty. 380. Trin. 1652, it was ſaid, in the caſe of Homes v. Bingley, that tenant at will may make a leaſe for years to try a title of land. ——S. P. by Popham, which Gawdy agreed. Cro. E. 676. pl. 4. Trin. 41 Eliz. B. R. in Spark's caſe.——Hetl. 73. Hill. 3 Car. S. P. by Hutton.

18. *Leſſee for years makes a leaſe at will; leſſee at will is ouſted*; leſſee for years may maintain ejectione firmæ, cites 9 H. 7. otherwiſe if leſſee for years makes a *leaſe for years*, and leſſee is ouſted. Per Bridgman Ch. J. Cart. Paſch. 18 Car. 2. C. B. Roll. Rep. 3. pl. 5. Paſch. 12 Jac. B. R. Stone v. Grubham. S. P. reſolved e contra as to ouſter of leſſee at will.——2 Bulſt. 217. S. C. and Coke Ch. J. ſaid it had been ſo ruled; and ſays, that clearly upon a poſſeſſion in law, a man ſhall never maintain an ejectment but he muſt have an actual poſſeſſion.

19. *Conuſee of a ſtatute-ſtaple* can bring no ejectment before the liberate. Vent. 42. Mich. 21 Car. 2. B. R. Anon. But after he may; Arg. Show. 40. Trin. 2 W. & M. in caſe of Dighton v. Greenvill.——But in caſe of a *ſtatute merchant* it is otherwiſe, for there is no need of a liberate; per Cur. Vent. 41. S. C.

20. *Vendee of commiſſioners of bankrupts* cannot maintain ejectment by his leſſee before inrolment, though the deed be inrolled after the action * brought. 2 Jo. 196. Paſch. 34 Car. 2. B. R. Perry v. Bowers. * [340] Vent. 360. S. C. adjornatur, but afterwards adjudged accordingly. ——Skinn. 30. pl. 6. S. C. argued, and ſays it was held afterwards that ſale of lands by commiſſioners muſt be by deed inrolled, and is void if otherwiſe.——2 Show. 156. pl. 142. Berris v. Bowyer S. C. adjudged accordingly.

21. Tenant by *elegit* before actual entry may have ejectione firmæ or treſpaſs; Arg. Show. 40. Trin. 1 W. & M. in caſe of Dighton v. Greenvill. It was ſo ruled at a trial at bar. Mod. 217.

22. *Aſſignment of a term by commiſſioners of bankruptcy* was made to a creditor, who before inrolment of the deed of aſſignment, made a leaſe to the defendant, and then the deed was inrolled; per Cur. ſuch a leſſee cannot maintain an ejectment, becauſe the Ognel v. Ld. Arlington.

leaſe could not have been before the inrolment; the words of the ſtatute are, that commiſſioners may ſell by deed inrolled, ſo *without inrolment* no ſale. Vide tamen. 2 Co. 26. a. 12 Mod. 3. Mich. 2 W. & M. Elliot and Danby.

(N) Againſt whom it lies.

1. IF the *heir himſelf enters and ouſts his guardian of the land*, writ of *ejectment of ward lies not, but writ of intruſion of ward.* Br. Ejectione, &c. pl. 11. cites 32 E. 3.

2. Where *diſſeiſor makes a feoffment reſerving rent*, this rent ſhall not make him parnor of the land; quod nota per Cur. Br. Parnor de Profits, pl. 15. cites 39 H. 6. 44.

3. If *maſter* of the cattle appoint his *ſervant* to look to the cattle being there, the maſter and not the ſervant ſhall be the ejector; but where no ſervant is ſo appointed, if a *ſtranger* come over the ground while my cattle are there, he ſhall be the ejector. Clayt. 29. pl. 50. Aſſiſa Mar. 10 Car. Vernon J. Rawcliff v. Booth.

4. Ejectment lies *not for leſſee* for recovery of his term *againſt feoffee*, becauſe he came to the land by title of feoffment, and not by tort, but quare ejecit infra terminum is given by ſtat. W. 2. cap. 24. per Vaughan Ch. J. Vaugh. 127. Paſch. 21 Car. 2. C. B. in caſe of Hayes v. Bickerſtaff.

(O) In what Caſes it lies.

1. WITHOUT *poſſeſſion at the time of the ouſter* a man ſhall not have an ejectment. Kelw. 130. a. pl. 99. Caſus incerti Temporis.

2. In an ejectione firmæ there ought to be a *right in fact*, and it is not ſufficient to be by *eſtoppel*. Per Anderſon. Godb. 15. pl. 22. Paſch. 25 Eliz. C. B. in Skipwith's caſe.

3. In an ejectione firmæ it was obſerved by the Court for an infallible rule, that *what may be reduced by a real action, may* be reduced *by an entry* (as *in one acre in the name of more*). Noy, 108. Trin. 2 Jac. C. B. Nichol's caſe.

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Saund. 112. S. C. — Sid. 223. S. C. — Raym. 135. 158. S. C.

4. *Rent* granted in fee with *proviſo* the grantee may *enter and retain* till he be ſatisfied of the profits, he may make leaſe to try the title in ejectment. Lev. 170. Trin. 17 Car. 2. B. R. Jemmot v. Cooly.

5. If a *ſheriff ſells a term on a fieri facias*, he cannot and muſt not put the perſon out of poſſeſſion and the *vendee* in, but the vendee muſt bring his ejectment; per Cur. 2 Show. 85. pl. 74. Hill. 31 & 32 Car. 2. B. R. The King v. Dean and Bird.

(P) What is Title ſufficient.

1. WRIT of ejectment of ward lies of *rent without poſſeſſion or ſeiſin*; for there is *poſſeſſion in law*, becauſe it cannot be received till the rent-day. *Contra of land.* Br. Ejectione, &c. pl. 9. cites 11 H. 4. 64, 65.

2. If parſon leaſe his *rectory* for years by parol it is good, and leſſee ſhall have tithes and offerings as incident, and it is good though there is no parſonage houſe, and but only church and church-yard, and if ſuch leſſee be ouſted he ſhall have ejectione firmæ. Br. Leaſe, pl. 15. cites 15 H. 7. 8. And the ſame law is of a *hundred.* Ibid. cites Trin. 6 H. 8.

3. Upon evidence it was agreed, that if a *leaſe for years* be *made to A. and delivered to B. to the uſe of A.* and *B. enters to the uſe of A.* if B. be ejected, A. may have an ejectione firmæ, Noy. 43. Purrell v. Biſhop.

4. Ejectment of a leaſe of *tithes* and *ſhews it not by deed*; and becauſe tithes cannot paſs without deed, after verdict for the plaintiff exception was taken for this cauſe and ruled to be ill, and judgment for the defendant. Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swadling v. Piers.

5. *Grantee of a rent* with *power to enter and take the profits* till ſatisfied of arrears may maintain ejectment. Raym. 158. Trin. 18 Car. 2. B. R. Jemmot v. Cooley. Saund. 112. S.C.—Lev. 170. S. C. —Raym. 135. 158. S. C. but all theſe books ſtate it as a rent granted in fee; but Sid. 262. Jenet v. Cowley, S. C. ſtates it as a rent for years.

6 A *leſſee for three years demiſes to B. for five years*, who brings an ejectment, and *declares againſt the firſt leſſor for five years*; and upon the evidence it appeared, that he had right but for three years, becauſe A. that leaſed to him had no more; and the Court were of opinion, that the plaintiff could have no judgment. Freem. Rep. 400. pl. 522. Trin. 1675. Roe v. Williamſon. 2 Lev. 140. S. C. and Hale held this verdict againſt the plaintiff; for the judgment ſhall be, that the plaintiff recover terminum ſuum prædictum, which is five years, and the leſſor's intereſt does not continue ſo long. And perhaps the defendant may be the reverſioner after the three years ended, and ſo the leſſor of the plaintiff will recover for two years more than he has right to hold it. Wylde held accordingly, but Twiſden ſeemed e contra. Et adjornatur. ——3 Keb. 490. pl. 31. S. C. the Court held the declaration ill, and that the plaintiff can have no judgment.

7. *Payment of rent* to the leſſor or to any for his uſe is a *ſufficient title* for the plaintiff, if the defendant has no title at all but poſſeſſion; held per Scroggs Ch. J. 2 Show. 126. pl. 105. Trin. 32 Car. 2. B. R. Anon. [342]

8. If a *leſſee holds over his term*, an action of treſpaſs cannot be brought without an *actual entry.* 5 Mod. 384. Hill. 9 W. 3. B. R. Anon.

9. If *H. has poſſeſſion of land for* 20 *years uninterrupted, and B. gains poſſeſſion*, upon which H. brings ejectment; though H. is plaintiff yet his poſſeſſion for 20 years will be a good title for him, as well as if H. had been then in poſſeſſion; becauſe poſſeſſion for

20 years now by virtue of the ſtatute of 21 Jac. 1. cap. 16. is like a deſcent at common law which tolls the entry. Ruled by Holt Ch. J. Summer aſſizes at Lincoln, 11 W. 3. 1699. and at Ayleſbury. Ld. Raym. Rep. 741. Stocker v. Berney.

10. *Ceſty que truſt* of a remainder executed by the ſtatute 27 H. 8. of uſes has eſtate ſufficient to make a leaſe. Gibb. 11. 18. Paſch. 1 Geo. 2. B. R. Shaw v. Weigh.

(Q) Pleadings. Declaration.

1. IF a *leaſe* is *dated the* 28*th* day, and it is *ſealed on the land* after the commencement of the term, viz. *the* 29*th day*, and *the ejectment is ſuppoſed and laid to be the* 30*th day*, this is well enough, though the leſſee did not enter on the 30th day but the day before; per Dyer. Dal. 105. pl. 47. anno 15 Eliz. Covert v. Leonard.

2. The plaintiff counts of a leaſe of the *fourth part of a houſe* in N. in four parts to be divided, by force of which he entered in *tenementa prædict'*, and was inde poſſeſſionatus until the defendant did eject him *de tenementis prædict'*, and held good. Cro. E. 286. pl. 2. Trin. 34 Eliz B. R. Rawſon v. Maynard.

3. Exception to a *declaration* in an ejectione firmæ becauſe it *was a poſſeſſione ſua (inde) ejecit;* where it ought to be according to the ſuppoſal of the writ. *Quod a firma ſua ejecit*, all the juſtices held that the word *(inde) had relation to the farm*, and ſhall be as much as if he had ſaid, a poſſeſſione firmæ; and the declaration was ruled to be good notwithſtanding the exception. Godb. 71. pl. 85. Mich. 28 & 29 Eliz. B. R. Anon.

4. Alſo it was *of three cloſes, naming them* with a viz. *containing by eſtimation* 30 *acres*, which was objected did contain no certainty, where he ought to have alleged in fact, that they did contain ſo many acres. But it was holden by all the juſtices, that although he does not put in the declaration the certainty of the acres, if he *gives a certain name to them, as Green-cloſe, &c.* that it is good. Godb. 71. in S. C.

5. In an ejectione firmæ exception was taken becauſe the *plaintiff in his declaration did not ſay extra tenet;* for in every caſe where a man is to recover poſſeſſion he ought to ſay extra tenet. But all the juſtices agreed, that in an ejectione firmæ thoſe words were not material; for if the defendant put out the plaintiff, it is ſufficient to maintain this action. And Kempe Secondary ſaid, that ſo were all the ancient precedents; although of late times it has been uſed to ſay in the declaration extra tenet; and the declaration was holden to be good without thoſe words. Godb. 60. pl. 72. Mich. 28 & 29 Eliz. B. R. Anon.

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6. In ejectment the plaintiff declared, quod cum R. D. *per indenturam ſuam gerent. dat.* 20 *Maii dimiſit*, &c. Exception was taken that he ought to have ſaid iiſdem die & anno; for though the indenture bears date as above, yet it may be, it was delivered at another day, and then it begins to be a demiſe. But judgment

Cro. E. 773. Mich. 42 & 43 Eliz. B. R. Hall v. Denbigh, S. P. re-

was

was given for the plaintiff. 2 Le. 117. pl. 157. Paſch. 30 Eliz. B. R. Cony v. Cholmley. ſolved per tot. Cur. to be well

enough, for when he declares that he let by indenture of ſuch a date, it ſhall be always intended to be delivered at the ſame time whereon it bare date, if it be not ſhewn with a primo deliberatum at another day; and he who pleads a deed of ſuch a date, cannot by replication, or other pleading, maintain to be delivered at another time, for it would be a departure, as 5 H. 7. 26. Dy. 167. 221. Wherefore it was adjudged for the plaintiff. ——Ibid. 890. pl. 7. Trin. 44 Eliz. B. R. Houſe v. Laxton, S. P. by all the juſtices præter Gawdy.

7. Ejectione firmæ by H. againſt C. The plaintiff declared upon a *leaſe for years, to have and to hold* to him *from the ſealing and delivery* of it; and *declared that the ſealing and delivery was* 1 *May, and the ejectment the ſame day;* and this matter was moved in arreſt of judgment, that the ejectment could not be ſuppoſed the ſame day, for the leaſe did not begin till the next day enſuing the ſealing, &c. But the exception was not allowed by the Court; for where the leaſe is to begin from the time of the ſealing and delivery, or by theſe words, for 21 years next following, the ejectment may be well ſuppoſed to be the ſame day; for the beginning of the leaſe is preſently upon the ſealing and delivery, and ſuch a leaſe ſhall end the ſame time and hour as it began. 4 Le. 144. pl. 255. Trin. 31 Eliz. B. R. Higham v. Cooke.

8. Ejectione firmæ *of a leaſe made* 20 *Aug. from Mich. then laſt ante datum hujus indenturæ*, and he *ſhews neither the indenture nor the date of it*, which was ſaid to be not good, becauſe it does not appear when the leaſe began; but the Court held it good, and the words ante datum indenturæ ſhall be void, and the beginning of the leaſe appears certain enough, and judgment for the plaintiff. Cro. E. 606. pl. 5. Paſch. 40 Eliz. B. R. Darrel v. Middleton.

9. Ejectione firmæ; the plaintiff *declared of a leaſe for years, habendum a die datus virtute cujus* dimiſſionis he entered and *was poſſeſſed until the defendant ejected him.* It was moved in arreſt of judgment, that the declaration was not good, becauſe the *time of the entry was not alleged;* for if he entered on the day of the demiſe he is a diſſeiſor, and then the action not maintainable; adjornatur; but afterwards it was reſolved that for that cauſe the declaration was ill, and adjudged for the defendant. Cro. E. 766. pl. 4. Trin. 42 Eliz. and Trin. 43 Eliz. B. R. Douglaſs v. Shank.

10. In ejectment the plaintiff *declared of a leaſe for years of a houſe and* 30 *acres of land in D. and that J. S. did let to him the ſaid meſſuage and* 30 *acres, by the name of his houſe in B. and* 10 *acres of land there five plus five minus;* it was moved in arreſt of judgment, becauſe that 30 acres cannot paſs by the name of 10 acres five plus five minus, and ſo the plaintiff has not conveyed to him 30 acres; for when 10 acres are leaſed to him five plus five minus, theſe words ought to have a reaſonable conſtruction to paſs a reaſonable quantity, either more or leſs, and not 20 or 30 acres more. Yelverton agreed; for the word 10 acres *five plus five minus, ought to be intended of a reaſonable quantity,* more or leſs by a quarter of an acre, or two or three at the moſt; but if it be three acres leſs than ten the leſſee muſt be content with it; quod

Fenner

Fenner and Crook conceſſerunt; and judgment was ſtaid. Ow. 133. Trin. 43 Eliz. C. B. Day v. Fynn.

Cro. J. 96. pl. 25. Mich. 3 Jac. B. R. S. C. & S. P. held by three juſtices, abſente Popham. ——

* 11. In ejectment the plaintiff *declared of a leaſe the 6th September, and that he was poſſeſſed, and that poſtea ſcilicet 4 September the defendant ejected him.* This declaration was held good by three juſtices, and that it is ſufficient that he declared of his poſſeſſion virtute dimiſſionis, and that he was afterwards ejected, and *the viz. the 4 September is void and repugnant.* Arg. Sid. 8. cites it as Cro. J. 96, 97. Adams v. Gooſe.

Cro. J. 429. in pl. 3. cites S. P. and intends S. C. and ſays that a precedent was then ſhewn thereof. —— S. C. cited Freem. Rep. 146. pl. 166. Paſch. 1674. in caſe of MEXTON v. BRAND, where the point was, that the plaintiff declared of a leaſe made the 10th January, habend' a primo Januarii, by virtue whereof he entered, and that the defendant poſtea, viz. primo Januarii, ejected him. The queſtion was, if the viz. being repugnant was not void as in the principal caſe cited; ſed adjornatur. —— Sid. 8. has a nota at the end of the caſe there, that the Ch. J. ſaid he did not apprehend any reaſon for ſuch judgment in the ſaid caſe of Adams v. Gooſe.

12. Ejectione firmæ was brought upon a *leaſe made 1 Jan. 3 Jac. habend. a datu indenturæ* prædict. and the *ejectment was the ſame day.* Reſolved, the date is the time of the delivery, and it differs from the time or day of delivery, wherefore the ejectment alleged poſtea the ſame day, is good enough; adjudged for the plaintiff. Cro. J. 135. pl. 10. Mich. 4 Jac. B. R. Oſborn v. Rider.

13. The *leaſe was dated 8 May, 7 Jac.* and the *ejectment was laid 13 May, 7 Jac.* and the *action was brought in Eaſter term following.* Adjudged, that if the ejectment is proved at any time after the leaſe, and before the action brought, it is ſufficient, though it was laid at a certain time which the plaintiff could not prove; but becauſe the plaintiff failed to prove this, the plaintiff was nonſuit. Bulſt. 122. Paſch. 9 Jac. Hall v. King.

2 Bulſt. 29. Mirril v. Smith, S. C. and the whole Court held the declaration good, and to a judgment in C. B. was affirmed in B. R. — Jenk. 325. pl. 41. S. P. cites S. C.

14. In ejectione firmæ, the courſe of C. B. is, where the defendant appears, then to count, and after imparlance to make a ſecond count by way of recital; but the firſt ought to contain the ſubſtance of the matter. In the firſt count in this caſe the *leaſe is alleged to be made 25 Mar. 6 Jac. and* afterwards *the ejectment, the ſaid 6 Jac. without mentioning the day of the ejectment;* the ſecond count mentions the ejectment to be the 26th of March 6 Jac. and the ejectione firmæ was brought in the 7 Jac. The plaintiff had judgment affirmed in error; *a certain day of the ejectment is not neceſſary to be alledged in the count; it will ſerve to ſay poſtea,* &c. Jenk. 341. pl. 98. cites Cro. J. 311. pl. 11. Mich. 10 Jac. Merrel v. Smith.

Mo. 837. pl. 1130. Worrall v. Harper. S. C. no judgment was given, becauſe the declaration was faulty. —— S. C cited accord-

15. An ejectment lies not *de omnibus & omnimodis decimis in W. without ſaying garbarum, fæni, lanæ, agnellorum, or ſome other certainty of the nature or quality of the tithes,* ſo that a certain judgment may be given, or execution by habere facias poſſeſſionem be had thereof; and though the certain number thereof ſhall not be expreſſed (for the fruitfulneſs or barrenneſs may be more or leſs), yet the certain kinds ought to be ſhewed, and all the tithing may conſiſt in modo decimandi by payment of an annual ſum in ſatisfaction thereof, of which no ejectment lies; for the ſtatute of

32 H. 8. cap. 7. which gives the action for tithes, gives it as they ſhould or might do for land; and in an action for lands, the plaintiff ought to ſhew the quality or nature thereof, as arable land, meadow, paſture, &c. adjudged, 11 Rep. 25. b. Trin. 12 Jac. Harpur's caſe.

ingly, Palm. 101. by Dodderidge J. Paſch. 17 Jac. B. R.

16. Original in ejectment was *againſt A. and three others;* plaintiff counts againſt 3 of the defendants, and *no ſimul-cum againſt the fourth;* judgment was ſtayed; per tot. Cur. Brownl. 129. Trin. 13 Jac. cites Goodhall v. Hill.

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17. Ejectione firmæ of a *leaſe* 21 *Oct.* 4 *Jac. Et quod poſtea ſcilicet eodem* 21 *Oct. anno* 3 *Jac. ſupradict. he ejected him.* It was moved, that the ejectment being alleged to be a year before the leaſe is void, but three juſtices, Tanfield e contra, held it to be good, becauſe the words be, poſtea ſcilicet eodem 21 die Oct. and therefore there needed not any year to be mentioned, and the addition of a year not mentioned before, and repugnant to the day mentioned, is idle, and ſhall be taken for null. Cro. J. 154. pl. 4. Paſch. 5 Jac. B. R. Brigate v. Shork.

S. C. cited Lat. 201.—Ejectment was *on a leaſe of the 6th May, 7 Jac.* and that the plaintiff entered, and was poſſeſſed, until the *defendant afterwards,* viz. *18th day of the ſame month of May, anno* 6, *ſupradicto, ejected him*; after verdict for the plaintiff, it was objected, that the declaration was not good, becauſe the ejectment is alleged a whole year before the leaſe was made, for the leaſe was on the 6th May, 7 Jac. and the ejectment was ſuppoſed to be anno 6 Jac. but adjudged it was good, and that *the word (ſexto) was void*; for the day of the ejectment being laid to be *ejuſdem menſis Maii*, it *cannot be intended* to be *of another year than that in which the leaſe was made.* Yelv. 182. Mich. 6 Jac. B. R. Davis v. Pardy. ——Brownl. 146. S. C. in totidem verbis.

If a *leaſe* be *made 1ſt Feb. 5 Jac. and ſo laid, & quod poſtea, 1ſt Feb. 4 Jac. the ejectment was,* this is good, and 4 *Jac. void,* and the word *poſtea guides all, and agrees with the leaſe.* Judged and affirmed in error. Superflua non nocent. Jenk. 325. pl. 41.——2 Bulſt. 29. in caſe of Mirril v. Smith, cites the caſe of Moyl v. Ewers, S. P. and adjudged the poſtea to be good, and the (viz.) to be void for the ejectment.

18. Ejectione firmæ *of two cloſes, called the Higher G. and the Lower G. containing three acres of land;* it was ſaid the words containing three acres of land, were uncertain, and SAVIL'S CASE, 11 Rep. was vouched; but adjudged by three juſtices, contra Houghton, that the ejectione firmæ did lie; and this caſe differs from Savil's, for there neither the quantity nor the quality of the land is mentioned; but here, the ſaying containing three acres of land, and the cloſes being named, it is certain enough what nature of land it is, and although the cloſes do contain more than three acres, he ſhall recover the whole cloſes. Cro. J. 425. pl. 4. Mich. 15 Jac. B. R. Wikes v. Sparrow.

S. C. cited 2 Roll. Rep. 167.

19. In ejectment, the plaintiff *declared on a leaſe* made to him *by one J. C. dated 1ſt Jan.* 15 *Jac. and ſealed and delivered 5th Jan. following, to hold from Chriſtmas laſt paſt for two years;* the jury *found* the leaſe and a letter of attorney to execute it, (viz.) that the leſſor was ſeiſed in fee of the lands, and being ſo ſeiſed, *he made, ſigned, and ſealed an indenture of demiſe in hæc verba, &c. but did not deliver it as his deed to the plaintiff on the 5th day of Jan. but by a letter of attorney bearing date on that day he gave full power to M. M. his attorney to enter* on the lands in his name, and after poſſeſſion taken, to deliver the ſaid indenture to the plaintiff, by virtue whereof he entered, and immediately afterwards delivered the

the leaſe to the plaintiff as the deed of the leſſor. It was objected, that this declaration was ill, for the plaintiff declared on a leaſe made to him by J. C. which if ſo, then the letter of attorney had been idle, and to no purpoſe; but adjudged good, and that it was the leaſe of the leſſor. Brownl. 128. Trin. 16 Jac. Hill. v. Scales.

20. Ejectione firmæ *of a leaſe of tithes*, and does *not ſhew that it was by deed*, and becauſe tithes cannot paſs without deed, after verdict for the plaintiff, exception being taken for this cauſe, it was ruled to be ill, and adjudged for the defendant. Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swadling v. Piers.

Palm. 267. S. C. adjudged accordingly in B. R.—Ibid. 327. Mead v. Arundel, Hill. 20 Jac. Judgment affirmed una voce in the Exchequer.

21. Ejectione firmæ *of a leaſe made by the lady Morley to the plaintiff, 1ſt Maii* 14 *Jac. for five years, if ſhe is ſo long lived, and that he entered and was poſſeſſed, and that the defendant poſtea, viz. 6 Maii, entered upon him, and ejected him a termino ſuo prædict' nondum * finito.* It was ſaid the declaration was not good, becauſe *there is not any averment of the life of the leſſor at the time of the action brought.* Three juſtices contra, Chamberlain held it good enough; for he ſhewing that the defendant ejected him a termino nondum finito, implies the lady was alive; judgment was for the plaintiff, and the judgment affirmed in error brought. Cro. J. 622. pl. 13. Mich. 19 Jac. B. R. Arundel v. Mead.

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22. If in ejectment the plaintiff *of a leaſe the 22d May, 20 Jac. habend' a primo die Maii for three years, virtute cujus he entered and was poſſeſſed quouſque poſtea, ſcilicet eiſd' die & anno the defendant ejected him;* this is well enough; for his entry being laid to be virtute diſmiſſion', the *poſtea eiſd' die, &c. refers to the day of the leaſe made;* adjudged in B. R. and that judgment affirmed in Cam. Scacc. upon a writ of error accordingly; though it was objected, that the eiſd' die, &c. referred to the laſt antecedent, and ſo the ejectment was laid before the leaſe commenced. Cro. J. 662. pl. 12. Hill. 20 Jac. Rutter v. Mills.

23. Judgment was for the plaintiff in ejectment brought in Ireland, and error aſſigned was, that the plaintiff had *declared on a leaſe made to him to commence at a day to come, virtute cujus, he entered and was poſſeſſed, and did not ſhew when he* entered, *either before or after the day* on which the leaſe was to commence. Sed non allocatur, becauſe he ſaid virtute cujus, &c. But Ley Ch. J. ſaid, that if he had ſaid prætextu cujus, it had been otherwiſe. 2 Roll. Rep. 466. Mich. 22 Jac. B. R. Wakely v. Warren.

24. If the *firſt declaration* in the common pleas *is vicious*, and the *ſecond is as it ought to be*, the firſt is not amendable in this caſe; for the firſt declaration is the foundation, and the ſecond is only by way of recital. Jenk. 325. at the end of pl. 41.

And ſo it was between BELL AND MARCH, and thisſame term between Spark and ..... where it was ſhewed quod conceſſit per eandem indent', where he had not ſpoke of any indenture before. Ibid.

25. B. brought an ejectione firmæ againſt J. and *declared upon a leaſe* of land *habend. a die dat' indentur' prædict.* and *does not ſpeak of any indenture before*, and for that the declaration adjudged naught. Hetl. 63. Mich. 3 Car. C. B. Brady v. Johnſon.

26. It

26. It was reſolved, that an ejectione firmæ *of* 40 *acres of land by eſtimation*, is not good, for the demand ought to be certain. Ley, 82. Mich. Car. in caſe of Row v. Ocam.

27. The declaration was *of a meſſuage and* 40 *acres of land, meadow and paſture*, thereto appertaining, and it was *not diſtinguiſhed how much* there was in land, how much in meadow, and how much in paſture, therefore the judgment was reverſed. Cro. C. 573. pl. 13. Hill. 15 Car. B. R. Martyn v. Nichols.

28. In error of a judgment in Ireland, the error aſſigned was, that the plaintiff *declared upon a demiſe made* 12 *Junii*, &c. *Habendum a prædicto duodecimo die Junii*, (which muſt be the 13th day of the ſame month,) uſq., &c. virtute cujus quidem dimiſſionis he entered, &c. *and that the defendant poſtea ſcilicet eodem duodecimo die Junii, did eject him*, &c. So that it appears upon the face of the declaration that the *defendant entered before the plaintiff had a title*; for the leaſe commenced on the 13th of June, and the entry was on the 12th of that month. Per Curiam; the *plaintiff entered as a diſſeiſor by his own ſhewing*, and thereupon judgment was reverſed. 3 Mod. 198. Paſch. 4 Jac. 2. B. R. Evans v. Crocker.

S. P. but if the plaintiff declares of a leaſe of the firſt of Decemb. habendum a die datus, the ejectment cannot be alleged the ſame day; but if the leaſe be made the firſt of Decemb. *labend. henceforth*, the ejectment may be alleged the ſame day; wherefore it was adjudged accordingly. Cro. J. 258. pl. 18. Mich. 8 Jac. B. R. Lewelyn v. Williams.

† If the *leſſee of the plaintiff entered before the term began*, he was a diſſeiſor; per Bridgman Ch. J. Cart. 160. Mich. 18 Car. 2. C. B. at the end of the caſe of Foot v. Berkley, and cites Dyer, 89. * Clifford's caſe. ——* D. 80. a pl. 111. Trin. 7 E. 6. in writ of error brought in B. R. Clifford v. Warren. —— Lev. 46. Mich. 13 Car. 2. C. B. per Bridgman Ch. J. in delivering the opinion of the Court. Hennings v. Brabazon.

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29. *A. B. and C.* joint tenants, *join* in the leaſe of a *houſe to J. S. to commence from Michaelmas laſt*; afterwards, *on the ſame day, B. and C.* without A. *demiſe the ſame houſe to J. S. to commence from the ſame time, and for the ſame number of years*, as in the leaſe made by all three; and in ejectment by J. S. he declares upon both theſe leaſes. Reſolved, that the declaration was not *double*, for when the three demiſed the whole, and afterwards two of them demiſed all the ſame thing, this is a *ſurrender* of the firſt leaſe, and a new leaſe of their two parts, and the old leaſe continues as to the third *part* of A. and ſo J. S. entered, and was poſſeſſed by both leaſes, viz. of the third part of A. by the *firſt leaſe*, and of the two parts of B. and C. by the *ſecond leaſe*. 3 Lev. 117. Paſch. 34 Car. 2. in Cam. Scacc. Turbervill v. Stockton.

30. In ejectment, the plaintiff declared that Frances Ford, and Elizabeth, dimiſerunt, and put no ſurname to Elizabeth. After verdict for the plaintiff it was moved, that this was a joint demiſe, and no ſurname being given to one of the partiess the declaration was void; and the Court held it void for the uncertainty, and ſo judgment was arreſted. Freem. Rep. 146. pl. 167. Paſch. 1674. Carter v. Weſt.

31. *Declaration* in ejectment mentions the demiſe to be for 11 years habendum *from the ſame day on which the entry is alleged to be*, and ill. Cumb. 83. Paſch. 4 Jac. 2. B. R. Stephens v. Croker.

32. *Declaration recited an original*; and an *original was produced teſte 2 Novembris, which was after the demiſe*. And the prothonotary

notary informed the Court, that this was frequently allowed, and that no memorandum of the originals bearing teſte within the term was uſed to be made upon the record. 2 Vent. 174. Paſch. 2 W. & M. C. B. Tunſtall v. Brend.

A leaſe by an aſſignee of a bankrupt's eſtate *before inrolment*, by which nothing paſſed till inrolment, and upon which an ejectment was brought, was denied to be amended: and per Holt Ch. J. it is *not amendable*, becauſe no other leaſe than what was laid was confeſſed. Show. 206. Paſch. 3 W. & M. Bennet v. Gaudy.

33. A fine was levied in Hilary term, and an ejectment brought upon the title, and the *demiſe was laid before the fine took effect*; and, upon motion, it was ordered that the demiſe be laid of Lady-day laſt. Cumb. 290. Trin. 6 W. & M. in B. R.

And though there is *but one habendum*, viz. habend' tenementa predicta ſo demiſed by the aforeſaid ſeveral parties for ſeven years, and lays in his declaration, that the defendant entered into all the aforeſaid tenements, *& ipſum* (the plaintiff) *a firma ſua predicta* (in the ſingular number) *ejecit, expulit, &c.* Per Cur. it is well enough, reddendo ſingula ſingulis. Carth. 224. Paſch. 4 W. & M. in B. R. Furſden v. Moor.

34. Two or three *ſeveral demiſes from ſeveral perſons* may be laid in one declaration in ejectment. Cumb. 290. Trin. 6 W. & M. in B. R.

Carth. 224. Furſden v. Moor. S. C. the count was of ſeveral demiſes by ſeveral parties; and per Curiam it is well enough, reddendo ſingula ſingulis.——2 Vent. 214. Moor v. Furſdon. S. C. and the plaintiff alſo ſet forth, that he entered into the premiſes demiſed to him by J. S. and J. N. in forma prædicta; and the Court held, that this is an averment that all was demiſed for five years; for that is the forma prædicta, and adjudged for the plaintiff in C. B. and that judgment affirmed in B. R.——It was held that two *tenants in common* leſſors muſt make *ſeveral leaſes* in ejectment. And *quod cum* is well enough becauſe the ejectment is poſitive. Show. 342. Mich. 3 W. & M. Moor v. Furſden.

35. Error on a judgment in C. B. in ejectment. The error aſſigned was, that the *declaration was on two demiſes*, and there was *no habend' in the firſt, but* afterwards the *ſecond demiſe was habend' tenementa prædicta*, which, as it was urged, did not extend to both the demiſes, nor would it be good in caſe of a grant, and the judgment is entire quod recuperet terminos prædict'; but per Cur. it is well * enough, and the judgment was affirmed. Comb. 190. Paſch. 4 W. & M. in B. R. Moor v. Parndon.

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Per three juſtices, he ought to declare upon ſeveral leaſes of their ſeveral parts; but Williams J. contra. Cro. J. 166. Mantle v. Wollington.

36. If two *tenants in common* are diſſeiſed, their leſſee in ejectment muſt declare upon *two ſeveral demiſes*. Cumb. 213. Trin. 5 W. & M. in B. R. Per Eyres J.

37. The *demiſe was on the eſſoign day* of Hill. term, and the *declaration was of the ſame Hill. term*, both which relate to the firſt day, and ſo the action was brought before the title accrued, or at leaſt on the very ſame day; which cannot be, becauſe the law allows no *fractions of days*. But, per Cur. this being after a verdict, the Ch. J. ſaid, that if the plaintiff in error would take advantage of this matter, he ſhould have alleged *diminution*, and procured the original writ to be certified, and if that was returnable before the plaintiff's title, it would have been *error*. Carth. 288. Mich. 5 W. & M. in B. R. Cook v. Darbyſon.

38. Ejectment was *brought as of the laſt term*, and the *demiſe was laid in October*, the tenant does not appear. Holt ſaid, he *would not*

not grant a rule for judgment againſt the caſual ejector, *where it appears upon the record, that the ejectment was brought before title accrued*, though the practice may have been ſo. Comb. 345. Mich. 7 W. 3. B. R. Clayton v. ———.

39. Ejectment of lands in Suffolk *upon the demiſe of the corporation of Bury*. Upon not guilty pleaded, a verdict was given for the plaintiff. But it was moved in arreſt of judgment in C. B. that it does *not appear upon the record that the leaſe was by deed*. And the prothonotaries there certified, that the practice was (notwithſtanding the common rule of confeſſing leaſe, entry, and ouſter, in ejectment) for things incorporeal, as tithes, or upon demiſes of corporations, to lay the demiſe by deed. But it was adjudged in C. B. that it was aided by verdict. And judgment was given there for the plaintiff. Upon which error was brought in B. R. and that judgment was affirmed. And Holt Ch. J. ſaid, that at this day the caſe of 2 Cro. 613. SWADLING v. PIERS, is not law. Ld. Raym. Rep. 136. Hill. 8 & 9 W. 3. Partridge v. Ball.

Carth. 390. Patrick v. Ball. S. C. and per Cur. ſince the caſe in 2 Cro. 613. the law is altered as to this point concerning declarations in ejectment. For now they are grounded on fictions only. And plaintiff had judgment, and affirmed in error.

40. In ejectment, the plaintiff *declared upon two ſeveral demiſes habendum tenementa prædicta*, &c. *by virtue whereof he entered and was poſſeſſed, quouſque the defendant entered in tenementa, and the plaintiff expulit et amovit a termino ſuo prædicto inde nondum finito*, &c. Mr. Northey moved in arreſt of judgment, that tenementa prædicta was uncertain, and therefore ill, for it did not appear which. The ſame of termino ſuo prædicto inde nondum finito, which makes the former objection the ſtronger, becauſe it complains but of one. But the Court held the firſt to be well enough, and that it would extend to both; and as to the other, if it had been omitted, the declaration had been well enough, and therefore it would not hurt it. Judgment for the plaintiff. Ld. Raym. Rep. 561. Paſch. 12 W. 3. Slabourne v. Bengo. [349]

41. Per totam Curiam; by the courſe of this Court *there can be no alteration in the declaration in the iſſue from the firſt declaration delivered, only in the defendant's name*. And a rule was made, that the iſſue ſhould be made according to the declaration delivered againſt the caſual ejector. Ld. Raym. Rep. 1411. Mich. 12 Geo. in caſe of Baſs v. Bradford.

42. In ejectment, the plaintiff declared *of the manor of Queenborough, with the appurtenances*, 400 *acres of land, and common of paſture for all manner of cattle, and for the rectory and advowſon, with the appurtenances, and for all, and all manner of tithes*, and held good. Hill. 6 Geo. 2. B. and affirmed in error in the Exchequer Chamber, Trin. 8 & 9 Geo. 2. and afterwards in the Houſe of Lords, 10th March 1735. Doe (on the demiſe of Savil) v. Borlace.

43. In ejectment, the plaintiff declared *of* 100 *acres of marſh, and one beaſt-gate*, with the appurtenances; after judgment a writ of error was brought, and the error aſſigned was, that the declaration was ill for the uncertainty what is meant by the word (*beaſt-gate*);

gate); on the contrary, a case was cited where so many acres of (alder-carves) in the county of Norfolk, was held good, because it was a term well known in that country. And in the case of METCALF v. ROE, Mich. 9 Geo. 2. *ten acres of pasture, and cattle-gates*, was held good. The Court held the ejectment was well laid, and said there was no difference between cattle-gate in the case of ROE v. METCALF, and beast-gate in the present case; and that any name well understood in the particular place to denote a certain sort or quantity of land is good; and per Lee Ch. J. so many acres of (mountain) in Ireland, is good. And the judgment was affirmed. Hill. 11 Geo. 2. B. R. Benington v. Goodtitle.

(R) Plea. Replication.

1. EJECTIONE custodiæ *by the lord*; the *defendant said, that he is tenant by the courtesy of the same land, by which he entered*, &c. the *plaintiff said that the land was specially tailed to the feme and her first baron, and to the heir of their two bodies*; and a good replication. Br. Ejectione, &c. pl. 12. cites 46 E. 3. 5.

2. It is a good plea in abatement that the plaintiff has *other ejectione* firmæ *pending* for the same land in the Common Pleas. Mo. 539. pl. 710. Trin. 39 Eliz. Digby v. Vernon.

3. *Ancient demesne* is a good plea. 5 Rep. 105. Hill. 43 Eliz. C. B. Alden's case.

4. In ejectment a man shall *not give colour*, because the plaintiff shall be adjudged in by title; adjudged per tot. Cur. Godb. 159. pl. 221. Mich. 7 Jac. B. R. Piggot v. Godden.

5. *Concord with satisfaction* is a good plea in ejectment. Brownl. 133. Trin. 9 Jac. Pats v. Chitty.

2 Brownl. 128. Peto v. Checy, S. C. & S. P. adjudged. — Godb. 149. pl. 193. S. C. adjudged accordingly. — 9 Rep. 77. b. Peytoe's case, S. C. adjudged accordingly.

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6. *Expiration of the term* is no plea in ejectione firmæ; per Jermin. Lat. 206. Trin. 3 Car. Dale v. Penhalerick.

7. In ejectment by A. against B. the Court was moved for C. that he will save B. harmless, and prays, that giving B. security to do so, B. may be *ordered by rule of Court to plead as C. should direct B.* and that B. be not suffered to confess a judgment; per Roll Ch. J. it is out of the way for you to give such security, for there yet appeared no *collusion*, but you shall be *made a party to defend the title*, and then move again. Sty. 382. Pasch. 1653. Ricot v. St. John.

8. If judgment in ejectment be signed in a country cause for *want of plea*, but no possession delivered, a judge, in his chamber, at any time before the assises, may compel the plaintiff to accept a plea; but if possession is delivered, he is without remedy; per Holt Ch. J. 2 Salk. 516. pl. 9. Mich. 9 W. 3. B. R. Anon.

9. In ejectment, *plea of ancient demesne* was allowed to be well, *without an affidavit* to verify the fact, and such plea had been before

fore allowed to be good in EARL CONINGSBY'S CASE. 2 Ld. Raym. Rep. 1418. Trin. 12 Geo. B. R. Goodright v. Shuffil.

(S) Bar.

1. A RECOVERY in one ejectment *is a bar* in another; per Anderſon Ch. J. eſpecially (as Periam J. ſaid) if the party relies on the eſtoppel. 3 Le. 194. pl. 242. Mich. 29 Eliz. C. B. Anon.

2. Declaration of a *park* containing 60 acres, and the jury find but of 30, adjudged againſt the plaintiff for the whole. N. B. The park was *a thing entire*. D. 115. b. pl. 67. Marg. cites 29 Eliz. Baſkervill's caſe.

3. A bar *in one* ejectione firmæ *is* a bar *in another* for the ſame ejectment, but not for another or new ejectment. Mar. 59. pl. 92. Mich. 15 Car. Anon. — 4 Le. 77. pl. 163. Paſch. 28 Eliz. C. B. Spring v. Lawſon, S. P.

4. If the *plaintiff dies*, the Court will ſuppoſe any other perſon of the ſame name to be the plaintiff, and they take notice judicially that the leſſor of the plaintiff is the perſon intereſted, and therefore they puniſh the plaintiff if he *releaſe the action* or the damages. Mod. 252. Trin. 29 Car. 2. C. B. Addiſon v. Otway. — Such releaſe not allowed. Raym. 93. Hill. 15 & 16 Car. 2. B. R. Keyes v. Bradon.

(T) Abatement.

1. IF ejectment of ward be brought *againſt* two, and the *one dies*, yet the writ is good againſt the other; per Thirn. and Hull of the ſame opinion; for *this is in nature of treſpaſs*; quod nota; by which Skrene, who pleaded this matter, imparled. Br. Ejectione, &c. pl. 2. cites 12 H. 4. 10.

2. Ejectione cuſtod' *of land in E.* the *defendant ſaid that the land is in C. and not in E.* Judgment of the writ, and plaintiff prayed leave to inquire a better writ. Br. Ejectione, &c. pl. 4. cites 14 H. 4. 16. [351]

3. In ejectione firmæ, the *omiſſion* of this clauſe, *et bona & catalla querentis ad valen'*, &c. is not material, and the writ is good without this clauſe. Thel. Dig. 94. lib. 10. cap. 6. ſ. 17. cites Plowden, fol. 199. 228.

4. *Leſſee for years brings an ejectione firmæ; the leſſor, being but tenant for life, dies pending the writ*; the writ does not abate. The plaintiff may have judgment and a writ of execution. Jenk. 293. pl. 38.

5. If an ejectment be brought *againſt two*, and *iſſue be joined*, and then *one of them dies*, and a *venire is awarded as to the two defendants, and a verdict againſt two*, yet, upon ſuggeſtion of the death of one of them, upon the roll, the plaintiff ſhall have judgment for the whole againſt the other; cites Cro. J. 330. 274.

2 Keb. 845. becauſe *this action is grounded upon torts, which are ſeveral in their nature, and one may be found guilty, and the other acquitted;* per Cur. Lord Raym. Rep. 717. Hill. 13 W. 3. in caſe of Gree v. Rolle and Newell.

(U) Verdict. How the Jury may find.

1. EJECTIONE firmæ; the plaintiff *declared of ejectment of* 100 *acres* of land, and *in evidence ſhewed a leaſe of* 40 *acres only;* it was ruled to be good for ſo much as was compriſed in the leaſe, and for the reſidue the jury may find the defendant not guilty. Cro. E. 13. pl. 4. Hill. 25 Eliz. C. B. Guy v. Rand.

2. In ejectment, *ſuppoſing the ejectment of ten acres,* and the *jury find the circumſtance but of four acres,* the plaintiff recovered thoſe four acres. D. 115. b. Marg. pl. 67. cites it as adjudged. Trin. 43 Eliz. B. R. Meredith v. Brown.

But where an aſſize was brought *of a park containing* 60 *acres,* and the *jury found* the diſſeiſin *of* 30 *only*; it was adjudged againſt the plaintiff for the whole. But the reporter ſays nota here, that the park was a thing intire. D. 115. b. Marg. pl. 67. cites 29 Eliz. Lady Baſkervill's caſe.

3. In ejectment, the plaintiff declared on a *leaſe of a meſſuage, ten acres of land,* 20 *acres of meadow,* 20 *acres of paſture, by the name of one meſſuage and* 10 *acres of meadow, be it more or leſs,* and upon not guilty pleaded, had a verdict, but nil capiat per billam entered, becauſe upon the matter diſcloſed by the plaintiff himſelf in the declaration, he cannot have his execution of the quantity found by the verdict; for, in the leaſe there are only 10 acres demiſed, and thoſe words (more or leſs) cannot, in judgment of law, extend to 30 or 40 acres, it being impoſſible by common intendment, and the rather, becauſe the land demanded by the declaration is of another nature than what is mentioned in the per nomen, which goes only to the meadow, and the declaration to the arable land or paſture. Yelv. 166. Mich. 7 Jac. B. R. Anon.

4. The *declaration was of a fourth part of a fifth part, in five parts to be divided;* and *the title of the plaintiff, upon the evidence, was only of the third part of the fourth part of the fifth part, into five parts to be divided,* which is only a third part of that which is demanded in the declaration; and it was ſaid that the plaintiff could not have verdict, becauſe the verdict, in ſuch caſe, ought to agree with the declaration. But, per Cur. *the verdict may be taken according to the title;* and ſo it was. Sid. 229. pl. 26. Mich. 16 Car. 2. B. R. Ablet v. Skinner.

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(W) Judgment.

1. JUDGMENT was forthwith given, becauſe the *leaſe determined the ſame day,* and execution awarded immediately. Cro. J. 227. pl. 1. Mich. 7 Jac. B. R. Underhill v. Kelſey.

2. If

2. If one *coparcener* brings ejectment *for the whole*, the judgment ſhall be for the whole. Roll. Rep. 386. pl. 6. Trin. 14 Jac. B. R. Cooper v. Franklyn. 2 Bulſt. 186. S. C. but reports that judgment was given only *for a moiety*.

3. Judgment in ejectment in C. B. was *quod querens recuperet*, and the words *quod defendens capiatur* are omitted, and on this exception judgment was reverſed; for they ſaid in this judgment ſo entered, there is no return of damages, nor a capiatur, and ſo the king is cozened of the fine, and the defendant barred of bringing his writ of error. Sty. 346. Mich. 1652. Acton v. Ayres.

4. In caſe of judgment againſt the caſual ejector, there ought to be a *latitat* ſued out againſt, and common bail filed for, the *caſual ejector*, and *judgment* was ſet aſide for want of it. 2 Show. 249. pl. 253. Mich. 34 Car. 2. B. R. Bouchier v. Friend.

5. *Affidavit* of the delivery of a copy of a declaration in ejectment to A. and B. *tenants* in poſſeſſion of the premiſes, or *of part* thereof. Ruled that there ſhould be *judgment for ſo much* as was in their poſſeſſion. Comb. 102. Paſch. 1 W. & M. B. R. Anon.

6. To have *judgment* ſigned *againſt the caſual ejector* all things muſt be very fair of the plaintiff's ſide; for the defendant loſes his poſſeſſion by a fictitious proceeding; per Cur. 7 Mod. 150. Hill. 1 Ann. B. R. Anon.

7. Ejectment to recover the poſſeſſion of the *Quakers meeting-houſe*. None of them would receive the declaration, and the houſe was open only on *Sundays*, and delivery is not good on that day; ſo the plaintiff took a *judgment by confeſſion of the nominal leſſee;* but it was ſet aſide, becauſe it cannot be entered on his confeſſion, which, in fact, is the confeſſion of the plaintiff himſelf. 8 Mod. 109. Mich. 9 Geo. Cooper v. Beale.

8. If *tenant in poſſeſſion appears and pleads*, and afterwards *withdraws* his plea, and *confeſſes judgment*, the plaintiff may enter judgment againſt the tenant in poſſeſſion; per tot. Cur. But whether he may in this caſe enter it againſt the caſual ejector, the Court was divided; adjornatur. 8 Mod. 118. Hill. 9 Geo. Smith v. Jones.

9. *Error* in Cam. Scacc. will not lie upon a *judgment* in ejectment *againſt the caſual ejector*. 8 Mod. 118. Hill. 9 Geo. Smith v. Jones.

10. Judgment was in ejectment *of two ſeveral demiſes of two ſeveral tenements*, and the entry was *quod recuperet terminum ſuum in tenement' prædict'*. It was urged that it ſhould be taken reddendo ſingula ſingulis; but if the plaintiff had two ſeveral terms in one and the ſame land, then poſſibly the judgment might not be right; and the judgment was affirmed. Gibb. 83. pl. 11. Trin. 2 & 3 Geo. 2. B. R. Anon. [353]

(X) What ſhall be recovered, and the Effect thereof.

1. IN writ of *ejectione cuſtodiæ*, the plaintiff ſhall not have judgment to recover *the ward and damages where the heir is within age, but* to recover *all in damages, and ſhall have ſeiſin of the land*; but at this day he ſhall recover poſſeſſion of the land. Br. Ejectione, pl. 13. cites 30 E. 3. 11.

Co. Litt. 285. a. S. P.

2. In ejectment *of a term for years*, the *term expired before judgment given*. Though the plaintiff cannot have judgment to recover the land, yet he ſhall have *judgment of damages*; but otherwiſe it is in actions where frank-tenement is to be recovered; and plaintiff had judgment. Sav. 28. pl. 66. Trin. 24 Eliz. Booth v. Ld. Cromwell.

It binds the right, and makes a title in the plaintiff.

3. By a recovery in an ejectment the *poſſeſſion is bound*. 3 Le. 194. pl. 242. Mich. 29 Eliz. C. B. Anon. 1 Salk. 258. Mich. 1 Ann. B. R. Withers v. Harris.

4. Ejectment for 10 *acres*, and the jury find but of *four*, plaintiff ſhall recover the four acres. D. 115. b. pl. 67. Marg. cites 43 Eliz. Meredith v. Brown.

Cro. E. 234. S. C. Meſuagium prædict', viz. ſo much in length, and ſo much in breadth, according to the verdict. ——Poph. 14. S. C.

5. A. ſeiſed of land, purchaſes a houſe and other land, and pulls down the houſe, and builds it ſix feet bigger, which ſix feet is *upon his own land*, though the demandant has title but to part of the houſe, part only being on the land demanded; yet judgment was that he ſhall recover the houſe. Lat. 62, 63. Paſch. 1 Car. Hems v. Stroud.

He ſhall only recover his *purparty pro indiviſo*, and ſhall be put in poſſeſſion of no more, and in ſuch caſe the ſheriff ſhall give the ſame execution as he would do of rent upon aſſiſe. 12 Mod. 657. Hill. 13 W. 3. in caſe of Johnſon v. Allen.

6. If *tenant in common* ſeals a leaſe in ejectment, he ſhall recover but a moiety; per Hale Ch. J. Mod. 102. pl. 9. Mich. 25 Car. 2. B. R. Anon.

7. Ejectment for an acre of land *in D. and S.* and it *lies only in D.* yet plaintiff ſhall recover; if it be for an *acre in D.* and *part of it lies in S.* he ſhall recover what lies in D. if *for a whole acre, and he has title only to the 4th part*, he ſhall recover the 4th part; arg. and not denied by the Court. 3 Lev. 334. Trin. 4 W. & M. in C. B. Goodwin v. Blackman.

8. Holt Ch. J. ſaid, that it was held in this Court in the caſe of BADGER v. LLOYD, that the *plaintiff might enter pending the writ of error upon the judgment in ejectment, if he could find the poſſeſſion empty*; for the writ of error binds the Court, but not the right of the party; but he muſt take care that he do not enter with force. 2 Ld. Raym. Rep. 808. Mich. 1 Ann.

(Y) Judgment ſtayed.

1. JUDGMENTS in ejectment againſt caſual ejectors for want of an appearance, ſhall be ſet aſide, and reſtitution granted, if no latitat hath been fued out againſt, *nor common bail filed* for, ſuch caſual ejector, or nominal defendant, *within* 14 *days after ſuch appearance*; per Cur. L. P. R. 85. cites Trin. 4 W. & M.

2. If notice in ejectment be *given to an under-tenant*, and he does *not acquaint his landlord* therewith, but ſuffers judgment to go againſt him, the Court upon motion will not ſuffer execution to be taken out till the right be tried. 12 Mod. 211. Mich. 10 W. 3. Anon.

This caſe was denied, per Cur. Mich. 12 Geo. 2. B. R. in caſe of Sir William Clayton v. Boone.

3. If judgment be againſt the caſual ejector, and it be made appear that *no declaration* was *rightly ſerved*, the Court will ſet it aſide; and if at common law an ejectment had been againſt one that had nothing in the land, and upon judgment againſt him another is turned out of poſſeſſion, there was no remedy for the right owner but treſpaſs or a writ of deceit; and this ſtill is all the certainty a man has of his poſſeſſion; and now all we can do is to ſet ſuch recovery aſide, and to puniſh the offender; per Holt Ch. J. 12 Mod. 655. Hill. 13 W. 3. in caſe of Gree v. Rolle.

4. *But* upon *affidavit that defendant was a ſoldier*, and ſo intitled to *protection* by law, it was ordered that he ſhould *give ſecurity for payment* of the rent for the future. 10 Mod. 383. Hill. 3 Geo. 1. B. R. Smith v. Parkes.

5. The Court uſually *ſtays proceedings* in ejectment, on reaſonable terms, at any time before execution executed, and where the ejectment was for *nonpayment of rent*, the plaintiff had judgment; but the proceedings were ſtayed on *bringing in the rent and coſts* within three days. 8 Mod. 345. Hill. 11 Geo. Philips v. Doelittle.

(Z) Writ of Error.

1. IN ejectment, the plaintiff declared of a *leaſe of the 4th part of an houſe in N. in four parts to be divided, by force of which he entered into a tenement parcel' prædict', and was inde poſſeſſionatus till the defendant did eject him de tenementis prædict'*, whereas he ought to ſuppoſe the entry in the fourth part, and the ejectment of the 4th part; the Court ſaid, de tenementis prædict' ſhall not be intended the whole tenement, but of the 4th part, and the judgment affirmed. Cro. E. 286. pl. 3. 34 Eliz. B. R. Rawſon v. Maynard.

Cro. E. 290. pl. 10. Hill. 34 & 35 Eliz. B. R. S. P. in caſe of Warnford v. Haddock.

2. A *writ of error* may be brought before the *writ of inquiry* be returned in an ejectment, for in that action the judgment is compleat at the common law before it be returned, for the judgment

is but to gain poſſeſſion, and ſo it is in dower; but otherwiſe, in treſpaſs, where damages only are to be recovered, for in ſuch caſe the judgment* is not perfect till the writ of inquiry is returned, nor can be made up before, as in the principal caſe it may; per Roll Ch. J. Sty. 109. Trin. 24 Car. Glede v. Dadeney.

3. In an ejectione firmæ, if the writ of *habere facias poſſeſſionem contains more acres of land than* are expreſſed *in the declaration* it is error; per Roll Ch. J. Sty. 238. Mich. 1650. Lumley v. Nevil.

4. 16 & 17 *Car.* 2. *cap.* 8. *ſ.* 3, 4. *Execution ſhall not be ſtayed by writ of error upon any judgment after verdict in ejectione firmæ, unleſs the plaintiff in ſuch writ become* bound to the defendant in ſuch a ſum as the court *to whom the writ is directed ſhall think fit; that if the judgment be affirmed, or the writ diſcontinued in his* default, *or he be* nonſuit, *he will pay ſuch* damages *and ſums of money, to aſcertain which, a* writ of inquiry *ſhall iſſue to inquire of the meſne profits, and damages by waſte done, after the firſt judgment as ſhall be awarded, and* coſts *of ſuit.*

The Court ſaid, that there was no reaſon for ſuch diſtinction. Hill. 2 Geo. 2. B. R. Ferguſon v. Rawlinſon.

5. A. had judgment in ejectment in C. B. and *execution of his damages and coſts.* B. brings error, and the *judgment is affirmed.* Whereupon A. prays his *coſts for his delay and charges*, but could not have them; for no coſts were in ſuch caſe at common law, and the ſtatute 3 *H.* 7. 10. *gives coſts only where error is brought in delay of execution.* So 19 *H.* 7. 20. and here, though he had *not execution of the term, yet he had it of his coſts.* Vent. 88. Trin. 22 Car. 2. B. R. Foot v. Berkley.

6. After a recovery in ejectment, the bringing a writ of error is *no bar to* an action of *treſpaſs for the meſne profits*, but that it may be brought pending ſuch writ of error. 12 Mod. 138. Mich. 9 W. 3. Donford v. Ellis.

(A. a) Of confeſſing Leaſe, Entry, and Ouſter.

1. IF the *leaſe is defective*, we can give no judgment, and the rule of Court does not bind the defendant to confeſs the leaſe otherwiſe than you have made it; per Roll Ch. J. Sty. 343. Mich. 1652. Theobald v. Conqueſt.

Vent. 332. Trin. 30. Car. 2. the Court inclined to the contrary, though Ld. Hale was ſaid to be of another opinion.——

2. In ejectment, the leſſor of the plaintiff had title to enter for a *condition broken for non-payment of rent.* Leaſe, entry, and ouſter, was confeſſed, and the Court was moved, that in regard the leſſor had ſuch a ſpecial title, and no eſtate until entry, whether ſuch an *entry* ſhould be *ſupplied by the general confeſſion*, or that there ſhould be an actual entry: and held that it ſhould be ſupplied by the general confeſſion. Vent. 248. Mich. 25 Car. 2. B. R. Anon.

1 Salk. 259. pl. 13. March 26, 1702. held by Holt Ch. J. at the aſſiſes, that in ſuch caſe entry and ouſter is not neceſſary; though it had been held otherwiſe before the time of Hale Ch. J.——— 2 Ld. Raym. Rep. 750. S. C. ruled by Holt Ch. J. accordingly, though he ſaid he formerly doubted of it, and reſerved it as a point for his opinion, and cauſed it to be moved in B. R. where the other judges held that the general confeſſion of entry by the defendant was good enough.

3. If

3. If A. lets to B. and B. lets to C. to try the title, the confeſſion of the leaſe, entry, and ouſter, *extends only* to the leaſe made *to C. and not to that to B. Per Hale. Vent. 248. Mich. 25 Car. 2. B. R. Anon.

This rule does not extend to confeſs *actual entry upon a leaſe which* of the other

is the title, but per Cur. it ſhall be *intended* that they entered till the contrary be proved part. Sid. 223. pl. 12. Mich. 16 Car. 2. B. R. Langhorne v. Merry.

4. Where the *defendant in ejectment appears, and confeſſes leaſe, entry, and ouſter*, that ſhall be ſufficient to prove an actual entry in any caſe where an actual entry is required; and ſo Scroggs ſaid it was always held by Ch. J. Hale, becauſe it ſhall be taken an entry to all intents. Freem. Rep. 468. pl. 643. Trin. 1678. Winch v. Huddleſton.

5. In an ejectment, where there are *divers defendants* which are to confeſs leaſe, entry, and ouſter; if every one do not appear at the trial, the plaintiff cannot proceed againſt the reſt, but muſt be *nonſuit*. Vent. 355. Trin. 33 Car. 2. B. R.

2 Vent. 195. Trin. 2 W. & M. in C. B. Fagg v. Roberts, S. P. and coſts taxed for the defendants.

6. For not appearing at the trial to confeſs leaſe, entry, and ouſter, there was *judgment* againſt the caſual ejector, but *ſet aſide, becauſe no bail was filed*. 2 Show. 201. Paſch. 34 Car. 2. B. R. Honor v. Gale.

7. Where an entry is required, and even neceſſary, the *confeſſion* of leaſe, entry, and ouſter, does *ſupply* it (though no *actual entry*). Per Scroggs Ch. J. who ſaid it was the opinion of all the judges. Show. 201. pl. 204. Paſch. 35 Car. 2. B. R. Honor v. Gale.

8. Eyres J. much doubted whether the rules of confeſſing leaſe, entry, and ouſter, be good in an *inferior court*, but they ſhould proceed the ancient way. Cumb. 208. Trin. 5 W. & M. in B. R. Anon.

9. Ejectment for two meſſuages, two gardens, 70 acres of land, 15 of meadow, and 30 of paſture, in D. The plaintiff delivered declarations to two tenants only, and as to the lands in their poſſeſſion, the defendant entered into the common rule, but becauſe he had made ſeveral ſmall purchaſes in that pariſh, and the plaintiff claimed only 20 acres lately granted to him by leaſe from the biſhop of Glouceſter; therefore he moved by his counſel, that *the plaintiff might give a note in writing* before the firſt day of the next term, *what lands in particular he claimed*, and where ſuch lay, and in whoſe poſſeſſion, &c. or otherwiſe that he might not proceed to trial at next aſſizes; for, defendant not knowing what lands plaintiff would claim, could not tell what purchaſe deeds to produce at the trial; ſed non allocatur. 4 Mod. 214. Paſch. 5 W. & M. in B. R. Gwynn v. Pie.

10. In *ejectment*, the *demiſe* by the leſſor of the plaintiff to the plaintiff *was laid to be the 27th of April* 1697, *which time was not come at the time of the trial*; but the *tenant had entered into the common rule to confeſs leaſe, entry, and ouſter*; and the Court compelled the defendant to confeſs leaſe, entry, and ouſter, otherwiſe the plaintiff would have been nonſuit, and then he would have had judgment againſt the caſual ejector; although it was objected,

that the plaintiff could not have judgment, though the verdict were found for him. Ruled, by the Court of B. R. upon a trial at bar. Ld. Raym. Rep. 728, 729. Anon. cites Mich. 8 Will. B. R.

Per Cur. S. P. *But if one enters* only upon another *claiming only as tenant in common*, and the other brings an ejectment, it will be hard to enforce the * defendant who has done nothing, but as tenant in common, to confeſs leaſe, entry, and ouſter. Per Cur. 12 Mod. 657. Hill. 13 W. 3. in caſe of Johnſon v. Allen.

11. In caſe of *tenants in common*, there muſt be an actual ouſter of one by the other, or elſe he ſhall not be compelled to confeſs leaſe, entry, and ouſter. Per Holt. 7 Mod. 39. Trin. 1 Ann. B. R. Anon.

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12. In ejectment, if defendant has *not regular notice of trial*, the way is not to confeſs leaſe, entry, and ouſter, but to oppoſe judgment againſt the caſual ejector. 7 Mod. 118. Mich. 1 Ann. B. R. Anon.

13. If *defendant will not appear*, and confeſs leaſe, entry, and ouſter, the *courſe is* to call him and his attorney, if he be within the rule, and then to call the plaintiff himſelf and nonſuit him, and then upon return of the poſtea judgment will be given againſt the caſual ejector; and the maſter will tax coſts upon the rule for confeſſing leaſe, entry, and ouſter; and if theſe are demanded of the defendant and not paid, the Court on affidavit will grant an *attachment*. 1 Salk. 259. pl. 14. Trin. 2 Ann. B. R. Turner v. Barnaby.

If plaintiff ſhews title, he ſhall recover the whole againſt the other; per Holt Ch. J. 12 Mod. 655. —If one confeſs leaſe, entry, and ouſter, *for as much of the premiſes as are in his poſſeſſion*, the jury ſhall inquire againſt him alone for ſo much, and *if the other ſaid not* appear, or not confeſs, &c. there ſhall be judgment for ſo much of the premiſes as are in his poſſeſſion; judgment againſt the caſual ejector; per Holt Ch. J. 12 Mod. 656. Hill. 13 W. 3. in caſe of Gree v. Roll.——C brought an ejectment againſt *S. F. and G. F. appeared, and confeſſed* leaſe, entry, and ouſter; S. and G. did not appear, nor confeſs leaſe, entry, and ouſter; upon which, by the direction of Holt Ch. J. at the ſummer aſſizes at Horſham in Suſſex, 12 W. 3. a *verdict was given* by the jury *for the plaintiff againſt F. generally*; and verdict was given againſt the plaintiff for S. and G. and indorſement was made upon the poſtea that this verdict was for S. and G. becauſe they did not appear and confeſs leaſe, entry, and ouſter; and for this reaſon that they ſhould not have coſts againſt the plaintiff, and that the plaintiff ſhould have judgment againſt the caſual ejector for ſuch lands as were in the poſſeſſion of S. and G. Lord Raym. Rep. 729. Claxmore v. Searle & al'.

14. In ejectment againſt ſeveral, if *ſome confeſs leaſe, entry, and ouſter, and others do not*, the plaintiff may go on as to the former, and be nonſuit as to the latter; but the cauſe of the nonſuit muſt be expreſſed in the record, viz. becauſe thoſe defendants would not confeſs leaſe, &c. and on the return of the poſtea the Court would be informed what lands were in the poſſeſſion of thoſe defendants, that the judgment might be entered againſt the caſual ejector as to them. 2 Salk. 456. pl. 6. Paſch. 4 Ann. B. R. Greeves v. Roll.

For more of Ejectment in general, ſee other proper titles.

Election.

(A) *In what Caſes* an Election is given by Law.

Fol. 725.

[1. IF *A. ſeiſed in fee of* 100 *acres, enfeoffs B. of* 18 *of the* 100 acres *(without aſſigning which* of the 100 acres he enfeoffed him of) *to hold to B. and his heirs at election of B. and his heirs when he pleaſe;* this is a void feoffment ſo that this cannot be * made good by any election, becauſe a *livery cannot operate in futuro,* but ought to paſs the freehold preſently or never, and therefore the feoffment void. Dy. 11 Eliz. 281. 19. adjudged.]

Mo. 81. pl. 215. Bullock v. Burdett, S. P. adjudged.— And. 11. pl. 24. S.C. adjudged.— Bendl. 148.

pl. 206. S. C. adjudged —— S. C. cited per Curiam, 2 Rep. 36. b. —— Hob. 174 cites S. C.

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2. If a common perſon grants to the mayor and burgeſſes of C. *the moiety of a yard land in a great waſte without certainty* in what part of the waſte they ſhould have the ſame, or the ſpecial name of the land, or how it was bounded, or without any certain deſcription of it, ſo as the ſame ought to be reduced to certainty by election, the corporation muſt not make their election *by attorney,* but after they are reſolved upon the land they *muſt make a ſpecial warrant of attorney, reciting the grant to them, and in what part of the ſaid waſte their grant ſhould take effect, eaſt, weſt, &c. or by buttals, &c.* according to which direction the attorney is to enter, &c. Le. 30. pl. 36. Trin. 27 Eliz. B. R. in Sir Walter Hungerford's caſe.

But if ſuch grant be made by the king it is utterly void for the uncertainty. Ibid.—— If the king grants 120 acres of his waſte in D. and the ad quod damnum returns, that it is not to his damage, and that the waſte contains 300 acres, there nothing paſſes, for it is uncertain which 120 acres were intended, and the party ſhall not have any election againſt the king: all which was agreed upon evidence to the jury. Noy, 29. Brand v. Todd. —— 12 Rep. 86. Trin. 9 Jac. in the Court of Wards in Stockdale's caſe, S. P.

3. Sir R. H. *bargains and ſells* to three perſons *ſeveral manors,* (which are *part in demeſnes, part copyhold, and part in leaſe for years with rents reſerved) and the reverſions and remainder* of them with all rent reſerved *habend. to them and their aſſigns after the death of Sir R. H. for* 17 *years, &c. Afterwards Sir R. H. covenants to ſtand ſeiſed of the premiſes to the uſe of himſelf for life, and to the heirs of his body,* and dies; *no attornment is made to the bargainees.* Reſolved, the bargainees have an election to take this as a demiſe at the common law or by bargain and ſale by 27 H. 8. without attornment; and though the leſſees or bargainees have entered generally, yet their election remains to them ſtill notwithſtanding the death of the leſſor and the alteration of the eſtate by the ſecond indenture; for they had an intereſt in them preſently. 2. Rep. 35. b. 36. a.

2 And. 202. pl. 19. S. C. adjudged; and though by the death of Sir R. H. their power to take the land in leaſe by attornment be determined, yet now they ſhall take as they may.— Poph 95. pl. 2. S. C.

& S. P. held accordingly by 36. a. Paſch. 37 Eliz. in the Court of Wards. Sir Rowl. Hayward's caſe.

Popham and Anderſon, and therefore if the bargainees after Sir R.'s death would elect to take it by way of bargain and ſale, they ſhall have all the reverſions, remainders, rents, and ſervices, as well as the land in poſſeſſion, executed to them by the ſtatute of uſes; and of the ſame opinion were all the juſtices in Trin. term following upon their meeting at Serjeant's Inn for another great cauſe. —— Hob. 159. S. C. cited by Hobart Ch. J. as reſolved. ——— Lutw. 803. Trin. 10 W. 3. S. C. cited by Powel J. that *when an election is coupled with an intereſt, ſuch election is deſcendible.*

4. If the tenant in *ſocage holds by fealty and* 10*s. or a pair of gilt ſpurs*, if the heir be not, *ſo ſoon as conveniently* he may, all circumſtances conſidered, after the death of his anceſtor, *ready upon the land to pay his relief*, the lord may diſtrain for which of them he will; for upon default of the tenant, the *election* is given to the lord. 2 Roll. Abr. 519. Tenure (L), pl. 7. cites Co. Litt. 91.

[359] ## (A. 2) Rules and Notes, as to Election.

1. IF your *act may work two ways*, both *ariſing out of your intereſt*, election is given to the patient, to uſe it either way, but not both ways to one entire thing and one entire act. Hob. 159. cites 2 Rep. 35. 37 Eliz. Sir Rowland Heyward's caſe.

2. If the act will work two ways, *the one by an intereſt, and the other by authority* or power, and the act be indifferent, the law will attribute it to the intereſt and not to the authority. Hob. 159. in pl. 193. Mich. 10 Jac.

3. But where *intereſt and authority meet*, if the party declares clearly that his will is that this act ſhall take effect by his authority or power, there it ſhall prevail againſt the intereſt, for modus & conventio vincunt legem. Hob. 160.

4. And though the party doth not make an *expreſs declaration*, yet if his act do import a neceſſity to work by his power, or elſe to be wholly void, the benignity of the law will give way to effect the meaning of the party. Hob. 160. in caſe of Colt v. Glover.

5. When election creates the intereſt, nothing *paſſes till* election, ſo where no election can be, no intereſt can *ariſe*. Hob. 174. Hill. 12 Jac. in caſe of Stukely v. Butler.

(B) *Who* ſhall have it.

[1. IF a man *leaſes land* for years, *reſerving weekly nine quarters of wheat, or the value thereof*, as it ſhall then be ſold in the market of W. if the leſſee pays neither of theſe at the time appointed, the leſſor may have his action at his election for the wheat only, or for the value only, for though the leſſee might have paid any of them at his election at the day, yet after the day the law gives the election to the leſſor. Tr. 3 Ja. B. R. between Lord DENNY AND PARNELL, adjudged.]

[2. If

[2. If a man *bargains and ſells* 300 *cords of wood out of his woods* to another and his aſſigns, *to be perceived by the appointment of the bargainor*, if the bargainor does not aſſign it within a convenient time after requeſt made by the bargainee or his grantee, they may take it without appointment. Co. 5. Palmer, 24. b. reſolved. P. 43 El. B. R.]

Mo. 691. pl. 955. Maynard v. Baſſet, S.C. but S. P. does not fully appear. ——Cro. E. 819. pl. 14.

Baſſet v. Maynard, S. C. adjudged for the aſſignee of the bargainee; for the bargainee had an intereſt before the appointment by the bargainor, which intereſt he may aſſign. ——Noy, 32. Baſſet v. Baynard, S. C. but not clearly reported. —— S. C. cited Jo. 276. that there is *no diverſity where the wood is to be taken per viſum, or per viſum & allocationem*; for in both caſes upon requeſt made and refuſal the party may take them without view or delivery.

3. When a thing is granted, or concludes conditionally, as 20s. per ann. or a robe price 20s. to be paid at ſuch a day, there *at the day* the debtor may pay the one or the other at his election; but if he does not pay at the day, the creditor, or the grantee, after the day, has election to demand the one or the other; per Cateſby, quod Moyle and Littleton J. conceſſerunt. Br. Dette, pl. 112. cites 9 E. 4. 36. [360]

4. A man *has three daughters, and covenants with J. S. that he ſhall have the diſpoſition in marriage of one of them*; the election is in the father of which of the daughters the other ſhall have the marriage, and he is not to deliver the daughter till requeſt; but upon requeſt he is to deliver the daughter to J. S. otherwiſe he cannot have the effect of the covenant; held by all the juſtices. Mo. 72. pl. 197. Trin. 6 Eliz.

Dal. 73. pl. 55. S.C. in totidem verbis.

5. If *A. grants* 1000 *cords of wood to J. S. to be taken at the election of J. S.* and the grantor or a ſtranger cuts any trees, J. S. the grantee cannot take them, but muſt ſupply his grant out of the reſidue. 5 Rep. 25. a. Paſch. 43 Eliz. B. R. the ſecond Reſolution in Sir Tho. Palmer's caſe.

S. C. cited Vent. 271. Trin. 27 Car. 2. B. R. in caſe of Motteram v. Jolly, where the caſe was that A. covenanted with J. S. that J. S. ſhould elect 20 of the beſt trees out of his wood to be taken within 11 years; and the breach was aſſigned, that the defendant had cut trees within the time; upon which it was demurred and relied upon the ſecond reſolution in 5 Rep. Sir Thomas Palmer's caſe. But here the Court were of opinion for the plaintiff, for by the covenant he has 11 years time to elect, and by cutting any trees in the mean time, the latitude of his election is abridged. And Hale ſaid that the caſe in 5 Rep. there if the grantee can have the number of his cords of wood, he has the effect of his grant; but trees differ in value exceedingly from each other.

6. Note, as to elections theſe *diverſities* following; 1ſt, *When nothing paſſes to the feoffee or grantee before election* to have the one thing or the other, the election ought to be made in the life of the parties, and the *heir or executor cannot make election. But when an eſtate or intereſt paſſes immediately* to the feoffee, donee, or grantee, there election may be made by them, or by their heirs or executors. Co. Litt. 145. a.

2 Rep. 36. b. 37. a. Paſch. 37 Eliz. in the Court of Wards, in Sir Rowland Heyward's caſe, S. P. in a nota by the reporter.

7. 2dly, *When one and the ſame thing paſſes to the donee or grantee, and the donee* or grantee *has election in what manner or degree he will take* this, there the intereſt paſſes immediately, and the party, his heirs or executors, may make election when they will. Co. Litt. 145. a.

2 Rep. 37. a. S. P.

8. 3dly,

2 Rep. 37. a. S. P.

8. 3dly, When *election* is *given to ſeveral* perſons, there the firſt election made by any of the perſons ſhall ſtand. Co. Litt. 145. a.

* 2 Rep. 37. a. S. P. cites 9 E. 4. 36. b. L. 5 E. 4. 6. b. 21 E. 3. Annuity, 27. and 11 Aſſ. pl. 8. 29 Aſſ. 55. 3 E. 3. tit. Aſſiſe, 175. 43 E. 3. tit. Bar, 194.

9. 4thly, In caſe an *election* be *given of two ſeveral things*, always *he which* is the firſt agent, and which *ought to do the firſt act, ſhall have the election*. *As* if a man grants a *rent of* 20 *s. or a robe* to one and to his heirs, the grantor ſhall have the election; for he is the firſt agent by payment of the one, or delivery of the other. So if a man makes a *leaſe rendering a rent or a robe*, the leſſee ſhall have election, cauſa qua ſupra, and with this agree the books in the * margin. *But if I give* unto you *one of my horſes in my ſtable*, there you ſhall have the election, for you ſhall be firſt agent by taking or ſeizure of one of them. And if one grant to another 20 *loads of hazil* or 20 loads of maple *to be taken in his wood of D.* there the grantee ſhall have election, for he ought to do the firſt act, viz. to ſell and take the ſame. Co. Litt. 145. b.

2 Rep. 37. a. S. P.

10. 5thly, When the thing granted is *of things annual, and are to have continuance*, there the election remains to the grantor (in caſe where the law gives to him election) as well after the day as before, otherwiſe it is when the *things* are *to be performed unica vice*; and therefore if *I grant to another for life an annuity or a robe at the feaſt of Eaſter, and both are behind*, the *grantee ought to bring his writ of annuity in the diſjunctive*; for if he brings his writ of annuity for one only, and recovers, this judgment ſhall determine his election for ever; for he ſhall never have a writ of annuity afterwards, but a ſcire facias upon the ſaid judgment. Which reaſon Fitzherbert in his Natura Brevium not obſerving, held an opinion to the contrary. But *if I contract with you to pay unto you* 20 *s. or a robe at* the feaſt of *Eaſter, after the feaſt you may bring an action of debt for the one or for the other*. Co. Litt. 145. a.

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In Marg. cites F. N. B. 122. (E)

2 Rep. 37. b. S. P.

11. 6thly, The *feoffee by his act and wrong may loſe his election*, and give the ſame to the feoffor; *as if one infeoffs another of two acres, to have and to hold the one for life, and the other in tail, and he before election makes a feoffment of both*, in this caſe the feoffor ſhall enter into which of them he will for the act and wrong of the feoffee. Co. Litt. 145. a.

12. If a man gives to another *the beſt horſe in his ſtable*, the donor here ſhall have the election. In caſe of a *heriot*, the ſame is to the beſt beaſt, here he who is to have the benefit of the ſame, is to have the election, and that ſhall be ſaid to be the beſt, which he thinks to be the beſt. Per Fleming Ch. J. 2 Bulſt. 9. Mich. 10 Jac. in caſe of Billingſly v. Hornby.

13. If a *ſale be of* 500 *ſtacks of wood out of* 700, the buyer in this caſe may chooſe; but if it be of 500 to be ſet out by the ſeller, the ſetting out would be a condition precedent; per Cur. 7 Mod. 88. Mich. 1 Ann. B. R. in caſe of Grips v. Ingledew.

14. A man *owes money by bond, and alſo by award*, ſuppoſe 20 *l. by each*, and he pays one 20 l. it ſhall be upon which of both he pleaſes; for he, and not the receivers, is the firſt agent. Quære. 7 Mod. 123. Hill. 1 Ann. B. R. Stracy v. Saunders.

(C) Who may elect, [and *when*.]

[1. IF a man levies a *fine* come ceo que il ad ſe ſon done *of an houſe and* 100 *acres of land in D.* where *he hath there an houſe and* 118 *acres*, the *conuſee* may elect which 100 acres he will have, for the election is given to him by the fine. M. 37 El. B. R. between MORRIS AND LEVESAY, agreed.] Mo 102. 16 & 17 Eliz. S. P. per Curiam. — D. 280. b. Marg. pl. 17. cites

S. P. ruled in the Court of Wards, 21 Eliz. in the caſe of Evans v. Mitton. ——— Mo. 84. S. P. accordingly by Weſton, but Dyer denied this caſe, and vouched 12 H. 7. and the caſe of the manor of Sour for his purpoſe, which was proved according to the intention of the party by circumſtances; but Weſton put this diverſity, that if leſſee for life be of 100 acres, and the leſſor grants the reverſion of 20 of thoſe acres by fine, the grantee ſhall compel the leſſee to attorn for which 20 acres he pleaſes by quid juris clamat; but if the grant be by deed, then it is in the leſſee's election to attorn for which 20 acres the leſſee pleaſes. ——— Mo. 602. pl. 832. Hill. 41 Eliz. C. B. Marſhall v. Marſhall adjudged, that where a fine was levied of five yard land, with a proviſo, that if the feme ſurvived her baron ſhe ſhould have a yard and half thereof for her life without ſhewing what certainly, after the baron's death, ſhe being ceſty que uſe, ſhall have election.

[2. *But* in the ſaid caſe, *if* the *conuſee renders it back to the conuſor for certain years*, the *conuſor* hath the election given him which 100 acres he will have, and he may elect. M. 37 El. B. R. between MORRIS AND LEVESAY, per Curiam.]

[3. If a man *gives two acres* to one, *to hold one for life the other in fee*, the *donee* hath election. Com. RENEGAR AND FOG. 6. b.].

[4. If a man levies a *fine* come ceo, &c. *of an houſe and* 100 *acres* of land *in D. (where he hath there* 118 *acres) and* the *conuſee renders to the conuſor for* 100 *years*, and after the *conuſor dies*, his *executor* may elect which of the 100 acres he will have, becauſe this was a thing in intereſt in the teſtator. M. 37 El. B. between MORRIS AND LEVESAY, agreed per Curiam.] [362]

[5. If a man *gives one of his horſes to A. and B.* and after *A. dies*, yet B. may elect, becauſe this was a thing in intereſt in them, and no expreſs election limited. Mich. 37 El. B. between MORRIS AND LEVESAY, per Curiam.]

[6. *But* if a man *gives one of his horſes to be elected by A. and B.* if *A. dies* before election, B. cannot elect. M. 37 El. B. between MORRIS AND LEVESAY, per Curiam.] Fol. 736.

7. In caſe of two grantees, the *firſt named* ſhall have election. Mo. 85. in pl. 215. Paſch. 7 Eliz. C. B.

8. Feoffment of a houſe and 17 *acres of land, parcel of a waſte*, the feoffee, and not his heirs, muſt make his election, or elſe the grant is void. Hob. 174. cites D. 281. 10 Eliz. Bullock's caſe. Bendl. 148. pl. 206. S. C. adjudged. ——— Mo. 81. pl. 215.

Bullock v. Burdet, S. C. adjudged. ——— And. 11. pl. 24. S. C. agreed that the election by the heir was not good. ——— S. C. cited 2 Rep. 36. b. per Curiam.

9. Upon *eſtates executed to uſes of a thing uncertain*, the Court thought that the election ought to be made by the feoffee or conuſee to the uſe, and this as well ſince the 27 H. 8. as before; becauſe elections being given to the grantees for their benefit, the feoffee before the 27 H. 8. was the ſole party who was intended to be benefited by the grant in judgment of the common law,

law, and ceſtuy que uſe had no intereſt but ſuch as the Chancery allowed in conſcience, and now ſince 27 H. 8. ceſtuy que uſe has the poſſeſſion in ſuch quality and form as he had the uſe, and if he had not the uſe till election, he ſhall not have the poſſeſſion till election, and if the election was not incident to his uſe before 27 H. 8. it is not given to his poſſeſſion ſince 27 H. 8. But quære, for in the principal caſe the election is limited to the uſe, and ſo that the poſſeſſion of all paſſes to the feoffees, and the uſe is diſtributory by election, and therefore it *ſeems reaſonable that he, who is to take the uſe, is to make the election.* Mo. 102. pl. 247. Mich. 16 & 17 Eliz. in Calthrop's caſe.

10. Sir T. S. was ſeiſed of a manor, and *aliened the manor, except one cloſe, parcel of the ſaid manor, called N.* and there *were two cloſes, parcel of the ſaid manor, called N.* the one containing nine acres, the other three acres. The Court held, that the alienee ſhould not chuſe which of the ſaid cloſes he would have, but the alienor or feoffor ſhould have the election which of the ſaid cloſes ſhould paſs. Le. 268. pl. 360. 20 Eliz. C. B. Sir Thomas Lee's caſe.

11. If a man deviſes *two acres of land out of four* acres lying together, the deviſee ſhall have election. D. 280. b. Marg. pl. 17. cites 40 Eliz. Marſhal's caſe.

12. If a man *ſells trees* growing upon his land, *excepting ſix oaks*, the exceptor is to have the election, and if there be a *time limited*, he muſt do it during ſuch time, but if he ſlip the time, then the other ſhall elect; but where *no time is limited*, and vendor does not elect which he will have left ſtanding, it is doubtful if the other may elect; but it is clear, that if the grantee *requeſts* vendor to make his election, and *vendor refuſes to elect*, the vendee ſhall elect, leaving the number of trees excepted for the vendor; but where no requeſt is, nor time limited, it is doubtful if vendee may do ſo; agreed by the juſtices. 2 Bulſt. 7. Mich. 10 Jac. in caſe of Billingſley v. Herſey.

[363] 13. A. *leaſes to B.* 40 *acres, parcel of* 60, and *before B. makes his election B. dies;* and the queſtion was, whether this leaſe was not void by the death of B. or whether his executor might make his election? The Court held, that an election might be made by the executor, *and diſtinguiſhed between* the caſe of *a leaſe for years and a feoffment;* for in caſe of a feoffment it is void, becauſe a *livery cannot operate in futuro.* Freem. Rep. 530. pl. 713. Mich. 1680. Jones v. Cherney.

14. Election is *deſcendible or not*, according to the nature of the thing, if it be merely perſonal it cannot deſcend. Per Powel J. Lutw. 803. Trin. 11 W. 3. in caſe of Eaſtcourt v. Weekes.

15. Where an *eligible eſtate* paſſes, the *heir* cannot make election, as feoffment of two acres, habend. the one for life, and the other in fee, the heir ſhall not make election, but the leſſor ſhall have all. Per Doderidge J. 2 Roll. Rep. 485. Mich. 22 Jac. B. R. in caſe of Hurd v. Foy.

(D) *What* ſhall be ſaid *an Election.*

[1. IF a man *gives two acres* to another, to hold *the one for life*, and *the other in fee*, and the *donee after makes a feoffment of one acre*, this is an election to have the fee in that. Com. 6. b.]

[2. If a man *leaſes two acres for life*, *the remainder of one* acre *in fee*, and *after licences the leſſee to cut trees in one acre*, this is an election that he ſhall have the fee in the other acre. Com. 6. b.]

3. Deviſe was that *he ſee A. well provided for*, *or elſe give her* 20*l.* A. lived with the deviſee two years, and then went away; his keeping A. two years is an election. Palm. 76. Hill. 17 Jac. B. R. Shaw's caſe.

4. A reſervation was of money or turkeys on a leaſe for years, *leſſors bringing an action* for the money is an election. Lutw. 655. Mich. 9 W. 3. Letten v. Winne.

(E) Where the Election ſhall be *perpetual.*

[Or is determined or not.]

[1. IF a man *delivers obligation to A. to the uſe of B.* and *B. when he hears of it refuſes it*, he cannot after by agreement make this a good deed, for the refuſal is peremptory. H. 5 Ja. B. per Curiam.]

3 Rep. 26. b. S. P. accordingly, per Curiam, but ſays, that perhaps in ſuch caſe the obligor, in action brought upon this obligation, cannot plead non eſt factum, becauſe it was once his deed, and cites Bendl. 75. in Tawe's caſe, and D. 1 Eliz. fol. 167.

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2. Treſpaſs quare vi & armis arbores ſuccidit, the defendant ſaid, that the *plaintiff ſold* to him *all his wood in ſuch a vill*, *except* 40 *of the beſt oaks*, *to be abated in two years*, and ſaid that he *came to abate them*, *and warned the vendor to chuſe* his oaks, *and he would not*, by which the defendant, when he could no longer ſtay, abated the trees, except the 40 oaks, and admitted for a good juſtification. Br. Reſervation, pl. 3. cites 44 E. 3. 43.

Br. Relation, pl. 4. cites S. C. accordingly.—S. C. cited by Hobart Ch. J. Hob. 174. and ſays, ſo note that the vendee in this caſe had no property till election or default made by the vendor, which was ſupplied and made certain by the vendee, and yet the vendee could not have made the choice in default of the vendor till the time incurred ſo near that he muſt needs, and that muſt be put upon judgment of jury or the Court upon ſpecial declaration of the time, and number of the trees, and the like.——S. C. cited 5 Rep. 25. a. and ſays, that the iſſue was taken upon the requeſt, which caſe Ld. Coke ſays is not well abridged by Brook, tit. Reſervation, 3. for there he has * omitted the requeſt; but ſays, that Fitzh. tit. Barre, 204. has abridged it truly.

* Brooke ſays (ut ſupra) that vendee warned the vendor to chuſe his trees, and he would not.

3. If a man grants *to pay to me* 10*l.* *at Chriſtmas*, *or to attend upon me at Chriſtmas*, there if he does not do the one nor the other, the

the money ſhall be paid afterwards, &c. for now the election is determined; for he cannot attend at Chriſtmas when the feaſt is paſt, therefore then the ſum is due, and it ſhall be paid, &c. Br. Dette, pl. 112. cites 9 E. 4. 36.

Bendl. 149. pl. 206. S. C.

4. A grant is made by a *biſhop*, election cannot be made by grantee in time of *ſucceſſor*. Mo. 86. in pl. 215. Paſch. 7 Eliz. C. B. Bullock v. Burdet.

Adjudged Le. 69. Baſſet v. Baſſet. S. C.

5. Condition of a *bond* was *to pay* 20 *kine or* 30*l. in money within a month at election.* The obligee makes *no election in the month.* Per tot. Cur. election muſt be made within the month, and convenient time allowed for proviſion of one of the things. Mo. 241. pl. 377. Mich. 29 Eliz. Kernet's caſe.

2 Rep. 37. S. C.

6. When an election is *coupled with an intereſt*, ſuch election is *deſcendible.* Per Powel J. Lutw. 803. Trin. 11 W. 3. cites Sir Rowland Heywood's caſe.

7. Grantor cannot by his own act or default either ſubvert or *derogate from his grant.* 5 Rep. 24. b. Sir Thomas Palmer's caſe.

In what caſes grantee has election to make it a rent or annuity, ſee tit. Annuity, (F. 2) what ſhall determine ſuch power of election. See Ibid. (F. 3).

For more of Election in general, ſee other proper titles.

Emblements.

(A) *Who* ſhall have them.

Cro. E. 460. (bis.) pl. 10. Paſch. 38 Eliz. B. R. S. C. & S. P. per Popham. [1. IF *leſſee at will ſows* the land, and after determines his will, the leſſor ſhall have the corn. Co. 5. OLAND, 116. agreed. Co. Litt. 54. b. becauſe he loſes his rent.]

Popham, to which Fenner agreed. ——— Gouldſb. 190. pl. 136. S. C. & S. P. per Popham. ——— If *tenant at will* ſows the land, and then determines his own will, he cannot break the hedges to carry the corn away. Vent. 222. Trin. 24 Car. 2. B. R. in the caſe of Perrot v. Bridges.

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Cro. E. 400. (bis) S. C. & S. P. [2. [*So*] if a *copyholder durante viduitate* ſows the land, and after before ſeverance takes huſband, the lord ſhall have the corn, be-

cauſe her eſtate determines by her own act. P. 38 El. B. R. between OLAND v. BURDWICK, adjudged. Co. 5. 116. ſame caſe. Co. Litt. 55. b.] adjudged by Popham and Clench, contradicente Fenner, and abſente Gawdy.——Gouldſb. pl. 189. pl. 136. S. C. & S. P. adjudged.——Mo. 394. pl. 512. S. C. & S. P. adjudged.——2 Bulſt. 213. S. C. & S. P. cited per Cur. Paſch. 12 Jac. B. R.——2 inſt. 81. cites S. C.

[3. If there be *leſſee for years, upon condition* that if he does waſte, or ſuch like, &c. that his eſtate ſhall ceaſe; if he ſows the land, and after does waſte, the leſſor ſhall have the corn. P. 38 El. B. R. held by Clinch. Co. 5. 116. b. Co. Litt. 55. b.] Cro. E. 461. (bis) S. P. in S. C. by Clench, to which Popham and Fenner agreed.——If he commits a forfeiture, the leſſor ſhall have the corn; per Popham. Gouldſb. 189. pl. 126. in S. C.——Where the leſſor enters for a *tort*, or by *title paramount*, or by *limitation* of the eſtate, the leſſor ſhall have the corn. Cro. E. 461. (bis) in the caſe of Oland v. Burdwick.——He that *enters for condition broken* is by relation in of his firſt eſtate, and as if the poſſeſſion had never been out of him, and ſo he that enters ſhall have the emblements. Arg. and to this opinion the Court ſeemed to incline. 2 Roll. R. 468. Mich. 27 Jac. B. R. Nicholas v. Simmonds.

[4. [*So*] if there be *leſſee for life, upon condition that if he doth ſuch an act, he ſhall have it but for two years, and* he ſows the land, and after forfeits the condition, by which *his eſtate for two years is ended before the ſeverance* of the corn, he ſhall not have the corn, but the leſſor. P. 38 El. B. R. by two againſt one.] If a leaſe be made for ſeven years upon a *condition* on the part of the leſſee, *to be performed at the end of the term*, to have it for life, and leſſee ſows the land the laſt year, but performs not the condition, per 2 J. contra one, leſſee ſhall not have the corn. Cro. E. 461. (bis) in caſe of Oland v. Burdwick.——Gouldſb. 189. pl. 126. S. C. & S. P. by Fenner.

[5. *So* if *leſſee for years or life* ſows the land, and after *ſurrenders* before ſeverance, the feoffor ſhall have the corn. P. 38 El. B. R. by Popham.] Cro. E. 461. (bis) in caſe of Oland v. Burdwick. S. P. agreed by all.

[6. *So* if leſſee for life or years ſows the land, and after *aliens in fee* before ſeverance, the leſſor entering for a forfeiture ſhall have the corn. P. 38 El. B. R. per Popham.] Cro. E. 461. (bis) S. P. in caſe of Oland v. Burdwick.

Agreed by all.——In treſpaſs it is not denied but where *my tenant for life aliens in fee*, and I enter, that *I ſhall have the emblements* upon the land which were *ſown meſne between the alienation and the entry*. Br. Emblements, pl. 3. cites 40 E. 3. 5.

[7. [*But*] if a *leaſe* be made *to baron and feme during the coverture*, and the baron ſows, and after they are *divorced* cauſa præcontractus, the baron ſhall have the corn, becauſe the judgment is the *act of law*. Co. 5. OLAND, 116. b.] S. P. by Fenner, to which Popham and Clench agreed.

Cro. E. 461. (bis) in S. C.——Mo. 395. pl. 512. S. C. & S. P.——Gouldſb. 190. pl. 136. S. C. & S. P. by Fenner, to which Popham agreed.

[8. *And* in this caſe *if the divorce be at the ſuit of the baron*, yet he ſhall have the corn, becauſe the judgment is the act of law. Co. 5. 116. b. But ſee the caſe in the report, and there *Popham doubted* thereof.] S. P. by Fenner, to which Popham and Clench agreed.

Cro. E. 461. (bis) in caſe of Oland v. Burdwick.

Hob. 132. pl. 174. Trin. 13 Jac. S. P.

[9. If *tenant for life, or for the life of another, ſows*, and after his eſtate determines by the *death of ceſtuy que vie* before ſeverance, the leſſee or his executors ſhall have the corn. Co. Litt. 55. b. for the corn is fructus induſtrialis, and this is given to encourage induſtry, and charge for the *public good*. Hobart's Reports, 178.]

Fol. 727.

Cro. E. 460, 461. (bis) S. C. & S. P. Per Clench, to which Popham agreed.

[10. If a *copyholder durante viduitate leaſes for one year*, and the *leſſee ſows* the land, and after the *copyholder takes huſband*, yet the leſſee ſhall have the corn; for her act ſhall not prejudice a *third perſon*. P. 38 El. B. R. between OLAND AND BURDWICK, agreed.]

[11. If *tenant at will* ſows the land, and after *ſurrenders* the land to the leſſor before ſeverance, and the leſſor accepts it, the leſſor ſhall have the corn, and not the tenant at will, though this is not properly a ſurrender for the weakneſs of his eſtate, yet this is a *relinquiſhment* of his eſtate, and ſo it is determined *by his own act*. M. 31, 32 El. B. R. between WEEPER AND HANDALL, admitted.]

[12. If *tenant for years, ſi tam diu vixerit*, ſows, and *dies* before ſeverance, yet the *executor* of the leſſee ſhall have the corn for the uncertainty of the determination of his eſtate, and it would be inconvenient that the land ſhould not be manured.]

I do not obſerve this point in 5 Rep. 116. or in Cro E. S. C. —— Gouldſb. 144. in pl. 60. Arg. S. P. the leſſee for years ſhall have the corn by reaſon of his right to the land at the time of his ſowing, and never lawfully diveſted by any act done by himſelf; and Gawdy held accordingly.

[13. If *leſſee for life leaſes for years*, and the *leſſee* for years ſows, and after the leſſee for life dies before ſeverance, yet the * executor of the leſſee for years ſhall have the corn for the uncertainty of the determination of his eſtate. Co. 5. OLAND, 116.]

* It ſeems that the words (executor of the) are ſurpluſage.

[14. If *A. ſeiſed in fee has iſſue a daughter, his wife privement enſeint with a ſon*, and *dies*, and the *daughter enters*, and ſows the land, and *before ſeverance a ſon is born*, yet the daughter ſhall have the corn, becauſe her eſtate was lawful, and defeated by the *act of God*, and it is for the good of the commonwealth that the land be ſowed. Co. Litt. 55. b.]

Went. Off. Ex. 59. S. P.

[15. If the *baron* be ſeiſed in fee or for life *in the right of his feme*, and *ſows* the land *and dies, or his wife dies* before ſeverance, yet he or *his executor* ſhall have the corn. Co. Litt. 55. b.]

Noy, 149. Arnold v. Skeale, S. C. but the Court was divided. — D. 316. a. Marg. pl 2. cites 5 Jac. B. R. Arnold v. . . . . that the Ch. J. and two juſtices were of opinion that the feme ſhould have the

[16. If there be *baron and feme jointenants for life*, and the *baron ſows* the land, and dies before ſeverance, *his executor* ſhall have the emblements and not the feme, for it ſeems there is no diverſity between this and where the baron is ſeiſed in the right of the feme. Dubitatur, M. 5 Ja. B. between SKELL AND ARNOLD. Dy. 15 El. 316. 2. Contra Co. Litt. 55. b.]

the emblements, but two juſtices e contra. ——Cro. E. 61. pl. 3. Mich. 29 & 30 Eliz. B. R. the S. P. cited by Wray to have been adjudged in B. R. that the feme ſhall have it. ——The wife ſhall have the emblements, per Coke Ch. J. obiter. Godb. 189. pl. 270. Trin. 10 Jac. C. B. —Went. Off. of Ex. 59. S. P. accordingly. ——D. 316. pl. 2. in the principal caſe, the Court propoſed for the executor to take a quarter part in recompence of the ſeed.

[17. If a *feme ſeiſed* in fee or for life of land, and ſows it, and *after takes huſband, who dies* before ſeverance, it ſeems the *wife* ſhall have them, and not the executor or adminiſtrator of the baron, becauſe the baron did not ſow them.] [367]

[18. If the *baron ſeiſed of a copyhold* in fee *ſows* it, *and after ſurrenders to the uſe of the feme, who is admitted* accordingly, and after the *baron dies* before ſeverance, it ſeems that the *wife* ſhall have the emblements, and not the executor or adminiſtrator of the baron, becauſe the *baron paſſed the emblements with the land to the feme, as annexed to the land*, and therefore the privilege which the law gave to him which ſowed, is taken away by the ſurrender, and ſo all one as if the feme had ſowed it, or purchaſed the land ſowed of a ſtranger.]

[19. If the *baron ſows* the land, and dies before ſeverance, and his *wife is endowed of this land*, ſo ſowed, for her third part, ſhe ſhall have the emblements, and not the heir nor executor, for ſhe is to have the land, *fuerit culta ſive inculta cum fructibus & redditibus*. Bracton, lib. 2. fol. 96. ſ. 2.] 2 Inſt. 81. cites ſame book. —— Brownl. 44. Trin. 15 Jac. Anon. S. P. where the feme recovered ſeiſin in dower. ——So if aſſigned to her for dower by the heir. D. 316. a. pl. 2. by 5 juſtices, but 4 e contra.

[20. If *tenant by ſtatute merchant ſows* the land, and before ſeverance a *caſual profit happens, by which he is ſatisfied*, yet he ſhall have the corn. Co. Lit. 55. b.] A. is bound in a ſtatute to B. and ſows the land; B. extends the lands which are delivered unto him in execution; it was adjudged in this caſe, that the conuſee ſhould have the corn ſowed. 2 Le. 54. pl. 75. Trin. 29 Eliz. C. B. Burden v. Withington. ——The ſame in caſe of a recognizance. Ibid.

[21. If *A. ſeiſed in fee of land ſows* it with grain, and after *grants it to B. for life*, the *remainder to C.* and after *B. dies* before ſeverance, C. ſhall have the corn, and *not the executors of B.* for the reaſon of induſtry and charge in B. is wanting. Hobart's Reports, 178. per Curiam.] Hob. 132. pl. 174. Trin. 13 Jac. —— Cro. E. 464. Arg. and agreed by Popham and Gawdy, juſtices, in caſe of Knevett v. Poole. —— S. P. Arg. Gouldſb. 144. and agreed by Gawdy J.

So if A. had deviſed it to B. for life, the remainder to C. for life, and B. dies before the corn is ſevered, Wray and Shute held that C. ſhould have the emblements, for by the deviſe of the land they paſs with it; but if B. had granted them to another it had been otherwiſe; for by the grant they are quaſi chattels ſevered from the land; but Clench doubted; for he conceived that the executor of the firſt tenant for life ſhall have them as chattels veſted in him: and he ſaid, if land be ſown, and then the land is deviſed to J. S. for life only, and before ſeverance the deviſee dies, his executor ſhall have the corn, and not the reverſioner, which caſe Wray and Shute denied, but ſaid if it were ſo, it is like the caſe of a remainder, and Popham attorney being demanded his opinion, agreed with Wray. Cro. E. 61. pl. 3. Mich. 29 & 30 Eliz. Anon.

[22. If *leſſee at will ſows* the land with *grain, roots, flax, hemp*, or other annual profit, and the leſſor enters before ſeverance, yet he ſhall have it. Co. Lit. 55. b.] Fol. 728.

[23. *But* if the *leſſee plants young fruit trees, or* young *oaks, aſhes, or elms*, &c. *or ſows* the land with *acorns*, and after before ſeve-

rance the leſſee at will is put out of the land by the leſſor, yet the leſſee ſhall not have theſe, becauſe *they render not any annual or preſent profit.* Co. Lit. 55. b.]

[24. If *leſſee at will by good huſbandry* or induſtry, either by overflowing or making of trenches, or compaſſing of meadows, or by digging out of buſhes or ſuch like, *makes the graſs to grow in greater abundance*, yet if the leſſor enters and ejects him, the leſſee ſhall not have the graſs, becauſe the graſs is the *natural profit* of the land. Co. Lit. 56.]

[368] [25. *So* if leſſee at will ſows the land *with hay-ſeed*, and by this increaſes the graſs, and the leſſor enters and ejects him, yet the leſſee ſhall not have it. Co. Lit. 56.]

26. *Termor and tenant in dower may deviſe* their emblements. Br. Emblements, pl. 22. cites 8 H. 3. and Fitzh. Deviſe, 25.

27. If a *villein leaſes his land*, and the *leſſee ſows* the land *and dies*, the *lord of the villein enters*, he ſhall have the emblements. The reaſon ſeems to be inaſmuch as the lord enters by title; for *he who recovers land or enters by title ſhall have the emblements.* Br. Emblements, pl. 25. cites 30 E. 1. and Fitzh. Villenage, pl. 45.

28. *Baron ſeiſed in jure uxoris leaſed the land for ſeven years and died within the term.* The wife entered and infeoffed G. but did not ouſt the termor, and yet this is a good feoffment; for by his death the term is void; but if the *termor ſowed the land in the life time of the baron*, and the baron died before ſeverance, the *termor ſhall have the emblements.* Br. Leaſes, pl. 24. cites 7 Aſſ. 19.

29. *Baron and feme tenants in tail ſow* the land, the *baron died* before ſeverance, the *feme ſhall have* the emblements, *and not the executor of the baron.* Br. Emblements, pl. 15. cites 8 Aſſ. 21.

30. *Contra if they had been ſevered in the life of the baron*, or if the baron had ſold or deviſed them in his life; quære. For Brook ſays, it ſeems to him that the executor ſhall have them. Br. Emblements, pl. 15. cites 8 Aſſ. 21.

Br. Forfeiture de Terres, pl. 109. cites S. C.

31. In treſpaſs it was adjudged, that where the *lord ſeiſes the copyhold of his tenant for not doing of the ſervices*, that the tenant ſhall have the corn which were ſevered before the ſeiſure, and the lord ſhall have the corn growing at the time of the ſeiſing. Br. Emblements, pl. 4. cites 42 E. 3. 25.

32. *Copyholder ſowed the lands*, and afterwards *committed a forfeiture;* the *lord* entered, and adjudged that *he ſhould have the corn.* 4 Rep. 21. b. in Brown's caſe, cites 42 E. 3. 25. a. b.

33. In treſpaſs it was agreed, that if a man *leaſes to two for life*, the *one dies*, the *leſſor enters and leaſes to W. who ſows the land*, the other *firſt leſſee entered upon him and took the goods*, and well. Br. Emblements, pl. 5. cites 46 E. 3. 32.

34. If *baron ſeiſed in jure uxoris, or a man ſeiſed for term de auter vie ſows* the land, and the *feme dies, or ceſtuy que vie dies*, he in *reverſion or the heir enters*, and *he who ſows re-ouſts him*, and the *other brought aſſiſe and recovered* his damages, yet *he who ſowed ſhall have the crop;* for the other has recovered damages which ſuffices for the tort. Br. Emblements, pl. 16. cites 46 Aſſ. 2.

35. If

35. If *tenant in dower ſows* the land *and takes baron, who makes his executor and dies before ſeverance* of the corn, the feme ſhall have the emblements, and not the executor of the baron. Br. Emblements, 26. cites lib. Fundamenti Legum, fol. 72.

36. *Contra if the baron ſows* the land *and dies before ſeverance*, there the executor of the baron ſhall have the emblements, the reaſon ſeems to be inaſmuch as *he who did the labour and coſts of the emblements ſhall have them.* Br. Emblements, pl. 26.

37. A man *ſeiſed in jure uxoris leaſed* the land *for term of years*, the *baron died*, the *feme entered*, the tenant ſhall have the emblements. Br. Emblements, pl. 6. cites 7 H. 4. 17. S. P. Br. Emblements, pl. 14. cites 7 Aſſ. 19.

38. *So in all caſes where a leaſe is determinable for the life of a man.* Br. Emblements, pl. 6. cites 7 H. 4. 17.

39. If *tenant at will be ouſted* he ſhall have the corn, *but if he plows the land or compeſtures it, and be ouſted before the ſowing*, he ſhall loſe the plowing and the compeſture; quod non negatur. Br. Tenant per Copie, pl. 3. cites 11 H. 4. 90.

40. If *tenant at will ſows* the land *and after is ouſted*, he ſhall have the emblements. *But if he plows or compeſtures* the land, *and is ouſted before the ſowing*, he *ſhall loſe the coſt of the plowing and compeſture.* Br. Emblements, pl. 7. cites 11 H. 4. 90. [369]

41. If a *man makes a leaſe at will* and the *leſſor is outlawed*, whereby the will is determined, *the king ſhall have the profits, but the leſſee at will ſhall have the emblements*; but *if the leſſee at will be outlawed*, the king ſhall have the emblements. 5 Rep. 116. b. Hil. 44 Eliz. B. R. per Curiam in Oland's caſe, and cites 9 H. 6. 20 & 21.

42. In aſſiſe it was ſaid, that he who *recovers land ſown by *aſſiſe or other action*, ſhall have the emblements, and the creſſure upon the land; quod nota bene. Br. Emblements, pl. 8. cites 19 H. 6. 45. * S. P. and therefore the aſſiſe *recouped the damages to* 40 s. and no more, in conſideration that the land was ſown. Br. Emblements, pl. 11. cites 24 E. 3. 50.

43. Where a *man ſows* the land and *dies before ſeverance*, the *executor* ſhall have the emblements, and *not the heir*; quod nota. Br. Emblements, pl. 9. cites 21 H. 6. 30.

44. It was held for clear law, that if a man *diſſeiſes me*, and *ſows the land, and after he ſevers* the corn, and I re-enter, *I ſhall have the emblements.* Br. Emblements, pl. 1. cites 27 H. 6. 1. Paſton's caſe.

45. *So* of *trees ſevered*; for theſe were once annexed, &c. Br. Emblements, pl. 1. cites 27 H. 6. 1.

46. Note for law in a quare impedit, if a *parſon dies before the Conception de Noſtre Dame, his glebe ſown*, his ſucceſſor ſhall have the emblements and the tenths growing, by the law of holy church; Per Littleton. Br. Dean and Chapter, pl. 1. cites 34 H. 6. 38.

47. In *treſpaſs* the *defendant ſaid, that he was ſeiſed till by the plaintiff diſſeiſed, who ſowed the land and cut it, and* the *defendant re-entered upon him and carried it away*; and a good plea by the opinion of the Court; *for* per Danby J. *when the diſſeiſee re-enters he ſhall puniſh all meſne treſpaſſes*; for the poſſeſſion ſhall be adjudged

judged continued in him ab initio. Br. Emblements, pl. 12. cites 37 H. 6. 67.

48. *But per Billing* Serjeant, *if the diſſeiſee re-enters before the cutting* or ſeverance of the emblements, he ſhall have the emblements; for *they are annexed to the franktenement; but if he enters after ſeverance* or cutting, the *diſſeiſor ſhall have them, for they are chattels veſted in him by the regreſs, but* the *diſſeiſee may take them damage-feaſant.* And Brook ſays, it ſeems to him that what Billing ſaid was good law; for a man cannot know one ſheaf of corn from another. Br. Emblements, pl. 12. cites 37 H. 6. 67.

49. In *treſpaſs;* a man *leaſed land at will*, the *leſſee ſowed* the land, the *leſſor infeoffed B.* the *leſſee ſevered* the emblements, and the *feoffee took them;* or if the feoffee ſever them and take them, yet the tenant at will ſhall have them; for the *feoffee cannot take them unleſs for damage-feaſant.* Br. Emblements, pl. 13. cites 37 H. 6. 25.

50. And per Forteſcue and Danby, *tenant at will*, and *for life, pur auter vie, and* tenant *in tail*, ſhall have the emblement by the *ſtatute of Merton, cap.* 2. and *tenant in fee-ſimple* ſhall have it *by common law.* Br. Emblements, pl. 13. cites 37 H. 6. 25.

51. If *leſſee at will be ouſted*, and after the *leſſor, tenant for life, dies*, the leſſee ſhall have the corn; per Gawdy J. Godb. 145. cites 38 H. 6.

52. If my *father be diſſeiſed*, the *diſſeiſor cuts trees*, the *father dies*, [370] and the *heir enters and finds the trees upon the land*, I ſhall have it; per Townſend; which Cateſby and Brian denied. Br. Emblements, pl. 17. cites 2 H. 7. 2.

53. If two *jointenants* ſow their land, and *one lets his moiety for years*, and the other, that did not let, dies, the other ſhall have the corn as ſurvivor. Arg. Ow. 102.

Br. Emblements, pl. 18. cites S. C. accordingly, and that it was the folly of the diſſeiſee he had not entered before the ſeverance of them. —— Br. Property, pl. 47. cites S. C. —— S. P. Br. Emblements, pl. 19. cites 12 E. 4. 5. per Fairfax.

54. If *diſſeiſor ſows the land*, and after *ſevers the emblements*, and the *diſſeiſee re-enters*, he ſhall not have the emblements; for they came of the manurance of the party. Br. Chattels, pl. 10. cites 5 H. 7. 16, 17.

S. P. Br. Emblements, pl. 10. cites 15 E. 4. 31. per Littleton; but Chocke contra; for by the re-entry the *franktenement ſhall be adjudged in him ab initio*, and he ſhall have treſpaſs againſt every mean occupier, as if he had continued poſſeſſion; to which Brian Ch. J. agreed.

S. P. Br. Emblements, pl. 13. cites 37 H. 6. 25. —— Ibid. pl. 17. cites 2 H. 7. 1. contra per Townſend, that at this day the diſſeiſee ſhall have the emblements, as corn, though they are ſevered, if they are lying upon the ſame land, and Brian concordat. —— So per Fineux Ch. J. Ibid. cites 12 H. 7. 25. —— S. P. by all the juſtices of C. B. that the diſſeiſee ſhall have them. Br. Emblements, pl. 20. cites 14 E. 4. 6. —— Contra if they had been *carried out of the land.* Ibid.

Br. Property, pl. 18. cites S. C. — 55. *Contra* if he had *entered before ſeverance.* Br. Chattels, pl. 10. cites 5 H. 7. 16, 17.

The diſſeiſee may take the emblements be they ſevered or not; per Paſton. Br. Emblements, pl. 12. cites 15 H. 6.

Br. Property, pl. 18. cites S. C. — S. P. Br. Emblements, pl. 13. cites 37 H. 6. 25. — 56. *But he ſhall have that which is ſevered* before his entry *which comes of the nature of the land*, as hay made of the graſs, and *trees cut* and made into bavins. Br. Chattels, pl. 10. cites 5 H. 7. 16, 17.

S. P. by Townſend, Ibid. pl. 17. cites 2 H. 7. 1. — S. P. per Fairfax, Ibid. pl. 19.

pl. 19. cites 12 E. 4. 4, 5. ——S. P. Contra if he carries them out of the land. Br. Emblements, pl. 10. cites 15 E. 4. 31. ——If the diſſeiſor *cuts trees and carries them away*, yet the diſſeiſee may take them; per Littleton; which Choke denied. Br. Emblements, pl. 20. cites 14 E. 4. 6. ——S. P. Br. Treſpaſs, pl. 202. cites 37 H. 6. 35.

57. So of *apples and nuts* gathered; per Fairfax and Tremaile, and the other ſerjeants. Br. Chattels, pl. 10. cites 5 H. 7. 16, 17. Br. Property, pl. 18. cites S.C.—S. P. Br. Emblements, pl. 18. cites 37 H. 6. 35.——Br. Treſpaſs, pl. 202. cites S. C.

58. *But* by the reporter, he cannot take them if they are *carried off the land*; for one apple or nut cannot be known from another any more than money. Ibid. Br. Property, pl. 18. cites S. C.

59. And by him, * *where the diſſeiſee enters before ſeverance, and the diſſeiſor re-enters and ouſts him, and ſevers them*, and the *diſſeiſee re-enters*, he ſhall have them by reaſon of his entry before ſeverance. Ibid. Br. Property, pl. 18. cites S.C.—* Br. Emblements, pl. 18. cites S. C.

57. *And* if *feoffee of the diſſeiſor ſows* the land, he ſhall be in the ſame plight of it, and no better, as the diſſeiſor himſelf. Ibid. Br. Emblements, pl. 18. cites S. C. accordingly.——Br. Property, pl. 18. cites S. C.

58. *And* if *feoffee upon condition ſevers the corn meane between the condition broken, and the re-entry* for the condition broken, he ſhall have the corn, and not he who entered. Ibid. Br. Emblements, pl. 18. cites S. C. accordingly.—Br. Property, pl. 18. cites S. C.

59. If *leſſor at will* be *outlawed* in a perſonal action, the king ſhall have the profits after, but the leſſee ſhall have the emblements; but if *leſſee is outlawed* in a perſonal action, the king ſhall have the emblements. 5 Rep. 116. b. Hill. 44 Eliz. B. R. Oland's caſe. [371]

60. A man deviſed land, which was ſowed, *for life*, the *remainder in fee*, and the deviſor died, and the *deviſee for life alſo died before the ſeveranee*, and it was adjudged that the executor of the tenant for life ſhall not have that, but he in remainder. Win. 51. cited to be ſo adjudged 18 Eliz. Allen's caſe.

61. A. gives *bond that B. ſhall enjoy a leaſe of Black-Acre immediately after his death*; the corn on the death of A. belongs to A.'s executors. 4 Le. 1. pl. 1. Hill. 20 Eliz. Launton's caſe.

62. A. lets land at will to B. and afterwards B. *agreed to ſurrender* the land and his intereſt to A. A. entered and let it to defendant, who took the corn. The queſtion was, if this was a ſurrender, (I agree to ſurrender my land,) if it imports an act to be done in futuro or in the preſent time? Judgment pro quer. Cro. E. 156. pl. 39. Mich. 31 & 32 Eliz. B. R. Sweeper v. Randall. He to whom the ſurrender is made ſhall have the corn; per Popham Goldſb. 189. pl. 126.

63. A. and B. are *jointenants*; A. by conſent of B. *occupies the land alone*, and takes the profits to his own uſe. A. by this is tenant at will to B. and if A. dies the emblements ſhall go to the adminiſtrator of A. but if B. had only ſaid to A. I will not occupy it, this would be no aſſent that A. ſhould have all, nor would it Owen, 102. James v. Portman. S. C. but ſomewhat differently reported,

as that if B. had ſaid that A. ſhould occupy it ſolely, then the emblements would not ſurvive.

give any thing to A. Cro. E. 314. pl. 7. Hill. 36 Eliz. B. R. Geanes v. Portman.

64. If a *leaſe be* made *for ſeven years upon a condition on the part of the leſſee, at the end of the ſeven years to be performed, to have it for life*, the *leſſee the laſt year ſows the land, and performs not the condition*, it was ſaid that he ſhall have the emblements, but Popham and Fenner denied it; and judgment was given for the defendant. Cro. E. 461. (bis) pl. 10. Paſch. 38 Eliz. B. R. in caſe of Oland v. Burdwick.

5 Rep. 85. Knivet's caſe, reſolved, that the mere right to the corn was in H. the leſſee of tenant for

65. *Tenant for life*, the *remainder in fee*; *tenant for life made a leaſe for years to H. who is ouſted by a ſtranger; the diſſeiſor made a leaſe for years*, his leſſee ſowed the land; tenant for life died. It was adjudged, that the corn belonged to H. the leſſee for years of the tenant for life. Cro. E. 463. pl. 12. Hill. 38 Eliz. B. R. Knevett v. Poole.

life, and he might have action of treſpaſs, and recover all the meſne profits againſt the leſſee of the diſſeiſor. And the reporter adds a nota, that the leſſee of tenant for life had right to the land, and conſequently to the emblements, as things annexed to the land, and the death of leſſee for life determined his intereſt to the land, but his right to the emblements remained, and this was the principal reaſon of the judgment. —— Gouldſb. 143. pl. 60. S. C. adjudged.

66. When the eſtate of him that ſows the land is determined *by his own act by a caſualty*, and when by the *act of the law*, or *by another man*, makes a difference as to the having the emblements. Per Clench J. Cro. E. 460. (bis) pl. 10. Paſch. 38 Eliz. B. R. Oland v. Burdwick.

67. If leſſee for life ſows the land, and after *prays in aid of a ſtranger*, now if the leſſor enters he ſhall have the corn. Per Popham. Godb. 190. in pl. 126. Hill. 43 Eliz.

68. A man *ſeiſed for life, or in fee or tail in his wife's right or his own*, and ſows it with corn, or any manner of grain, and
[372] dies before harveſt, it ſhall go to the executor of the huſband, and not to the wife or heir that ſhall have the land; but *graſs ready to cut, apples, pears, &c. upon the trees*, ſhall go to the wife or heir. Went. Off. Ex. 59.

69. If land ſowed with corn, ſaffron, hemp, &c. or planted with hops, or having graſs ready to be cut, be *ſold or conveyed*, it ſhall all go to the *purchaſor of the land, unleſs excepted*, though never ſo near reaping, or cutting, or gathering. Went. Off. Ex. 59.

70. *Roots of carrots, parſnips, turnips*, ſkirrits, &c. ſown by him that had the inheritance of the garden or land, it ſeems ſhall go to the heir, and not to the executors; for the profitable part is the root which is hidden *within the ground, and cannot be come at without breaking the ſoil*, which the executors cannot lawfully do; but as for *melons* which are above ground, the executors may take them, yet as for *artichokes*, though the fruit be above the ground, yet it ſeems they have not ſuch yearly ſetting or manurance as

ſhould

ſhould ſever them in intereſt from the ſoil, therefore they ſhall go with it to the heir. Went. Off. Ex. 63.

71. Albeit the *leſſor determines his will before the corn, &c. be ripe*, yet becauſe the ſtate of the leſſee is uncertain, and therefore leſt the ground ſhould be unmanured, which ſhould be hurtful to the commonwealth, he ſhall reap the corn, which he ſowed, in peace. Litt. ſ. 68. and Co. Litt. 55. a. b.

72. A man *after judgment given againſt him* ſowed the land, and afterwards brought a writ of error to reverſe the ſaid judgment, but it was affirmed he ſhall not take the emblements. Adjudged per tot. Cur. 2 Bulſt. 213. Paſch. 12 Jac. Wicks v. Jordan.

73. If *A. ſeiſed of land ſows it with corn*, and then *conveys it to B. for life, remainder to C. for life*, and *B. dies before the corn is reaped*, now C. ſhall have it, and not the executors of B. though his eſtate was uncertain; agreed per Cur. Hob. 132. pl. 174. Trin. 13 Jac. in caſe of Grantham v. Hawley.

74. The *leſſor covenanted with the leſſee, his executors, &c. that he ſhould carry away to his own uſe ſuch corn as ſhould be growing on the land at the end of the term*; afterwards he *conveyed the reverſion* to the plaintiff, and the *executors of the leſſee ſowed the land, and ſold the corn growing on it at the end of the term* to the defendant. It was objected, that the leſſor had never any property in this corn, and therefore could not grant it away; but adjudged that the very right was paſſed when it ſhould happen; for though the leſſor had not any actual property in the corn, yet he had a right in poſſe, becauſe of the lands out of which it proceeds, and the words in the leaſe are ſufficient to paſs the property, as ſoon as the corn is growing on the land. Nelſ. Abr. 702. pl. 9. cites Hob. 132. [pl. 174. Trin. 13 Jac.] Grantham v. Hawley.

75. A man was *ſeiſed* of land *in fee, and ſowed the land*, and deviſed that to J. S. and before ſeverance he died, and whether the deviſee ſhall have the corn, or the executor of the deviſor, was the queſtion; and by Hobart, Winch, and Hutton, the deviſee ſhall have that, and not the executor of the deviſor. Win. 51. Mich. 20 Jac. C. B. Spencer's caſe.

L. P. R. 512. S. P. cited to be ſo held per Saunders Ch. J.

76. If a man *deviſe land, and after ſows* it and dies, in this caſe the deviſee ſhall have the corn, and not the executor of the deviſor. Winch J. ſaid it had been ſo adjudged. Win. 52. Mich. 20 Jac. C. B. in Spencer's caſe.

77. *Hops* growing out of the old roots ſhall go to the executor or adminiſtrator, becauſe they grow by the manurance and induſtry of * the owner, and ſo are *like emblements*. Cro. C. 515. pl. 13. Mich. 14 Car. B. R. Latham v. Atwood.

S. P. and ſo of *ſaffron and hemp*, they ſhall go to the executor.

Went. Off. Ex. 59.

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78. If *ſheriff on a fieri facias* ſells corn growing, the vendee cannot juſtify an *entry on the land* to reap it till ſuch time as the corn is ripe. Per Twiſden J. Vent. 222. Trin. 24 Car. 2. B. R. in caſe of Perrot v. Bridges.

79. *Tenant*

79. *Tenant at ſufferance* ſows the land, and afterwards *judgment is recovered againſt him, and the corn ſeiſed thereupon and ſold* by the ſheriff (ſtanding), then the treſpaſs lies for the landlord againſt the ſheriff and his officers. L. P. R. 512. cites 32 Car. 2. Sir John Banks's caſe.

80. *Baron and feme jointenants for life*, baron ſows the land, and dies before ſeverance. The Court propoſed to each to take a moiety. Per Ld. Somers. 2 Vern. 322. pl. 311. Mich. 1694. Rowney's caſe.

81. But where ſtrangers are *jointenants*, the emblements will go to the ſurvivor, it was admitted. Arg. 2 Vern. 323. pl. 311. Mich. 1694. in Rowney's caſe.

82. A. *tenant for life*, remainder *to B. his wife for life* for jointure, *remainder to A. in fee.* A. *deviſes his remainder in fee to B.* and *died in May, leaving hops in the ground*, which were *cultured at great charge in February, and gathered in Auguſt.* Quære, whether they belonged to B. the wife, or to executor of A. The Maſter of the Rolls at firſt inclined to think the hops belonged to B. in right of her rent and emblements; but in regard of caſes cited as adjudged, that in caſe of dower ſhe ſhall have the emblements, becauſe dower is conſidered as an excreſcence or continuance of the eſtate of the huſband, but a jointure is not; he afterwards declared that the hops and corn growing at the teſtator's death were emblements, and *ought to be accounted for as part of the teſtator's eſtate.* MS. Rep. Trin. 1734. Canc. Fiſher v. Forbes.

For more of Emblements in general, ſee Deviſe, and other proper titles.

Enfants.

(A) *What* Infants in reſpect of their Office, &c. or for other collateral Reſpect, *cannot avoid their own Acts.*

[1. IF the *king conſents to an act of parliament* during his minority, yet he cannot after avoid this act, becauſe the king as king cannot be a minor; for as king he is body politic. Co. Lit. 43. [*a. ad finem.*]

2. So the *king ſhall not avoid leaſes or grants* in reſpect of the infancy of his natural capacity. 5 Rep. 27. a. Hill. 26 Eliz. Arg. Fitzh. Enfant, pl. 15. cites 26 Aſſ. pl. 54. S.P. as ſaid by ſeveral peers and ſages of the realm.——Br. Age, pl. 34. cites S. C. & S. P. accordingly, and ſays that concordat 6 E. 3. tit Age, Fitzh. 89.——Same caſes cited Plowd. C. 213. a.——7 Rep. 12. a. S. P. in Calvin's caſe. Trin. 6 Jac. accordingly; for otherwiſe his revenue ſhould decay, and the king ſhould not be able to reward ſervice, &c.

3. So the *mayor, bailiff, or head of any other corporation*, ſhall not avoid any of their deeds or grants by reaſon of infancy of their natural capacities; becauſe they do them in another right or capacity, &c. 5 Rep. 27. a. b. Arg. Hill. 26 Eliz.

(A. 2) Infant. Favoured.

1. THE common principle is, that an infant *in all things which ſound in his benefit* ſhall have favour and preferment in law, as well as another man, but ſhall not be prejudiced by any thing in his diſadvantage. D. 136. b. 137. a. pl. 22. Hill. 3 & 4 P. & M.

2. *Tenant for life* of full age, *and remainder-man, an infant, levy a fine*, and afterwards the infant reverſeth the fine as to himſelf for the inheritance, he ſhall not *enter for the forfeiture*, becauſe he joined in the fine, and ſo aſſented to it. 2 Le. 108. pl. 139. Trin. 30 Eliz. C. B. Piggot v. Ruſſel.

3. Infant *makes a feoffment*; it is no *forfeiture*. Noy, 92. Trin. 2 Car. B. R. Aſhfield v. Aſhfield. It is a defeaſible forfeiture, Arg. admitted. Godb. 364. Trin. 2 Car. B. R. Aſhfield v. Aſhfield.

4. An infant was relieved againſt a *ſlip by his counſel in miſpleading*. 3 Ch. R. 24. 20 Car. 2. Savage v. Whitebread.

(B) What *Acts* of an Infant are *void*, and what *voidable*.

[1. IF an *infant in ward* to guardian in ſocage *infeoffs the guardian*, this is void, for the deceit that the law intends in him that hath the command of him, and the breach of truſt which the law repoſes in him. 35 Aſſ. 8. adjudged.] Fitzh. Aſſiſe, pl. 322. cites S. C.

[2. If an infant *ſurrenders a leaſe for years* to him in reverſion, this is void, and cannot be made good by any agreement at full age. Mich. 13 Car. B. R. between FLUDD AND GREGORY, per Curiam, reſolved upon a trial at bar.] Cro. C. 502. pl. 2. S. C. all the Court held, that a ſurrender by an infant cannot be by deed, but it is abſolutely void, and judgment accordingly.——Jo. 405. pl. 2. S. C. but not exactly S. P.——A ſurrender made by an infant is void. Per Cur. obiter. 3 Mod. 310. Trin. 2 W. & M. in caſe of Thompſon v. Leech.

[3. *But*

[3. *But* if an infant being a *leſſee for years, to begin at a day to come, accepts a new future intereſt for the ſame term*, and *at full age*, when the term begins, *enters* into the land and accepts the new leaſe, and claims in by it, this agreement to the new term ſhall be a ſurrender in law of the firſt eſtate. M. 13 Car. B. R. between FLUDD AND GREGORY, per Curiam, upon a trial at bar; but a ſpecial verdict was found of this among other things, and after Tr. 14 Car. B. R. upon argument at the bar, adjudged per Curiam upon this point, becauſe it could not be for the benefit of the infant, and therefore the law adjudged it void ab initio. Intratur. Tr. 13 Car. Rotulo, 1154.]

Cro.C. 502. pl. 2. S. C. all the Court held that the ſurrender by an infant by acceptance of a ſecond leaſe is void, becauſe it is without increaſe of his term, or decreaſe of his rent, and where there is not an apparent benefit, or the ſemblance of a benefit, his acts are merely void; and there being no ſuch in this caſe, judgment was given accordingly. —— Jo. 405, 406. pl. 2. S. C. and the judges held, that the agreement to the ſecond leaſe did not make void the firſt, becauſe the ſecond leaſe was never good. —— 2 Roll. Rep. 408. cites 9 H. 6. 36. and 9 H. 7. 24. that a ſurrender of infant is void.

4. Dum fuit infra ætatem was brought *of land and rent againſt the alienee of the father of the demandant*, and the writ was *admitted to lie of the rent*, and yet, by ſome, the grant of an infant was void, and not voidable, which is not ſo, as appears here; for then action does not lie, and alſo the *delivery of the deed cannot be void, but voidable*. Br. Dum fuit, &c. pl. 1. cites 46 E. 3. 34.

5. If an infant *levies a fine*, he ſhall have a writ of error during his nonage, and *aſſign it for error*. 12 Rep. 122. Mich. 12 Jac. cites F. N. B. 121.

6. If an infant makes a *leaſe for years, without reſerving any rent*, it is void, and not voidable only, becauſe there is no conſideration, but if any rent is reſerved, it is only voidable. Agreed by all, except Gawdy. Mo. 105. pl. 248. Paſch. 17 Eliz. B. R. the 7th reſolution in caſe of Lane v. Cowper.

Cro. J. 320. pl. 1. Ketley's caſe, S.C & S.P. held accordingly. —— 2 Bulſt. 69. Kirton v. Elliot, S. C. the Court were all clear of opinion, that the infant leſſee was liable to pay the rent, and ſo judgment was given for the plaintiff.

7. If an infant *takes a leaſe for years rendering rent*, it is only voidable at election; for if it be to his benefit, be that benefit apparent or implied, it ſhall be void in no caſe prima facie, as 21 H. 6. b. but he may at his election make it void; for *before the rent day he may refuſe and waive the land*, and then an action of *debt will not lie againſt him*. Held per Cur. Brownl. 120. Paſch. 11 Jac. Kettlie's caſe.

8. If an *infant makes a leaſe for years rendering rent*, and the *leſſee enters*, it is at the election of the infant to charge him in aſſiſe, or to bring debt for the rent, or to accept the rent at his full age, as 7 Ed. 4. 6. and other books be. Per three juſtices. Cro.C. 303. pl. 6. Paſch. 9 Car. B. R. in caſe of Blunden v. Baugh, and Ibid. 306. agreed per Richardſon Ch. J.

9. If an infant *makes a leaſe for years rendering rent*, the leaſe is but voidable; but if an infant makes a leaſe for years, *rendering a roſe or a pepper-corn*, or any ſuch like trifle, the leaſe is void.

Arg.

Arg. cites Fitzh. tit. Entry Congeable, 26. Mod. 263. Trin. 29 Car. 2. in caſe of Barker v. Keate.

10. An infant's *deed* is not void, but only voidable, for which reaſon an infant cannot plead non eſt factum to his deed, as a feme covert may. 3 Wms.'s Rep. 208. Mich. 1733. Nightingale & al' v. Ferrers.

(B. 2) Bound. In what Caſes. [376]

1. IN aſſiſe, *baron and feme purchaſed the land in fee*, and after the *baron aliened to his youngeſt ſon in fee within age*, and after the *baron and feme entered into the tenements of the aſſent of the feoffee*, who was yet *within age*, and after the *feme continued ſeiſin and died*, and the *eldeſt ſon entered as heir*, and the youngeſt, who was infeoffed, brought aſſiſe and recovered by award; for the aſſent was void, becauſe he was within age, and ſo the entry of the baron and feme a diſſeiſin; quod nota. Br. Aſſiſe, pl. 169. cites 11 Aſſ. 14.

2. Infant may be *bound* by law to the performance of a *condition*. Per Hale Ch. B. Chan. Caſes, 143. in caſe of Fry v. Porter, cites 31 Aſſ. 17. Fitzh. Condition, 15. Br. 114. and Coverture and Infancy, 71.

Pl. C. 375. b. S. P. and cites S.C.—2 Vern. 56. pl. 508. Trin. 1706.

Scot & Ux' v. Haughton and Doctor Fuller, S. P.——All conditions in fact ſhall bind an infant, but not condition in law. Arg. Godb. 365.——S. P. per Rainsford J. Vent. 200. in caſe of Fry v. Porter, cites 8 Rep. Whittingham's caſe.——S. P. per Hale Ch. J. Vent. 205. Paſch. 24 Car. 2. B. R.——Copyhold ſurrendered to the uſe of an infant, to the intent that he ſhould pay an annuity to another at full age, which he refuſed to do, it was decreed he ſhould pay it, and the arrearages. Toth. 171. cites 9 Eliz. Sawyer v. Gillet.

3. He who *aliens within age may enter*, *but* he ſhall *not have* writ of *dum fuit infra ætatem till* he comes of *full age*; quod nota. Br. Dum fuit, &c. pl. 3. cites 39 H. 6. 42.

4. If an infant *commands J. N. to make an obligation in his name, and to deliver it as his deed*, this is not his deed; for the command of an infant is void; contra if he himſelf delivers it. Br. Coverture, pl. 50. cites 14 E. 4. 3.

5. If an infant be to make a *preſentation*, it ſhall not be ſtayed for his nonage, for the cure of ſouls is to be regarded, and therefore if in ſuch caſe he doth ſurceaſe in ſix months, the ordinary ſhall collate. Per Manwood J. 3 Le. 46. pl. 66. Mich. 5 Eliz. C. B. Anon.

6. Infant ſhall be *bound* by the *ſtatute of* * *ceſſavit* and † *waſt*, &c. though the ſtatutes are general, for the firſt is an injury to the lord, and the other to the leſſor, and he himſelf acquires the eſtate, and he that hath policy to acquire is by law preſumed to have reaſon to defend the ſame thing. Per Walſh. Pl. C. 364. b. Mich. 4 & 5 Eliz. in Lord Zouch's caſe.

* 3 Mod. 222. Arg.—Per Eyre J. Show. 83. contra.

† Committing waſte by infant is a forfeiture, becauſe *it is againſt a ſtatute*, and if leſſor recovers the place waſted, the infant ſhall not enter again. Arg. Godb. 365.

7. Infant *lord* has title to enter for *mortmain*, but *enters not within the year*, or does not enter into the land of the villein before the villein has aliened the land, he ſhall be *bound by laches*, becauſe he had not but title to the thing which never was in him. Per Walſh. Pl. C. 364. b. Mich. 4 & 5 Eliz. in Ld. Zouch's caſe.

8. Infants are bound by *laches* in caſe of *waif*, *eſtray*, *wreck*, *ſale in market overt*, or acts done by reaſon of their office, or for neceſſity. Per Walſh. Pl. C. 364. b. Mich. 4 & 5 Eliz. in Ld. Zouch's caſe.

9. A. of full age, and B. within age, *jointenants*, are *diſſeiſed* by C. C. levies a *fine*, and after proclamations 5 years paſs. A. dies. B. ſhall have other five years after his full age for the whole. Per Bendloes J. Pl. C. 367. Mich. 4 & 5 Eliz. Stowell v. Zouch.

[377] 10. Where an infant *made a conveyance by bargain and ſale to Queen Eliz.* it was not aided by the ſtat. 18 Eliz. [cap. 2.] cited by Coke Ch. J. Cro. J. 364. pl. 2. as adjudged in 30 Eliz. in Bawd's caſe.

11. *Feme obligor of full age marries an infant*, in debt on the bond age was denied. Noy, 69. 39 Eliz. Deeles v. Nokes.

12. Infant keeps an *hoſtry*; his gueſts are *robbed*; no action lies againſt the infant. See Actions (D), pl. 3. cites 40 & 41 Eliz. Croſs v. Andrews.

13. Though a *feoffment* by infant tenant for life or years be not ſuch a forfeiture but that the infant may enter again upon the leſſor, yet if it be *by matter of record*, as if he levies a *fine*, he ſhall never enter again. Arg. Godb. 365. cites 8 Rep. 44. [Hill. 45 Eliz.] Whittingham's caſe.

14. If an infant bargains and *ſells lands by deed indented and inrolled*, he may avoid it at any time. 2 Inſt. 673.

Submiſſion by him not void, but voidable.

15. *Chancery* will decree no *award* to bind an infant. Chan. Caſes, 280. Trin. 28 Car. 2. Cavendiſh v. . . . . Cumb. 318. Hill. 6 W. 3. B. R. Roberts v. Newbold.

But per Dolben J. contra Ibid. 85.——But a *general* cuſtom does not bind an infant. Per Eyre J. Show. 84. in S. C.

16. *Expreſs cuſtoms* may bind an infant copyholder. Per Eyres J. Show. 83. Hill. 1 W. & M. in caſe of King v. Diliſton, cites Le. 266. Seeme's caſe, of the lords appointing one to receive the profits during nonage; and ſo it is in the caſe of *an office*, a *condition expreſſe* will bind an infant. Ibid. cites 8 Rep. 44. Whittingham's caſe.

(B. 3) Acts of Infant avoided when.

1. IT is a common known rule, that *all* ſuch gifts, grants, or *deeds* made *by an infant*, which do not *take effect by delivery of his hand*, are void; but ſuch gifts, grants, or deeds, made by an infant by matter in deed, or in writing, which take effect by delivery

livery of his own hand are voidable by himſelf, and his heirs, and by thoſe which ſhall have his eſtate. Perk. 6. ſ. 12.

2. If an infant brings error to reverſe a fine levied by him, if the *inſpection* be had, and witneſſes produced to prove the infancy, the reverſal may be after full age, or after his deceaſe by his heir. Mo. 844. pl. 1139. Paſch. 13 Jac. Keckwith's caſe.

Fine by infant was vacated on the inſpection. 3 Lev. 36. Mich. 33 Car. 2. C. B. Hutchinſon's caſe.

3. A *diverſity* is to be obſerved *between matters of record* done or ſuffered *by an infant, and matters en fait;* for matters en fait he ſhall avoid either within age, or at full age, as has been ſaid; but matters of record, as ſtatutes-merchants, and of the ſtaple, recognizances knowledged by him, or a fine levied by him, recovery againſt him by default in real action (ſaving in dower) muſt be avoided by him, viz. ſtatutes, &c. by audita querela, and the fine and recovery by writ of error during his minority; and the like; and the reaſon thereof is, becauſe they are *judicial acts*, and taken by a court or a judge, therefore the nonage of the party to avoid the ſame, ſhall be tried by inſpection of judges, and not by the country. *And for that his nonage muſt be tried by inſpection, this cannot be done after his full age;* and ſo is the law clearly holden at this day, though there be ſome difference in our books. But if the age be inſpected by the judges, and recorded that he is within age, albeit he come of full age before the reverſal, yet may it be reverſed after his full age. Co. Litt. 380. b.

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4. A *fine* was levied *by an infant feme, and ſhe and her huſband were examined as to her age*, and *both anſwered that ſhe was of age*, and afterwards ſhe was examined privately as to her conſent, who anſwered, *that ſhe was under no conſtraint, and was willing to levy the fine;* but was not queſtioned then as to her age. About two years after the wife died without iſſue; the Court agreed that the fine cannot be ſet aſide *after her death*. Mod. 246. pl. 6. Paſch. 29 Car. 2. C. B. Barrow v. Parrot.

But a *common recovery* may; for this ſhall not be tried by inſpection as in caſe of a fine. Cro. E. 739. pl. 13. Hill. 42 Eliz.

B. R. Holland v. Dauntzey. ——— The bringing a writ of error during his nonage is not ſufficient, but the fine by judgment in the writ of error muſt be *reverſed during his nonage*. Godb. 120. pl. 141. 29 Eliz.

(B. 4) Acts of Infants; avoided by whom.

1. IF *two jointenants* are, and the *one is an infant*, and *he makes feoffment* of his part, the other cannot enter; for none ſhall avoid an act done by an infant but he who is *privy in blood*. Br. Entre Cong. pl. 47. cites 39 H. 6. 42.

2. None ſhall *take advantage of the infancy of his anceſtor*, but he that has right deſcended to him from the ſame anceſtor; but the heir of an infant may take benefit of a condition, though no right deſcended to him from the ſame anceſtor. 8 Rep. 44. a. Hill. 45 Eliz. Whittingham's caſe.

3. *Privies*

3. *Privies in blood*, as the *heir general or ſpecial*, may avoid a conveyance made by their anceſtor during his nonage. 8 Rep. 42. b. Hill. 45 Eliz. in the Star-Chamber, in Whittingham's caſe.

4. As if an *infant ſeiſed in fee makes a feoffment* and dies, his heir ſhall enter. 8 Rep. 42. b. in S. C.

5. So if *ſeiſed in tail male*, and he *makes a feoffment and dies*, his ſon being heir general and ſpecial may enter. 8 Rep. 43. a. in S. C.

6. *And* if he has *no ſons* but only daughters, *his brother being his ſpecial heir per formam doni* made to his father, may avoid the feoffment, becauſe he is privy in blood, and has the land by deſcent. 8 Rep. 43. a. in S. C.

7. But *privies in eſtate cannot* avoid a conveyance made by an infant. 8 Rep. 43. a. in S. C.

8. *As* if *tenant in tail*, being *within age, makes a feoffment and dies without iſſue*, the *donor ſhall not enter*, becauſe he was privy only in eſtate, and no right accrued to him by the death of the donee. 8 Rep. 43. a. in S. C.

9. *So* if there be *two jointenants within age*, and *one* of them *makes a feoffment in fee of his moiety, and dies*, the *ſurvivor cannot enter*; for by the feoffment the jointure was ſevered ſo long as the feoffment continued in force, and therefore the heir of the feoffor
[379] may have a dum fuit infra ætatem, or enter into the moiety. 8 Rep. 43. a. in S. C.

10. *But if both had joined* in the feoffment, *and one had died*, the right had ſurvived to the other, and he ſhould have had the land from the firſt feoffor. 8 Rep. 43. a. in S. C.

11. If a man within age, *ſeiſed in the right of his wife, makes a feoffment and dies*, his heir cannot enter, becauſe no right deſcends to him, but inaſmuch as the baron, if he had lived, might have entered in the life of his wife only, and not in reſpect of any right which he himſelf had, *the wife might in ſuch caſe have entered in her own right*. 8 Rep. 43. b. in S. C.

12. *But if the feme, being only tenant in tail, and the baron within age, had made a gift in tail* to another, *by which the baron gained a new reverſion in fee, and died*, the *wife might enter, or the heir of the baron*, who had a new reverſion deſcended to him; *but if the heir had entered, and defeated the tail given by the infant*, his eſtate vaniſhed, and by operation of law *the feme was immediately ſeiſed of her old eſtate*. 8 Rep. 43. b.

13. *Privies in law*, as the *lord by eſcheat*, ſhall not avoid a conveyance made by an infant. 8 Rep. 44. a.

14. *As* if an *infant makes a feoffment and dies without heir*, the lord ſhall not avoid it; per Curiam agreed; *but* becauſe it appeared the feoffment was *executed by letter of attorney made by the infant*, it was reſolved to be void, and that the land ſhould eſcheat to the queen. 8 Rep. 42. 45. Whittingham's caſe.

15. Where an incroachment of a *water courſe* was made in the infancy of the anceſtor, who *after full age acquieſced* under it 21 years, though ſuch infancy was urged, yet Ld. Cowper took no notice of it for the above reaſon. G. Equ. R. 4. Hill. 6 Ann. in Canc. Ld. Guernſey v. Rodbridges.

(B. 5) How relievable after Age, and in what Caſes.

1. IF an infant within age *ſeiſed of rent purchaſes the land*, and *aliens the land within age*, he ſhall have election if he will demand the land or the rent; per Kyrton, quod non negatur. Br. Coverture, pl. 12. cites 46 E. 3. 33, 34.

2. If an infant be *bound in a recognizance*, he *has no remedy to avoid it* by his nonage; but the Court ought not to take him to be bound, if they can perceive it; quod nota. Br. Coverture, pl. 23. cites 8 H. 6. 30.

3. If an infant *makes* a gift or *a leaſe rendering rent, and accepts the rent at full age*, this is a good bar in dum fuit infra ætatem. Br. Dum fuit, &c. pl. 8. cites 22 H. 6. 24.

4. If a *guardian pleads an ill plea where he might have pleaded a good one, by which the infant loſes*, the infant ſhall have writ of diſceit at his full age, and *recover all in damages* againſt the guardian; and therefore the Court cannot accept a guardian but ſuch as is ſufficient to render the infant damages at his full age. And in this caſe the infant here is at no miſchief; for he ſhall recover in value againſt the vouchee, and the ſame law where the guardian vouches illy, he ſhall render damages to the infant. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36. [380]

5. Where an infant *aſſigns dower* to his mother *more than the third part*, he cannot enter into the ſurpluſage at full age, but is *put to his writ of admeaſurement of dower*. Per Kingſmill J. but per Rede Ch. J. he may enter as upon *partition* made within age, which is equal; quære. Br. Entre Cong. pl. 44. cites 21 H. 7. 29.

6. If an infant *makes a feoffment*, he *may enter either within age or at full age*; and if he dies, *his heir may enter or have a dum fuit infra ætatem*, &c. Litt. ſ. 406. and Co. Litt. 247. b. 248. a.

7. An infant who is *bound in a ſtatute ſtaple* or the like, ſhall reverſe it by *audita quærela* at full age, or within age. Br. Coverture, pl. 64. cites F. N. B. 104.

8. Infant is not relievable by audita querela after full age againſt a *ſtatute* by him entered into. Mo. 75. pl. 206. Mich. 7 & 8 Eliz. Worſley's caſe.

9. Infant *acknowledged a recognizance*, and upon *audita quærela upon inſpection he* was adjudged within age, and had ſcire facias againſt the conuſee, and upon one nihil returned judgment was that recognizance be diſcharged where two nihils ought to be returned or ſcire feci, and for this *judgment was reverſed for error*, and now the infant is of full age, and cannot have a new audita querela; but he ſhall *have a ſpecial writ reciting all the matter*, and ſo be relieved; though judgment be reverſed, yet the depoſitions of witneſſes remain. Jenk. 322. pl. 30. cites 2 Jac. Randal's caſe. Godb. 149. pl. 52.

10. Land of an infant was charged by his father's *will for payment of portions* to younger children, who bring a bill praying that the truſtees may be decreed to ſell, &c. The infant, while a minor, deſired that the truſt eſtate might not be ſold, and *offered to ſubject other lands not within the truſt*, by which means a ſale was delayed; decreed per Lords Commiſſioners to hold him to his offer, for if he would have departed from it he ſhould immediately on his coming of age have *applied to the Court to have retracted his offer* and amended his anſwer, but now he had acquieſced under the anſwer about four years. 2 Vern. 224. pl. 206. Paſch. 1691. Cecil v. E. of Saliſbury.

(C) *What Act* done by an Infant *ſhall bind him.*

Contract.

[1. IF an *infant in reverſion accepts a leaſe for life of tenant in dower, but never takes the profits, and at full age diſagrees* to the leaſe, (*) *this ſhall not bar him of his action of waſt, for waſt done in the mean time.* 30 E. 3. 16.]

* Fol. 729.

[2. If a man *lends an infant 10 l. to pay at a certain day*, this contract ſhall not bind him. 39 E. 3. 20. b. admitted by the iſſue.]

[3. If an infant makes a *contract pro victu & veſtitu*, this ſhall bind him.]

Fitzh. Arbitrement, pl. 4. cites S.C. & S.P. admitted.

[4. [*So*] if an infant makes a contract *for his table*, he may be charged in an action upon this contract. 18 E. 4. 2. 10 H. 6. 14.]

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Fitzh. Arbitrement, pl. 4. cites S.C. & S.P. admitted.—

[5. *So* if he buys a coat or *cloth for apparel*, this ſhall bind him, for he cannot live without meat, drink, and clothes. 18 E. 4. 2. 10 H. 6. 14.]

But where an infant buys ſilks and velvets, which appear to be above his degree, the ſame is void, they being things of ſuperfluity and not of neceſſity. Lat. 22. in a nota ſays it was adjudged. —— So for gold lace to trim his ſuit. 2 Roll. Rep. 45. cites it as the lord of Eſſex's page's caſe. —— Ibid. 144. S. C. cited by the name of Price's caſe. ——S. C. cited by Vaughan Ch. J. Cart. 216. Trin. 22 Car. 2. C. B.

Cro. J. 494. pl. 15. Trin. 16 Jac. S.C. adjudged, and the firſt judgment reverſed.— 2 Roll. Rep. 45. S. C. adjudged, and the former judgment reverſed accordingly.

[6. If an infant *is a mercer and hath a ſhop* in a town, *and* there *buys and ſells*, and he *contracts to pay* a certain ſum to J. S. *for certain wares ſold to him by J. S. to re-ſell*, yet he is not chargeable upon this contract, for this trading is not immediately neceſſary ad victum & veſtitum. Trin. 10 Ja. B. R. between HILL AND WHITTINGHAM, in a writ of error per Curiam, and the judgment given before e contra reverſed, for if he ſhall be bound thereby, infants might be infinitely prejudiced, and buy and ſell and live by the loſs.]

——D. 104. b. Marg. pl. 13. cites S. C. adjudged, and judgment reverſed accordingly. —— Noy, 21, 22. S. P. obiter, accordingly that the infant is not bound. ——S. C. cited by Crooke, 2 Roll. Rep. 271.

[7. If

[7. If an infant makes a contract *pro victu or veſtitu*, and *enters into a ſingle bill for payment thereof*, this ſhall bind him, though he be ouſted of his law thereby.] Lev. 86. Mich. 14 Car. 2. B. R. Ruſſell v. Lee, S. P.

where it was for victuals and clothes neceſſary, delivered to him and ſuitable to his quality, and they ſhall be intended to be for his own uſe though not ſo alleged.

[8. *But if* the infant enters *into an obligation with a penalty* for payment thereof, this obligation ſhall not bind him. Paſch. 32 Eliz. B. R. by three juſtices. Mich. 11 Ja. CUPWORTH'S caſe, per Curiam.] Co. Litt. 172. a. S. P. —Lev. 86. Mich. 14 Car. 2. in caſe of

Ruſſel v. Lee, S. P. Arg. cites Co. Litt. ut ſupra, and Cro. E. 920. S. P. held accordingly, and the Court in the principal caſe was of the ſame opinion. Godb. 219. pl. 316. Mich. 11 Jac. C. B. Rearſby v. Cuffer, S. P. agreed per Cur. But it is ſaid there that if when he comes to full age he enters into an obligation for neceſſaries which he had when he was within age, the law is now taken to be that the ſame ſhall bind him. ——— But ibid. cites Randall's caſe, 44 Eliz. adjudged, that an obligation with a penalty for money borrowed within age is abſolutely void. ——— But per Wray if an infant had been bound in an obligation with a ſurety, and afterwards at his full age he in conſideration thereof promiſes to keep his ſurety harmleſs, an action lies on ſuch promiſe; for the infant cannot plead non eſt factum. Le. 114. in pl. 156. cites Mich. 28 & 29 Eliz. Edmonds's caſe.

[9. *But* an infant may bind himſelf in an *aſſumpſit for payment thereof*, and an action upon the caſe lies againſt him upon the promiſe; for this is but in nature of an action of debt, and therefore where debt lies, an action upon the caſe lies againſt him, (but perhaps it would be otherways upon a collateral promiſe), for wager of law is not to be regarded; for a man of full age ſhall by ſuch action be ouſted thereof. Trin. 15 Ja. B. R. between TILLET AND BUCKSTONE, Rot. 1374, adjudged, that an action upon the caſe lay againſt an infant upon promiſe of payment for beer and billets. Mich. 2 Car. Regis, between DELAVALL AND CLARE, agreed per Curiam. Contra, Mich. 11 Ja. B. per Curiam.] An *infant having a family buys bread*, and afterwards *makes up an account with the baker*, he is not *chargeable in an aſſumpſit upon this account*, becauſe it is founded upon the account in which an infant is not chargeable, for the law allows him not ſuch diſcretion, for it may be miſreckoned. 2 Roll. Rep. 271. Mich. 20 Jac. B. R. Tirrill's caſe.

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[10. If an infant *promiſes* another, *that if he will find him meat, drink, and waſhing, and pay for his ſchooling*, that *he will pay 7 l. yearly*, an action upon the caſe lies upon this promiſe, for learning is as neceſſary as other things, and though it is not mentioned what learning this was, yet it ſhall be intended what was fit for him, till it be ſhewn to the contrary on the other part; and though *he to whom the promiſe was made does not inſtruct him, but pays another for it*, the promiſe of re-payment thereof is good; and it appears that the learning, meat, drink, and waſhing, could not be afforded for a leſs ſum than 7 l. Mich. 4 Car. B. R. between PICKERING AND GUNNING adjudged, this being moved in arreſt of judgment, which intratur. Trin. 3 Car. Rot. 918.] Palm. 528. S. C. held accordingly. —— Jo. 182. pl. 4. S. C. adjudged that the action lay. —— Co. Litt. 172. a. S. P. —— An action *on the caſe* lies againſt an infant upon an aſſumpſit by him for neceſſaries, though it was objected that damages are to be recovered in it, and that debt only would lie. Lat. 169. Trin. 2 Car. Wood v. Witherick. ——— Noy, 87. S. C. & S. P. agreed per Curiam.

11. If an *infant binds himſelf* he ſhall not avoid it; per Markham. Newt. ſaid this is by cuſtom; but, per Markham, this is

by the common law; for it *is for his benefit* to be inſtructed to gain his living. For as the maſter may have action of covenant againſt the apprentice to ſerve him, ſo ſhall the apprentice have againſt him to inſtruct him. But per Newton, covenant by an infant is void by the common law. But per Aſcue J. an infant may be an apprentice *by indenture*; for it is for his benefit. But Paſton J. denied theſe caſes. So Newton and Paſton againſt Aſcue and Markham. And it was agreed, that an infant may be conſtrained to ſerve, but not to be an apprentice. Br. Coverture, pl. 25. cites 21 H. 6. 31.

12. *Account* does not lie againſt an infant clearly, per Newton Ch. J. quod non negatur. Br. Coverture, pl. 24. cites 19 H. 6. 5.

13. If an infant be at *table* with me *for* 12*d. for the week*, or *buys cloth* of me for his robes, debt lies, and nonage is no plea; for thoſe are neceſſaries; for he cannot live without meat, drink, and veſture. Br. Coverture, pl. 51. cites 18 E. 4. 12.

Cro. E. 020. pl. 16. Hill. 45 Eliz. B. R. Ayliff v. Archdale, S. C. the whole Court held it to be void; *but* if he had taken an *obligation of the very ſum which he laid out* for his neceſſary maintenance it had been otherwiſe. ——— Mo. 679. pl. 929. S. C. adjudged in C. B. for the defendant. ——— Godb. 364. pl. 456. Arg. cites S. P. adjudged 5 Jac. B. R. in caſe of Bendloſe v. Holiday. ——— Reſolved that a bond taken for neceſſaries of an infant is good. Mar. 145. cited by Bramſton Ch. J. as Trin. 4 Car. Pickering v. Jacob.

14. An infant had taken ſo much for *neceſſary apparel and diet* as *amounted to* 50*l. A. paid the money for the infant and took an obligation of him with a penalty.* Adjudged that it did not bind him in regard of the forfeiture. Arg. Hutt. 107. cites it as 25 Eliz. Aleph's caſe.

See 1 Mod. 86. 300. 2 Lev. 21. 3 Mod. 28.

15. Infant has eſtate on *condition* to be performed by him; if the condition be broken during his minority, the land is loſt for ever. 8 Rep. 44. b. Hill. 45 Eliz. Whittingham's caſe.

If *conditions* in law annexed to *offices* founded on confidence and ſkill, be broken by infant or *feme covert*, this ſhall bar infant and feme covert for ever. 8 Rep. 44. b. Hill. 45 Eliz. Whittingham's caſe.

16. *Debt on eſcape againſt an infant gaoler* that ſuffers a priſoner to eſcape out of execution, will lie upon the ſtatute of W. 2. 11. 2 Inſt. 382.

17. Infant *ideot* (ſo found by office) *levies a fine* to A. and declares the uſe of it by indentures, and good. 10 Rep. 24. b. Mich. 10 Jac. B. R.

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Roll. Rep. 281. in pl. 2. S. P. by Coke and Crooke agreed.

18. An infant ſhall not be charged upon his *promiſe for the board of a ſtranger*, though otherwiſe it ſhall be for his own board; agreed by Coke and Crooke. 3 Bulſt. 118. Trin. 14 Jac. in a nota.

2 Roll. Rep. 144. Green v. Cheſter. S. C. & S. P. agreed. ——— Palm. 361. Cheve v. Cheſter. S. C. adjudged

19. *Aſſumpſit* by executor, in conſideration the teſtator *would buy and pay for the defendant* 24 *yards of lace*, 11 *yards of velvet, and three yards of broad-cloth, and make him a cloak*, defendant promiſed to pay ſo much as he ſhould pay for the wares, and alſo ſo much as he ſhould deſerve for the making of the cloak; and further declared that the defendant was *indebted* to the teſtator 27*l. for a doublet and a pair of velvet hoſe made for him*, which he promiſed

miſed to pay, but had not. The defendant ſaid, that at the time of the ſeveral promiſes he was within age; adjudged for the defendant, becauſe it does not appear, that this cloak, doublet, and hoſe were for the defendant himſelf, nor if it had been ſo averred, yet it not being averred that it was *neceſſary and convenient apparel for him to wear according to his eſtate and degree*, therefore the promiſe did not bind him. Cro. J. 560. pl. 8. Hill. 17 Jac. B. R. Ive v. Cheſter.

againſt the plaintiff for not averring that it was for neceſſary apparel.—— Poph. 151, 152. Jene v. Cheſter. S. C. adjudged.——Lev. 87. Mich. 14 Car. 2. B. R. cites S. C.

20. *Infant and another of full age covenanted the one with the other*, though the infant is not bound, yet the other is. Sid. 446. pl. 5. Paſch. 22 Car. 2. B. R. Farnham v. Atkins.

21. Where it has been held that the *deeds of* infants are not void but voidable, the meaning is, that *non eſt factum cannot be pleaded*, becauſe they have the form though not the operation of deeds, and therefore are not void upon that account, without ſhewing ſome ſpecial matter to make them of no efficacy; per Curiam. 3 Mod. 310. Trin. 2 W. & M. in B. R. in caſe of Thompſon v. Leach.

Therefore if an infant makes a *letter of attorney*, though it is void in itſelf, yet it ſhall not be avoided by pleading non eſt factum, but by ſhewing his infancy. 3 Mod. 311. Trin. 2 W. & M. in B. R. in caſe of Thompſon v. Leach.——But he may ſay, non conceſſit, &c. per Wray Ch. J. 2 Le. 218. in Humfreſton's caſe.

22. If one deliver goods to an infant on a *contract*, &c. knowing him to be an infant, the infant ſhall not be charged in *trover* and converſion for them; for by ſuch way all the infants in England ſhould be ruined. Sid. 129. Paſch. 15 Car. 2. in the Exchequer Chamber, in caſe of Manby v. Scott.

23. *But* if the *delivery of goods* be to a feme, not knowing her to be a feme covert, or to an infant, *not knowing him to be an infant*, it will be otherwiſe. Sid. 129. in caſe of Manby v. Scott.

24. Some have endeavoured to *diſtinguiſh between a deed which gives only authority to do a thing, and ſuch which conveys an intereſt by the delivery of the deed itſelf*, that the firſt is void and the other voidable. But the reaſon is the ſame to make both void, only where a feoffment is made by an infant it is voidable, becauſe of the ſolemnity of the conveyance; per Curiam. 3 Mod. 311. Trin. 2 W. & M. in B. R. in caſe of Thompſon v. Leach.

25. An infant *being bail, and taken in execution*, it is diſcretionary to diſcharge him on bail or not. Carth. 278. Trin. 5 W. & M. in B. R. Loyd v. Eagle.

26. A. *lends* an infant *money*, and infant lays it out *in neceſſaries*, yet the infant is not liable; per Treby Ch. J. 1 Salk. 279. pl. 4. Paſch. 5 W. & M. in C. B. Darby v. Boucher. 1 Salk. 387. Earle v. Poole. S.P.

27. Covenant lies not againſt *apprentice* being an infant. 7 Mod. 15. Paſch. 1 Ann. B. R. Lylly's caſe. Unleſs by cuſtom. Mod. 271.

28. William Pengelly an *infant apprentice in Exeter goes to the Angel in Taunton* with one R. D. *and there abides for ſeveral days* together *on pretence of a courtſhip*, &c. In an *action brought* by one Periam, *the landlord, for the proviſions and neceſſaries found* for [384]

Pengelly the plaintiff was nonſuited, for it was at his peril to entertain another man's apprentice, and he might have had an action for it; beſides the ill conſequence this would bring if ſuch things ſhould be allowed to infants, *theſe things not being for neceſſaries, though it was objected the plaintiff was an inn-keeper*; but it was made out that the plaintiff was privy to the courtſhip, &c. Devonſhire Aſſizes in the Summer, 1708.

(D) *Acts* done by an Infant.

What Acts are *void*.

For being *without livery* is void, ſo that the entry is not neceſſary. Br. Treſpaſs, pl. 338. cites 18 E. 4. 1, 2.

[1. IF an infant *leaſes for years*, and the leſſee enters, the infant may have treſpaſs againſt him. 18 E. 4. 1. b. 4. b.]

Quære, If *leaſe for years without rent* be not void. 2 Sid. 110. Davis v. Mannington.

* Fol. 730.

[2. If he leaſes for years, *rendering rent*, it is at his *election to* (*) *affirm the leaſe, or to have treſpaſs* againſt the leſſee for the occupation. 18 E. 4. 2.]

An action *of debt for rent upon a leaſe made to an infant*, and judgment pro quer' againſt the infant. 2 Bulſt. 69. Kirton v. Elliot.——Such leaſe is not void but voidable, and may be affirmed by acceptance, and that though it was made by an infant copyholder of his copyhold lands without licence. Noy, 92. Tria. 2 Car. B. R. agreed per Cur. Aſhfield v. Aſhfield.——Jo. 157. S. C. adjudged, that the leaſe ſhall be good as to ſtrangers.

Contra if it be *by deed and livery* of ſeiſin made by *himſelf*, but otherwiſe if by attorney. Br. Treſpaſs, pl. 338. cites 18 E. 4. 1, 2.

[3. If an infant *exchanges* with another, if the other enters, the infant may have an aſſiſe. 18 E. 4. 2.]

Br. Treſpaſs, pl. 338. S. C.

[4. If he *ſells goods*, it is at his *election to* make it void, for he may *have treſpaſs or debt* for the money. 18 E. 4. 2.]

Fitzh. Arbitrement, pl. 4. cites S. C. & S. P.—Br. Arbitrement, pl. 43. 10 H. 6. 14. is of a treſpaſs done *by an infant, and* that award in ſuch caſe ſhall bind him, becauſe it is for his advantage to excuſe him of a treſpaſs of which he is impeachable by law. But Brooke ſays quære.

[5. If a *treſpaſs be* done *to an infant*, and *he ſubmits to an award*, the award made by them ſhall not bind but at his *election*. Contra. 10 H. 6. 14.]

† Br. Faits, pl. 31. cites S. C. and Aſcue J. held it good becauſe it is for his advantage; But Paſton J. e contra. But Brooke ſays that the law ſeems to be with Aſcue. —— S. C. cited Noy, 130.

[6. If a man makes a deed of *feoffment to* an infant, *and* the *infant makes a letter of attorney* to another *to take livery* for him, this is good, becauſe it is *for his benefit*. Dubitatur, †21 H. 6. 31. But Brooke in abridging it, title Faits, 31. ſeems that it is good, Mich. 11 Car. B. R. between PALFRYMAN AND GROBY, per Curiam, upon evidence at the bar, reſolved, upon a trial which concerned Sir Sidny Montague and Dame Gorges, ſhe *being but of the age of* 11 *years at the making of the letter of attorney*.]

7. If

7. If the king *aliens land, parcel of his dutchy of Lancaſter, within age*, there he may void it by nonage, for he has the dutchy as duke, and not as king; *contra of the land which he has as king*; for the king cannot be diſabled by nonage as a common perſon ſhall be. Br. Prerogative, pl. 132. cites 1 E. 6. & concordat anno 6, and 26 E. 3. tit. Age, 8.

8. If a man *infeoffs an infant, and after enters* into the land *by the aſſent of the infant*, and *continues ſeiſin*, and *dies ſeiſed*, yet the entry of the heir of the feoffor is not lawful, for his father was a diſſeiſor, and the aſſent of the infant was void. Br. Coverture, pl. 34. cites 11 Aſſ. 14.

9. In mortdanceſtor it was held clearly, that *releaſe of an infant of all the right in lands of which he was never ſeiſed* is void, ſo that another who is of half blood ſhall have the land as heir of their common anceſtor, if he who releaſed dies without iſſue; but *otherwiſe* it is ſaid *of a feoffment*; the reaſon of the diverſity ſeems *by reaſon of the livery* of the land this is only voidable, and the other is void. Br. Coverture, pl. 40. cites 34 Aſſ. 10.

10. If an infant *accounts before auditors of receipt*, he ſhall be bound, per Newton; quære. But note, that this is matter of record. Br. Arbitrement, pl. 43. cites 10 H. 6. 14.

11. In præcipe quod reddat, nonage at the time of the deviſe is a good plea where a man *claims by deviſe* by teſtament of *J. N.* if he was *within age* at the time of the deviſe; for an infant *cannot deviſe*. Br. Coverture, pl. 30. cites 37 H. 6. 5.

12. If an infant makes a deed of *feoffment and a letter of attorney* to a ſtranger *to make livery* of ſeiſin, and he makes livery of ſeiſin by force thereof, he ſhall be taken for a diſſeiſor. Perk. ſ. 13. cites P. 18 E. 4. 2. S. P. Arg. 2 Roll. Rep. 242.

13. If an infant *commands W. to make a bond* for him, *and to deliver it as his deed*, which he does, this is not the deed of the infant. Br. Obligation, pl. 53. cites 14 E. 4. 2.

14. *Contra* where he *himſelf delivers it*, quod fuit conceſſum; for the command is void. Ibid.

15. If an infant *delivers a horſe, or bails* goods, treſpaſs does not lie for him. Br. Treſpaſs, pl. 338. cites 18 E. 4. 1, 2.

16. If an *infant* makes *grant of an advowſon by his deed, and at his full age he confirms* the ſame grant, yet it is not good, for the firſt grant was void. Br. Coverture, pl. 1. cites 26 H. 8. 2.

17. *But* if he *gives goods and delivers them with his hands*, treſpaſs does not lie. Ibid. S. P. Br. Coverture, pl. 26. cites 22 H. 6. 3. But contra if the donee takes them by virtue of the gift.

18. *So of feoffment* and *livery made by the infant himſelf*, and *not by attorney, this is voidable*, and not void; note the diverſity. And ſo ſee that livery of a deed of an infant is not like to the livery of land or goods by him. Ibid. Br. Feoffment de Terres, pl. 48. cites 18 E. 3. pl. 27. S. P. accordingly. —— S. P. Br. Coverture, pl. 26. cites 22 H. 6. 3. But if he makes letter of attorney to one to make livery, who does it, treſpaſs lies.

19. Infant *makes a will*, and publiſhes it, and dies at full age, it is of no effect. Pl. C. 344. Trin. 10 Eliz. in caſe of Brett v. Rigden.

Mo. 103. 105. pl. 248. Lane v. Cowper. S.C. & S.P. held by all but Gawdy to be void Rames v. Machin.

* 20. *Leaſe to try a title in ejectment* made by an infant *without rent*, profit, or other recompence, but only to try the title, being made upon the land, it is not *void*; per Gawdy J. but per Wray and Southcot contra. 2 Le. 216, 217. pl. 275. Paſch. 16 Eliz. B. R. Humfreſton's caſe.

—— Such leaſe by infant is good enough, becauſe it *is for his advantage*. Noy, 133.

21. *Surrender of copyhold* was made by infant to the uſe of a ſtranger, who was admitted; the infant ſhall enter at full age; for this is no bar nor diſcontinuance. Mo. 597. pl. 814. Hill. 35 Eliz. Gooles v. Grane.

Infant ſurrenderor, may enter at full age. Poph. 30. Mich. 35 & 36 Eliz. in caſe of Bullock v. Dibler.

22. *Surrender of a copyhold* by infant of five years of age allowed by this court, though lord of the manor inſiſted he never heard of any admittance in that manor at ſuch an age. 2 Chan. Rep. 392. 2 Jac. 2. Naylor v. Strode.

23. If an infant *bargain and ſell his land for money for commons, or teaching*, it is good with averment; if for money otherwiſe, if it be proved, it is avoidable; if for money recited, and not paid, it is void; and yet in the caſe of a man of full age the recital ſufficeth. Ld. Bacon on the Statute of Uſes, 355.

24. If a *leaſe for life* be made *to an infant*, and *he by charter of feoffment aliens in fee*, the breach of this condition in law is no abſolute forfeiture of his eſtate. Co. Litt. 233. b.

25. So of a *condition in law given by ſtatute*, which gives an entry only; as if an infant *aliens* by charter of feoffment *in mortmain*, this is no bar to the infant. Co. Litt. 233. b.

26. *Exchange* by infant of lands is not void, but voidable only. Co. Litt. 51. b.

27. *Leaſe of land to an infant* if for his benefit is voidable only at his election; but he may make it void by refuſing or waving the land before the rent day comes; for then no action of debt will lie againſt him; but the infant *coming to age before the rent-day*, and it not being ſhewed that the rent was of greater value than the land, in debt for rent againſt leſſee it was adjudged for the plaintiff. Cro. J. 320. pl. 1. Paſch. 10 Jac. B. R. Ketſey's caſe.

28. *Money paid by an infant* with his own hands, in conſideration of an horſe agreed to be ſold him for that and a further ſum, is but voidable to be recovered again by an action of account; per Hobert Ch. J. Hob. 77. pl. 98. Auſtin v. Gervas.

No ſtranger ſhall avoid it. Ibid. 44, 45. cites the caſe of Lord Rook v. Ld. Latimer.

29. If infant *makes feoffment in fee and dies without heir*, the feoffment is unavoidable; per Bridgman. Bridgm. 44. Mich. 13 Jac. cites 49 E. 3. 13. 6 H. 4. 3. 7 H. 5. 9. 39 H. 6. 42.

——Arg. Bridgm. 75. S. P.—The lord by *eſcheat* ſhall not take advantage of the infancy becauſe a ſtranger, and if infant *tenant in tail* makes feoffment and dies *without iſſue*, no ſtranger

ſtranger in blood ſhall take advantage of the infancy; per Holt Ch. J. Show. 87. Hill. 1 W. & M. in caſe of King v. Dilliſton.

30. *Two jointenants in fee, one* of them being an *infant makes a feoffment in fee* and *dies*, the ſurvivor ſhall * not enter; but if *both within age make feoffment*, one joint right remains in them, and therefore if one dies the right will ſurvive, and the ſurvivor may enter into all; Arg. Bridgm. 44. Mich. 13 Jac.

But they muſt ſue ſeveral writs of *dum fuit infra ætatem*; for the nonage of the one is not the nonage of the other. Ibid. —— * Becauſe the *jointenancy is ſevered*. But 35 Aſſ. pl. 15. where the jointenancy is not ſevered it is otherwiſe; agreed. Roll. R. 442. in caſe of Smallman v. Agburrow.

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31. If an infant *grants a rent-charge* out of his land, it is not voidable, but ipſo facto void; for if the *grantee diſtrains* for the rent, the *infant may have an action of treſpaſs* againſt him; per Curiam. 3 Mod. 310. Trin. 2 W. & M.

Perk. ſ. 17. cites Paſch. 18 E. 4. 2. S. P.

32. A *leaſe of land* by infant rendering rent is good till diſagreement, but if without render it is void; Arg. Show. 299. Mich. 3 W. & M.

It is not in the election of the leſſee to avoid it for the infancy of his leſſor; per Twiſden J. Sid. 42. in pl. 8. Paſch. 13 Car. 2. B. R.

33. The *difference* taken that the deed of an infant (as *letter of attorney*, whereby he gives an authority) is *void*, but where he paſſes any intereſt, (as *bond*, &c.) is *only voidable*, is not agreeable to reaſon; for by that means the infant would be more prejudiced in paſſing his eſtate than he would in giving a bare authority which cannot be maintained; per Holt Ch. J. Cumb. 468. Hill. 10 W. 3. B. R. in caſe of Thompſon v. Leach.

(E) What [*Acts* are] *voidable.*

[*As to Chattels.*]

[1. AN infant *delivers goods to his own uſe*, this is only voidable, for he *ſhall not have treſpaſs* againſt the bailee. 18 H. 6. 2.]

2. If an infant *gives a horſe, and does not deliver* the horſe *with his hands*, and the donee takes the horſe by force of the gift, the infant ſhall have an action of treſpaſs; but if an infant be an executor, the payment of the debt of the teſtator by him is good and effectual, &c. Perk. ſ. 14. cites Trin. 15 E. 3. 45.

If an infant delivers *money* with his hands, it is only voidable to be recovered back in an action of account; Hobart Ch. J. Hob. 77. in caſe of Auſten v. Gervis. —— If an infant delivers goods with his own hands treſpaſs does not lie. Lat. 10. cites it as adjudged Paſch. 32 Eliz. —S.P. Mod. 137. by Hide J. cites 21 H. 7. 39. 26 H. 8. 2. But if an infant gives or ſells goods, and the *vendee or donee takes them by force of the gift or ſale*, the infant may have an action of *treſpaſs* againſt him.

(F) What ſhall *bind* him.

[1. IF an infant *adminiſtrator*, being *above* 17 *years of age, by the aſſent of his friends, ſells a leaſe for years* that he hath for lands as adminiſtrator, *to the intent with the money to pay the debts of the teſtator, and* diſcharge the debts of the infant *himſelf*, which were *for his apparel and diet*, this ſhall bind the infant. Mich. 14 Ja. in Camera Stellata, reſolved by Hobart and Tanfield, and decreed by the Court between two SNOWS plaintiffs, and BARRADEN and WATKINS defendants; but it would have been *otherwiſe*, as they agreed, *if* the infant had been *under* 17 years of age, for before this age he cannot adminiſter by the civil law.]

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Cro. C. 490. pl. 15. Kniveton v. Latham, S. C. adjudged. — Jo. 400. pl. 8. Kniveton v. Katham S. C. adjudged niſi by three juſtices, but Crooke e contra.

[2. If *A.* be *bound to B. in* 100 *l. for payment of* 52 *l. at the end of one half year* after, and after *B. dies making three executors*, and after the obligation is forfeited *one of the executors comes to the age of* 18, *and* then *accepts the* 52 *l. in full ſatisfaction of the ſaid obligation, and makes a releaſe* of the ſaid obligation, yet *this does not diſcharge the obligation*, becauſe the releaſe is made by an infant, and *by the forfeiture the* 100 *l. was a debt of the teſtator*, and the 52 l. cannot be a ſatisfaction of the 100 l. and in equity there may be a good cauſe to take the forfeiture, and in an action of debt againſt an executor he may plead a judgment upon an obligation forfeited in bar, ultra quæ he has not aſſets, which ſhews that the ſum forfeited is the debt, and an *infant executor cannot releaſe the debt of the teſtator without a ſatisfaction.* Mich. 13 Car. B. R. between KNYVETON AND STATHAM adjudged upon a demurrer, intratur Trin. 13 Car. Rot. 962. but this was againſt the opinion of Croke.]

Jo. 389. pl. 10. S. C. adjudged, and judgment affirmed. — Win. 103, 104. Cooper v. Edgar, S. C. and Ibid. 115. to near the end of 120.

[3. If an *infant covenants by indenture to levy a fine*, and that it ſhall be *to certain uſes, and* after he *levies the fine*, and *dies within age*, the limitation of the uſes ſhall bind the heir of the infant, as well as the infant himſelf, ſo long as the fine continues not reverſed. Trin. 13 Car. B. R. between SPRING AND SIR JULIUS CÆSAR, Maſter of the Rolls, and others, in a writ of error upon a judgment in Banco in a quare impedit, adjudged per Curiam, without queſtion as to this. Intratur, Mich. 11 Car.]

S. C. debated by ſeveral ſerjeants in C. B.

Fol. 731.

(G) What *judicial Acts* done *by an Infant* ſhall bind him.

See tit. Recovery Common (D), per totem.

[1. IF an infant *by his guardians ſuffers a common recovery, he being tenant to the præcipe*, this ſhall bind him, ſo that he ſhall not avoid it in a writ of error, for by intendment he ſhall have recompence in value; and if this be not for the good of the infant,

infant, he may have his recompence over againſt his guardians. Paſch. 9 Car. B. R. between the Earl of NEWPORT AND G. Duke of BUCKINGHAM, adjudged in a writ of error to reverſe ſuch a common recovery ſuffered in Banco, and then ſeveral precedents were cited of ſuch common recoveries ſuffered by infants, and then ſaid, that much land depending upon ſuch recoveries, and all the ſaid precedents are in nature of judgments.]

[2. [*But*] *If* an infant ſuffers a common recovery, in which *he comes in as vouchee in proper perſon*, and not by guardian or attorney, this is erroneous, and may be reverſed for this cauſe in a writ of error, for this is more ſtrongly error than if it had been by attorney, inaſmuch as he cannot have any remedy againſt any if he be deceived. Hill. 1650, between AYLET AND WALKER, per Curiam reſolved, that this ſhall not bind the infant, and that *he may reverſe it* for this cauſe *in a writ of error; but* it was adjudged that he could *not* avoid it himſelf *by entry without a writ* of error. Intratur Trin. 1649. Rot. 200. upon a ſpecial verdict in Eſſex.]

Sty. 246. Ailet v. Watleſs, S. C. adjudged accordingly for the defendant niſi. —A common recovery was ſuffered, in which a feme covert was vouchee, and under age, and appeared by attorney, and the ſame was reverſed in a writ of error niſi cauſa at the end of the term. 5 Mod. 209, 210. Paſch. 8 W. 3. Stokes v. Oliver.

3. It was ſaid for law, that if *poſſeſſion* be in *an infant plaintiff in aſſiſe*, the aſſiſe ſhall be awarded, becauſe he cannot know nor chuſe his poſſeſſion and title, &c. Br. Coverture, pl. 29. cites 24 E. 3. 24. [389]

4. *But* if *recovery* be *pleaded againſt him without poſſeſſion*, this is alſo as ſtrong as againſt a man of full age. Ibid.

5. *So* of a *fine if he ſhews part* of the fine. Ibid.

6. Note per Finch. in præcipe quod reddat, that if an *infant* be *nonſuited in writ of right*, yet he *may have writ of poſſeſſion after*, by reaſon of his infancy. Br. Droit de Recto, pl. 2. cites 41 E. 3. 12.

7. If an infant *be barred in aſſiſe upon verdict at large, becauſe they did not find a divorce*, which was not given in evidence, yet the infant ſhall be bound by it; for *matter of record* ſhall bind an infant who has appeared to it, the record being in force, as ſtrong as it ſhall bind a man of full age. Br. Coverture, pl. 15. cites 7 H. 4. 23.

8. In *ſcire facias ad cognoſcend' fact'. After a judgment of debt upon a releaſe thereof*, it was agreed that none ſhall be bound by a recognizance, as mainpernor thereof, if he be within age; for if he was bound he has no remedy. Br. Age, pl. 20. cites 8 H. 6. 30.

9. If an *infant does treſpaſs, and puts himſelf in arbitrement*, &c. who give their award that, &c. this ſhall bind the infant, for this is for his advantage to excuſe him of the treſpaſs of which the law charges him; per Strange. Brook ſays, quære inde; for it may be that the award is of greater recompence than the law will give in the action. Br. Coverture, pl. 62. cites 10 H. 6. 14.

10. *And*

10. *And* per Newton, if an infant *be receiver, and enters into account before auditors*, he ſhall be charged in debt upon account, per Newton, which Brooke ſays he believes is law; for it does not appear of record now if he was within age or not, and it ſeems that he cannot have for plea in debt upon account, that he was within age at the time of the account; for it is a judgment paſſed before againſt him; quære. Br. Coverture, pl. 62. cites 10 H. 6. 14.

11. To avoid *recognizances* or *ſtatutes* entered into by an infant, he muſt bring his *audita querela* during his infancy, for there is no remedy after; Arg. 2 And. 158. in pl. 87. Paſch. 42 Eliz. But he may avoid a *bond* after full age, by pleading infancy at the time. Ibid.

12. In writ of right, an infant may *join the miſe and try it by battel*, for he may perform it by champion, and not in proper perſon; *but in appeal* he ſhall not join battel; for this ſhall be done in proper perſon. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

13. An infant is not bound by *failure of record pleaded in aſſiſe* to be diſſeiſor as another man is, and yet the ſtatute is general, but it ought to have a reaſonable conſtruction; per Hawes, quod non negatur. Br. Coverture, pl. 44. cites 4 H. 7. 11.

14. The juſtices ſeemed to incline that if *judgment by default of a real action* of land, be given againſt an infant, that it ſhall bind him. But no rule was given in the caſe. Godb. 80. pl. 94. Mich. 28 & 29 Eliz. Anon.

15. S. tenant in tail covenanted in conſideration of the marriage of his eldeſt ſon, to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon for life, and after to the uſe of the firſt ſon of his eldeſt ſon which ſhould be in tail; and afterwards his eldeſt ſon had iſſue G. S. his eldeſt. The grandfather would ſell part of the land, and aſſure more in recompence to the ſon, and the purchaſors would not take any aſſurance unleſs the infant, who was but four years old, would ſuffer a recovery; and to ſatisfy the purchaſors, it was prayed that a *guardian* might be *allowed the infant*, and *that a recovery might be had againſt him as vouchee*, which the Court agreed unto, and admitted two gentlemen there preſent to be guardians for him, (the
[390] infant being brought into court,) and *he by his guardians appeared and vouched the common vouchee; and the recovery had accordingly.* Cro. E. 471. pl. 24. Hill. 38 Eliz. B. R. Stapleton's caſe.

16. Infant *confeſſed a judgment*, and an action of *debt in B. R.* was brought againſt him, and now he brought audita querela during his nonage. Popham Ch. J. was clear that *audita querela* does not lie upon action of debt in this court, as it would lie upon a *recognizance* or *ſtatute* acknowledged, but that the party *ſhall have error*, but not in B. R. but *in the Exchequer Chamber* by the ſtatute of 27 Eliz. Mo. 460. pl. 642. Mich. 38 & 39 Eliz. B. R. Randal's caſe.

17. Judgment *in dower by default* againſt infant tenant ſhall bind. D. 104. a. pl. 10. 104. b. pl. 13. in Marg. cites Mich. 2 Jac. B. R. Smith's caſe.

18. An

18. An infant *tenant in tail ſuffered a recovery by his guardian;* the Court held, that the ſame ſhould bind him, becauſe he might have *remedy over againſt the guardian by action upon the caſe;* but *otherwiſe* if he ſuffer a recovery *by attorney*, for that is void, becauſe he has not any remedy over againſt him, as it was adjudged 4 Jac. in caſe of Holland v. Lee. Godb. 161. pl. 225. Mich. 7 Jac. C. B. Zouch v. Michil.

19. An *infant, who wanted only nine weeks to be of full age, acknowledged a fine before commiſſioners*, who by the inſpection could not tell whether he was of age or not; the fine was reverſed. 2 Bulſt. 320. Hill. 12 Jac. Requiſh v. Requiſh.

20. *In an aſſiſe* the *defendant pleaded in bar a recovery againſt the plaintiff in a former aſſiſe;* the *demandant ſaid he was an infant, and that he was not tertenant at the time* of the ſaid recovery, *but that J. S. was tenant, and the recovery was a recovery by default:* reſolved, 1ſt, That a recovery is not ſo ſacred a thing but that it might be falſified. 2dly, That becauſe in this caſe, the *infant cannot have error or attaint, therefore he ſhall falſify;* and the rather in this caſe becauſe *here is a title and judgment pleaded againſt an infant where his title is not diſcovered.* Cro. J. 464. pl. 13. Hill. 15 Jac. B. R. Holford v. Platt.

21. An infant widow *brought* writ of *error to reverſe a fine levied by her of her lands whilſt ſhe was covert baron*, and it was moved that a guardian be aſſigned her to proſecute for her, and that ſhe might be inſpected by the Court, and the inſpection be recorded; and an affidavit was made by one in court, that he knew the infant there preſent, and the time of her birth and baptiſing, and ſwore the times preciſely; the church-book was alſo produced in court, and proved by oath, wherein the time of her baptiſing was entered, and that ſhe was the ſame perſon; upon which ſhe had by her own election Attwood an attorney of this court aſſigned for her guardian, and the affidavits were ordered by the Court to be recorded, and the inſpection to be entered, and a ſcire facias awarded againſt the heir. Sty. 457. Trin. 1655. Sherlock's caſe.

22. Error to reverſe a *fine* for infancy; now it was moved, that the *party being in court* ſhe *might be inſpected and the inſpection recorded;* and there was produced and read a copy of the Regiſter-book, ſworn to be a true one, and ſeveral affidavits of her age. Curia: Let the inſpection be now recorded; the *iſſue of her infancy may be tried at any time hereafter, though ſhe comes of age.* Vent. 69. Paſch. 22 Car. 2. B. R. Couſin's caſe.

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25. P. married J. B. an heireſs, and afterwards Sir H. P. (father of P.) and an ignorant carpenter took the conuſance of a *fine* of the ſaid J. being under age, and by indenture the uſe was limited to P. and his wife for their two lives, the remainder to the heirs of the ſurvivor; about two years after the *wife died without iſſue;* and B. as *heir to her prayed the relief of the Court. Upon examination it appeared that Sir H. P. did *examine the woman whether ſhe were willing to levy the fine? and aſked the huſband and her whether ſhe were of age or not? Both anſwerd that ſhe was.* She

2 Vent. 30. Perrot's caſe, S. C. the *wife at the time of levying the fine was 20 years old, ſo that the nonage could not be diſcerned on the view.*

All the judges agreed they could not meddle with the fine; but if the wife had been alive

She afterwards being privately examined touching her conſent, anſwered as before, and that ſhe had no conſtraint upon her by her huſband, but ſhe was not there queſtioned concerning her age. All agreed, that there was no way to ſet the fine aſide. Mod. 246, 247. pl. 6. Paſch. 29 Car. 2. C. B. Barrow v. Parrot.

and ſtill under age, they might bring her in by habeas corpus and inſpect her, and ſet aſide the fine upon a motion; for perhaps the huſband would not ſuffer the bringing or proceeding in a writ of error.

26. An infant *was bail and taken in execution*, whereupon he brought audita querela, and witneſſes ſwore to his infancy. But per Cur. it is a matter of diſcretion either to admit him to bail, or refuſe it. He being in execution; but had the audita querela been brought before, he muſt have had a ſuperſedeas of courſe, ſo he was not bailed then; but afterwards in Michaelmas term, *upon producing a copy of the regiſter of his age* out of Yorkſhire, *and examining the witneſſes* again, *he was diſcharged* by the Court. Carth. 278. Trin. 5 W. & M. in B. R. Loyd v. Eagle.

27. A. *deviſes lands to truſtees until debts paid, and then to an infant and his heirs. Defendant enters and levies a fine, and five years paſs.* Infant when of age brought an ejectment, but was barred becauſe the truſtees ſhould have entered; equity will relieve and not ſuffer an infant to be barred by *laches of the truſtees*; nor to be barred of a truſt eſtate during his infancy. The infant in this caſe ſhall recover the mean profits. 2 Vern. 368. pl. 331. Mich. 1699. Allen v. Sayer.

28. The *father tenant for life*, remainder *to the ſon in tail*, with *remainder over*. The *ſon is an infant*, and *on an advantageous propoſal for the ſon's marriage, the father and infant ſon join in marriage-articles*, and the *father only covenants, that within a year after the ſon's coming to age the father and ſon will join in a fine and recovery* of the family eſtate *to divers uſes*. The *infant ſon ſeals the deed*, and *within a year after he comes to age, joins with his father in a fine and recovery*; the infant ſon's ſealing of theſe articles is not ſufficient to declare the uſes of the fine and recovery. 3 Wms's Rep. 206. pl. 51. Mich. 1733. Nightingale v. Ferrers.

(G. 2) Bound by what Contract.

Cro. E. 583. pl. 11. S. C. the Court held that he having acknowledged ſatisfaction for 4 l. for

1. WHERE an infant was charged for *apparel* ſome of which was *beyond his rank and ſome not*, and the plaintiff in his declaration confeſſed that the *infant had paid part*, but it did not appear for what part, whether for the neceſſary or unneceſſary; per Gawdy J. it ſhall be *intended* for the neceſſary apparel. Goldſb. 168. pl. 99. Hill. 43 Eliz. Mackerel v. Batchelor.

part, &c. and they did not know for which part, therefore they could not have judgment for any part; but otherwiſe he ſhould have judgment for thoſe contracts which were allowed of. —— A *taylor ſues* an infant for the making apparel *not convenient for the quality of the infant*. He need not aver that convenient, becauſe

becauſe he does not provide the materials, but only the making, and neceſſaries thereto, as lining, &c. See Lat. 157. Trin. 2 Car. Delaval v. Clare. ——— It will come time enough in the replication. Jo. 146. Vere v. Delavall. —— Noy, 85. S. C. adjudged for the plaintiff.

* 2. An action was brought againſt an infant who attended the earl of Eſſex in his chamber, and it was for 40 l. for a *ſattin doublet and hoſe, with ſilver and gold lace*, and a *velvet coat and hoſe* to his own uſe; he pleaded infancy, and though he was ſued by the addition of *gentleman*, yet the Court held that theſe were not proper cloaths for a gentleman, but above his degree, and ſo the action would not lie againſt him for thoſe things, as not agreeable to his rank, but for a fuſtian doublet and cloth hoſe it lay, being neceſſaries. Goldſb. 168. pl. 99. Hill. 43 Eliz. Mackerell v. Batchelour.

3. Infant buys a horſe, and *pays* part of *the conſideration money with his own* hand, this is not void, but voidable only (being delivered by his own hands), and to be recovered again by an action of *account*. Hob. 69. 77. Auſtin v. Jervas.

4. A brewer brought an action againſt an infant for *beer* ſold to the infant, and held maintainable. Noy, 85. in caſe of Delaval v. Clare, cites M. 17 Jac. B. R. Rot. 1574. Blackſtone's caſe.

Lat. 157. cites S.C. & S. P. adjudged maintainable.

5. If infant has houſes it is neceſſary to repair them, and yet *contract for repairs* will not bind him, for no contract binds but what concerns his perſon. Per Haughton J. 2 Roll. Rep. 271. Mich. 20 Jac. B. R. Turell's caſe.

6. Single bill given by infant *for neceſſaries* is good, but obligation with penalty is not. 1 Lev. 86. Mich. 14 Car. 2. B. R. Ruſſel v. Lee.

7. Caſe by a farrier for *medicines applied to defendant's horſes*, for which defendant promiſed to pay. Defendant pleads that at the time of the ſuppoſed promiſe he was an infant under the age of 21. Plaintiff replied, that the medicines were neceſſary for the defendant's horſes. Defendant demurred, and had judgment; for though the phyſic might be neceſſary for the horſes, yet the horſes were not neceſſary for defendant, and as an infant's contract is *binding for things neceſſary only for his perſon*, ſuch neceſſity ſhould have been put in iſſue, that the Court might have judged of it. M. 12 Geo. 2. B. R. Clowes v. Brooks.

In this caſe was cited, and admitted per Cur. as a caſe in point, Cart. 215. Trin. 22 Car. 2. C.B. Rainſford v. Fenwick.

8. In an action upon a quantum meruit for *diet, lodging, and apparel*, the evidence was, that the defendant being an infant was ſent with a Ruſſia merchant beyond ſea by his mother, who did agree to pay him ſo much for diet, waſhing, and apparel, and the merchant in Ruſſia committed the care of the infant to the plaintiff, and promiſed to pay him for his diet, lodging, and apparel. And Roll directed the jury, that if an infant *comes to a ſtranger and boards with him*, there is a *contract in law* implied that he ſhould pay for his board, as much as it is worth; but if another undertakes to pay for his boarding, this expreſs agreement takes away the implied contract, and the verdict was accordingly found for defendant. All. 94. Mich. 24 Car. B. R. Duncombe v. Turkridge.

9. Aſſumpſit was brought for *labour and medicines in curing the defendant of a diſtemper, &c.* who pleaded infancy. The plaintiff replied, it was for *neceſſaries generally*. Adjudged upon demurrer that

If an infant ſhould promiſe to give an *unreaſon-*

able price for neceſſaries, it would not be good to bind him.

that the replication in this general form without ſhewing how, or in what manner, was good. Carth. 110. Hill. 2 W. & M. in B. R. Huggins v. Wiſeman.

Arg. 10 Mod. 85. Paſch. 11 Ann. B. R. in caſe of Mitchel v. Reynolds.

For here the infant is a trader, and the bill of exchange was *drawn in courſe of trade, and not for any neceſſaries.*

10. Infancy is a good plea in bar againſt a *bill of exchange.* Carth. 160. Mich. 2 W. & M. in B. R. Williams v. Harriſon.

Ibid.

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Roll. 2. pl. 3.

11. Infant keeps a *common inn*, yet an action on the caſe on the cuſtom of inns will not lie againſt him. Cited per Holt Ch. J. Carth. 161. Mich. 2 W. & M. in B. R. in caſe of Williams v. Harriſon.

5 Mod. 368. S. C. but reported there as not good for the money lent, but only for what money plaintiff laid out for neceſſaries for the infant, who (it ſays) was dead, and this laſt is according to 1 Salk. 279.

12. No difference between *money lent* to an infant, *and he buys neceſſaries*, or if a ſtranger buys them for him; for in both caſes it will come in iſſue whether the goods were convenient for his degree and quality; but becauſe the plaintiff had laid the *venue* where the money was lent, and not where the neceſſaries were bought, judgment was given againſt him. Cumb. 482. Trin. 10 W. 3. B. R. Ellis v. Ellis.

Darbey v. Boucher. 5 W. & M. in C. B. that of Ellis v. Ellis was Trin. 10 W. 3. B. R. ——— Hill. 10 Ann. B. R. * a judgment in C. B. agreeing with that of Ellis v. Ellis, as reported by Cumb. 482. was reverſed, for that the lender muſt lay the money out for the infant, or ſee it laid out, and then it is his laying out. 1 Salk. 386. Earle v. Peale. ——— 12 Mod. 197. S. C. and becauſe the employment of the money for neceſſaries was *traverſeable*, and no venue laid, judgment was given for the defendant for that omiſſion. ——— * 10 Mod. 66. S. C. and per Cur. the goodneſs or badneſs of a contract is not to depend on a *ſubſequent contingency.* ——— But though the law be, that if one actually lends money to an infant to pay for neceſſaries, yet as the infant in ſuch caſe *may waſte and miſapply it*, he is therefore not liable, as in 1 Salk. 279.; it is yet otherwiſe *in equity*; for if one lends money to an infant *to pay a debt for neceſſaries, and thereupon he actually does pay the debt*, he is liable in equity, though not at law; for in this caſe the *lender ſtands in the place of the perſon paid*, (viz.) the creditor, for neceſſaries, and ſhall recover in equity as the other ſhould have done at law. Per the Maſter of the Rolls. Wms.'s Rep. 559. Trin. 1719. Marlow v. Pitfield.

As for diet, apparel, or neceſſary *learning*, but covenant to *bind himſelf apprentice* does not, unleſs by ſpecial cuſtom. Cro. J. 494. pl. 15. Trin. 16 Jac. B. R. Whittingham v. Hill. ——— Such *apparel* muſt be convenient only. 2 Roll. 144. Green v. Cheſter. ——— *But* he may be charged for a *tort*, as in trover, though not on contract, nor as *bailiff*, or for goods to carry on a *trade*, and therefore when infants are *factors*, their friends ſhould give ſecurity for their accounting. Abr. Equ. Caſes, 6. pl. 3. Trin. 1700. Smalley v. Smalley.

13. No *contract* binds an infant but what concerns his perſon. 2 Roll. Rep. 271. Mich. 24 Jac. B. R. Tirril's caſe.

14. Infant made a *contract with conſent of friends*, that intereſt money ſhould become principal, (it being a matter of extremity,) and it was decreed good. 9 Mod. 103. Mich. 11 Geo. cited per Ld. C. as Lady Betty Cromwell's caſe.

(G. 3) Bound by Forfeiture.

1. IF an *eſtate upon condition deſcends* to an infant, *who does not perform the condition*, he ſhall loſe the land, notwithſtanding the nonage. Br. Coverture, pl. 71. cites 31 Aſſ. 17.

(G. 4) Bound by what Agreement of him and his Guardian.

1. BILL to have a ſpecific performance of an agreement, &c. upon this caſe. *Mr. Fuller during his minority by himſelf and guardian enters into articles with the defendant to let him a farm at a certain rent*, &c. The *defendant enters* upon the farm, and continues the poſſeſſion, *and pays the rent after Mr. Fuller came of full age.* After that *Mr. Fuller conveys the inheritance to the plaintiff*, and then the *defendant quits the farm, inſiſting that he was only tenant at will*, and refuſes to accept a leaſe, or execute a counterpart, *becauſe Mr. Fuller being an infant at the time of making the agreement, was not bound by it, and therefore the defendant ought not to be bound* by it. It was inſiſted, that the defendant was bound by the articles, though Mr. Fuller had his election at his full age to perform or not perform the articles; for though in ſuch caſes the infant has his election at his full age, the other party has not his election, but is bound by ſuch agreement with an infant. It was inſiſted by the defendant, that this bill is brought by a purchaſor of the inheritance, and this covenant does not run with the land, nor is transferred by the ſtatute H. 8. But Harcourt C. decreed that the plaintiff ſhould execute a leaſe to the defendant, and the defendant execute a counterpart of ſuch leaſe to the plaintiff in purſuance of the articles, and the defendant to pay coſts. MS. Rep. Trin. 13 Ann. in Canc. Clayton v. Aſhdown. [394]

2. If an *infant ſeiſed in fee, upon a marriage* with the conſent of her guardians, ſhould *covenant, in conſideration of a ſettlement, to convey her inheritance to her huſband*, Ld. C. Parker ſaid, that equity would execute the agreement if the conſideration was a competent ſettlement. 2 Wms.'s Rep. 244. Mich. 1724. in caſe of Cannel v. Buckle.

(H) What *Judicial Privileges* an Infant ſhall have.

See tit. Age, per totum.

[1. IN an *aſſize againſt two*, of which *one is an infant*, if *they make default*, by which the *aſſize is awarded*, and after the *aſſize remains for default of jurors*, yet the *infant ſhall be received to plead afterwards.* 29 Aſſ. 36.]

Br. Aſſize, pl. 298. cites S. C. —— Br. Reſceit, pl. 126. cites S. C. but Brooke makes a quære if this receipt be ratione ætatis.

[2. In an *aſſize by* an infant, if the *tail pleads an ill bar*, and the *infant replies, by which he makes the bar good, if* the plaintiff *had been of full age*, yet this ſhall not make the bar good againſt the infant; but if the judgment be for the tenant thereupon, this is

Br. Error, pl. 128. cites S. C.

error, for the Court ought to plead for the tenderneſs of his age 37 Aſſ. 5. adjudged.]

3. If an infant be *nonſuited in writ of right*, yet after he may have writ de poſſeſs'; and if he prays to be received, and ſhews cauſe, he may after change the cauſe. Br. Coverture, pl. 6. cites 41 E. 3. 13. per Finch.

4. If an infant makes *default in præcipe quod reddat*, by which grand cape is awarded, he has not loſt the land by his default by reaſon of his infancy, quod nota. Br. Coverture, pl. 4. cites 3 H. 6. 10.

5. If an infant be *impleaded by any præcipe* of his lands, and loſes by defending, he ſhall have a *writ of error*, and becauſe he was within age at the time of the judgment, it ſhall be reverſed, and the infant ſhall be reſtored to all that he loſt. Hetl. 65. Mich. 3 Car. C. B. Wilkins v. Thomas.

[395] (H. 2) Actions. Liable to Actions or Suits in what Caſes for Torts, &c.

Co. Litt. 72. a. S. P.

1. *ACCOUNT* does not lie againſt an infant *of receipt during his nonage*. Br. Coverture, pl. 20. cites 21 E. 3. 7, 8.

2. *Agreement of an infant* to a tort does not make him a tort-feaſor, by the beſt opinion. Br. Aſſize, pl. 46. cites 3 H. 4. 16.

3. Infant ſhall not be ſworn within age, nor ſhall he be charged by *bailment*; contra upon *trover*, as executor. Br. Coverture, pl. 63. cites 11 H. 6. 40.

4. If *leaſe for years* be made *to an infant*, and he *manures the land*, debt lies of the rent, for he has quid pro quo. Br. Coverture, pl. 25. cites 21 H. 6. 31.

5. If an *infant* of ſo tender age that the juſtices think he cannot conceive malice, be indicted and *found guilty of felony*, the juſtices may diſmiſs him; per Moil and Billing, quod nemo negavit. And Wangf. who was of the counſel againſt the infant of four years, in treſpaſs of putting out the eyes of a man conceſſit, becauſe in felony a man cannot juſtify, but plead not guilty. Br. Corone, pl. 6. cites 35 H. 6. 12.

6. If a man *leaſes to an infant of ſeven or eight years*, and *a ſtranger does waſte*, the infant ſhall not be thereof charged; contra *of his own waſte*, and contra of a man of full age in the firſt caſe. Br. Coverture, pl. 68. cites Doct. & Stud. 67.

7. *And* an infant ſhall be bound by his *ceſſer in ceſſavit*. Ibid. cites Doct. & Stud. lib. 2. fol. 113.

2 Inſt. 382. S. P. and that the ſtatute of Weſtm. 2. 13 E. 1. cap. 11. extends to ſuch infant, ——— 8 Rep. 44. b. S. P. per Curiam.

8. *So* if he be *warden of a priſon, and ſuffers a priſoner to eſcape*, for thoſe ſtatutes do not except infants. Ibid.

9. An infant *ſhall anſwer to the intruſion or to the purchaſe by him*; ſo where he is vouched in writ of *dower*; and he ſhall anſwer to

appeal if he be of the age of 12 years. Br. Coverture, pl. 66. cites F. N. B. dum fuit infra ætatem.

10. *Waſte* done by an infant ſhall bind, and ſo of *ceſſavit*. 8 Rep. 44. b. Paſch. 25 Eliz.

11. An infant and baron and feme ſhall be puniſhed for *waſte done by a ſtranger*, and ſo ſhall the wife that has eſtate by ſurvivor for the waſte done by the huſband in his life-time, if ſhe agree to the ſtate, though there has been variety of opinions in other books. Co. Litt. 54. a.

12. Action *for words* lies againſt an infant of 17 years of age; for *malitia ſupplet ætatem*. Per Cur. Noy, 129. Hodſmam v. Griſell.

13. A *bill* was exhibited in the Star-chamber on 27 *Eliz.* 4. *of fraudulent conveyances* againſt ſeveral perſons, of whom one was an infant, and it was reſolved that this infancy ſhall not excuſe him of the penalty of the year's value of the land, he being of 16 *years and privy to the conveyance, and having juſtified that* fraudulent deed *to be made bona fide*, and therefore ſhall be puniſhed as if he were of age. Noy, 105. Poulton v. Wiſeman & al'.

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14. *Account* lies not againſt an infant, becauſe the infant may be miſtaken, and in ſuch action evidence ſhall not be upon the value of the things, but upon the account only. Lat. 169. in caſe of Wood v. Witherick, ſays, the very ſame point was adjudged 19 Jac. B. R. between STIRRELL AND HOMEDAY, and the reaſon there was, becauſe the infant might be miſtaken.

Noy, 87. S. C. accordingly, and cites the caſe of Stirrel v. Holliday. —2 Roll. Rep. 271. Tirrel's caſe, S. C. held accordingly. ——— Action lies not againſt an infant upon an infimul computaverunt for diet, becauſe infant may miſreckon in the account. Palm. 528. Paſch. 4 Car. B. R. Pickering v. Gunning. —— Jo. 182. pl. 4. S. C. but S. P. does not appear.

15. Action upon the *caſe* was brought againſt an infant for *affirming a jewel to be* his own which was not, and the defendant pleaded infancy, and the plaintiff demurred, and adjudged for the defendant; for be the jewel his own or not he was not bound. Cited Sid. 258. in caſe of Johnſon v. Pye, as of Paſch. 16 Car. 2. between Gorve and Nevil.

16. *Caſe* lies not againſt an infant *for affirming himſelf to be of age*, and thereby borrowing money of the plaintiff; and a *diverſity* was taken between *torts* and *contracts* of infants, for though infants ſhall not be bound by contracts, yet they ſhall be bound for torts, cites D. 105. But per Cur. though infants ſhould be bound by *actual torts*, as treſpaſs, &c. which are *vi & contra pacem*, yet they ſhall not be bound by *thoſe which ſound in deceit*. Sid. 258. Trin. 17 Car. 2. B. R. Johnſon v. Pye.

Lev. 169. S. C. adjornatur. —— Keb. 905. pl. 7. S. C. adjornatur. — Ibid. 913. pl. 16. S. C. awarded that the plaintiff nil capiat per billam.

17. If an infant *judicially perjures himſelf in point of age*, or otherwiſe, he ſhall be puniſhed for the perjury. Agreed. Sid. 258. pl. 3. Trin. 17 Car. 2. B. R. in the caſe of Johnſon v. Pye.

18. But not for barely affirming himſelf to be of age, in order to borrow money on a mortgage; for ſuch *torts* that muſt puniſh an infant *muſt be vi & armis, or notoriouſly againſt the public*, but

not where the plaintiff's own credulity has betrayed him. Per Keeling. And by Windham, the commands of an infant are void, and for ſuch he ſhall never be attainted a diſſeiſor, much leſs ſhall be puniſhed for a bare affirmation, which Twiſden agreed, and that there muſt be a fact joined to it, as *cheating with falſe dice*, &c. Alſo by this means all the pleas of infancy would be taken away, for ſuch affirmations are in every contract. Windham ſaid, that had any other perſon affirmed the infant of age, an action would lie; (and cited the caſe of GROVE v. NEVIL, where the defendant pleaded infancy, to which the plaintiff demurred in an action upon the caſe, *for falſely affirming a jewel to be his own which was another man's.*) The Court awarded, on the plaintiff's prayer, a nil capiat per billam. Keb. 914. pl. 16. Trin. 17 Car. 2. B. R. in caſe of Johnſon v. Pie.

19. Infant may be charged for *trover* becauſe it is *a tort*, but *not on contract*, nor as *bailiff*, or for goods to carry on a *trade*, and therefore when infants are *factors*, their friends ſhall give ſecurity for their accounting. Abr. Equ. Caſes, 6. Trin. 1700. Smally v. Smally.

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(H. 3) What real Actions he may have.

1. INFANT may have *writ of right and join the miſe* if he be purchaſor. Br. Coverture, pl. 66. cites F. N. B. Dum fuit infra ætatem.

2. Infant may have *formedon* within age, but *if deed of warranty of his anceſtor, whoſe heir*, &c. be pleaded, the parol ſhall demur. Ibid.

(H. 4) What Action an Infant may have on his own Contract.

1. IF an infant *makes* me *bailiff of his manor*, treſpaſs does not lie againſt me, for he ſhall have writ of account; for it is for his benefit. Br. Coverture, pl. 25. cites 21 H. 6. 31. per Aſcue J.

2. If an infant makes a contract for an horſe, and *pays part of the money himſelf*, it is not a void conſideration, for being delivered with his own hands, it is but voidable, to be recovered again by an action of account. Per Herbert Ch. J. Hob. 77. Auſten v. Gervas.

This was on a promiſe to the infant, that on payment of ſo much money by the infant, the defendant would make an aſſurance, and judgment for the plaintiff. Keb. 1. pl. 1. Gable v. Foſter, S. C.

3. An infant by his guardian brought *aſſumpſit*, and after verdict for him it was *moved* in arreſt of judgment, becauſe *the conſideration of the promiſe being made by the infant to pay a ſum of money was void*. But per Cur. the action well lies, for it is only in the *election of the infant* to make his promiſe void, and not of the other party. Sid. 41. Paſch. 13 Car. 2. Forreſter's caſe.

4. An

4. An infant brought an *aſſumpſit by his guardian*, and *declared, that where the defendant entered into his cloſe, and cut his graſs, that in conſideration he would permit him to make it into hay, and carry it away, he promiſed to give him 6l.* for it. Upon this declaration the defendant demurred, ſuppoſing it to be no conſideration, becauſe it was *not reciprocal;* for the infant was not bound by his permiſſion, but might ſue him notwithſtanding; but the Court gave judgment for the plaintiff. Vent. 51. Mich. 21 Car. 2. B. R. Smith v. Bowen. Mod. 25. pl. 66. S.C. adjudged niſi, &c.—2 Keb. 581. pl. 114. S. C. adjudged.—If an infant makes a leaſe for years, rendering rent, it is not in the election of the leſſee to avoid this leaſe for the infancy of the leſſor, but the infant ſhall have an action for the rent; and ſo on a promiſe to an infant to pay ſo much, in conſideration he would permit the defendant to enjoy ſuch a houſe, it was adjudged a good conſideration, and an action for it maintainable by the infant; though the infant might avoid his promiſe if an action were grounded upon it againſt him. Mod. 25. in S. C. by Twiſden ſaid it had been ſo adjudged.——S. P. by Twiſden, Sid. 42. in pl. 8.

(H. 5) Actions. When they muſt ſue. Limitations.

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1. AN *aſſumpſit* is made to an infant, the *ſtatute of limitations* is not pleadable if he brings his action within ſix years after his full age, though he was but a day old when the promiſe was made. 2 Mod. 71. Paſch. 28 Car. 2. C. B. Croſier v. Tomlinſon.

2. If an infant *lets ſix years paſs after he comes of age*, and then brings a *bill for an account againſt the receiver of the profits of his eſtate* during his infancy; if the defendant pleads the *ſtatute of limitations*, it is as much a bar to ſuch ſuit as it would be to an action of account at common law, and this is not ſuch a truſt as being a creature of a court of equity the ſtatute ſhall be no bar to. Ch. Prec. 518. pl. 320. Trin. 1719. Lockey v. Lockey.

(H. 6) Actions. How they muſt be ſued. By Attorney or Guardian.

1. *Weſt.* 2. 15. 13 *E.* 1. ENACTS that *if an infant be eſſoigned, ſo that he cannot ſue perſonally, his next friend ſhall be admitted to ſue for him.* Upon this ſtatute, whether the infant be *eſſoigned or no*, he ſhall ſue by prochein amy; for the eſſoignment is put in the act to ſhew what miſchief may fall out in this caſe. If the *ſurmiſe* that the plaintiff is within age be *untrue*, his *admittance by prochein amy is error.* 2 Inſt. 390.

2. R. brought aſſize by prochein amy, it is no plea that the infant-mother is alive, for the *ſtatute intends him to be the prochein amy who will firſt ſue for him.* Br. Garden and Prochein Amy, pl. 27. cites Temp. E. 3. It. Not.

3. *But* the iſſue was ſuffered 27 E. 3. who was prochein amy, and there it was agreed that *where land deſcends of the part of the*

father, and other land of the part of the mother, that *ſuch amy* of one part or the other *who firſt gets the infant ſhall have the ſuit.* Brook makes a quære if this be not ſuch amy to whom no land may deſcend. Br. ibid.

4. *But* the ſuit is always *in name of the heir* by prochein amy, as it is in other caſes by ſuch a one his attorney, &c. which appears in the Book of Entries. Br. ibid.

5. *And* ſee 34 E. 3. that an *infant who ſues or anſwers by prochein amy, ſhall not be ſuffered to diſallow* the ſuit or plea pleaded by him, nor the prochein amy, though the infant comes in perſon; neither may a feme diſallow the plea of her baron. Br. ibid.

* This is miſprinted, and ſhould be 40 E. 3. 16. pl. 6. and ſo are the other editions.

6. *Scire facias upon a fine*, the defendant made default, and one came and informed the Court that the *plaintiff eſſoigned the infant for fear of a recovery by the defendant*, for the defendant was *infant*; wherefore he was admitted to anſwer by guardian ex aſſenſu querentis. Quære, if he may not be admitted by guardian, without his aſſent, as well as by prochein amy. Br. Garden and Prochein Amy, pl. 4. cites * 40 E. 19.

[399] 7. Infant brought aſſiſe by guardian, and well; and ſo it ſeems that an *infant may ſue as well by guardian as by prochein amy*, for the ſtatute of prochein amy *W.* 2. *cap.* 15. *is in the affirmative*; but *where the ſuit of the infant is againſt his own guardian*, as for waſte, mortdanceſtor, aſſiſe, &c. there for neceſſity it ſhall be by prochein amy; and it ſhall be by prochein amy by the ſame ſtatute where the infant is eſſoigned; but *where the ſuit is not againſt the guardian, and alſo the infant is not eſſoigned, there the ſuit may be by guardian.* Br. Garden and Prochein Amy, pl. 26. cites 12 E. 3. and Fitzh. Aſſ. 116.

8. *Aſſiſe by two coparcenors*, of which the *one was an infant*, and appeared by guardian, and it was demanded where he was made guardian. Per Stone, he ought not to ſhew it, for he may anſwer as prochein amy by ſtatute, and there has been great debate *where one anſwers as guardian, and the other as prochein amy*, which *plea ſhall be taken.* Per Fiſh, *his who beſt pleads in advantage of the infant.* Br. Garden, pl. 9. cites 28 Aſſ. 22.

9. *Guardian ſhall ſhew warrant*, but *prochein amy not*, quod nota; and yet it ſeems that the guardian ſhall be admitted by the Court, and prochein amy not; *but* by 19 *Aſſ.* 10. the *guardian ſhall not have warrant as attorney ſhall have*, becauſe he is admitted by the Court, and this is the beſt law. Br. Garrant de Attorney, pl. 47. cites 34 Aſſ. 5.

10. In *eſtrepement againſt* an infant, he *appeared by guardian*, and well, per Cur. notwithſtanding that it be a *perſonal action*, and the infant in a manner treſpaſſor. Br. Garden, pl. 20. cites 3 H. 6. 16.

11. Brook makes a quære if an infant may ſue a *perſonal action by prochein amy.* Br. Garden, pl. 20. 3 H. 6. 16.

12. Writ of *waſte* has been ſued by the infant of the prochein amy *againſt the father of the infant tenant by the curteſy.* Br. Garden, pl. 3. cites 34 H. 6. 4.

13. &

13. S. *brought action of falſe impriſonment* againſt P. and becauſe the *plaintiff was eſſoigned*, G. came as prochein amy, and prayed to be admitted for him, and counted by Vaviſor, and the plaintiff was *of the age of ten years*, and becauſe G. took upon him to ſay, upon his honeſty, that the plaintiff was eſſoigned, therefore he was *admitted without oath*. Br. Garden, pl. 14. cites 20 E. 4. 2.

14. *Office may be traverſed* by prochein amy of the infant, where the tenure is *found in chivalry* of the king, *where it is held of W. N. in ſocage*. Br. Garden, pl. 13. cites 6 H. 7. 15.

15. Infant may have *appeal of murder* of his anceſtor, whoſe heir he is, and it ſhall be by guardian and not by attorney, and the parol ſhall not demur at this day. Br. Garden, pl. 1. cites 27 H. 8. 11.

16. An infant ſhall *ſue by prochein amy, but if* he be *defendant* in any action, he *ſhall make his defence by guardian*, and not by prochein amy. F. N. B. 27. (H) and in the new notes there (d) cites 40 E. 3. Stat. Weſtm. 2. cap. 15. 27 H. 8. 11. 3 H. 6. 16. 1 H. 5. 6. 29 Aſſ. 67. 27 Aſſ. 53.

In our books the names of *guardian and prochein amy are ſometimes taken the one for the other*, becauſe they are oftentimes all one; as the *guardian in ſocage is alſo prochein amy*, and now as well the one as the other are allowed by the judges to be ſome of the officers of the Court. 2 Inſt. 261.

Guardian and prochein amy are diſtinct, and either may be admitted for the plaintiff, and the *prochein amy* never was till the ſtatute W. 1. 47. and W. 2. 15. and he *is appointed in caſe of neceſſity where an infant is to ſue* his guardian or be eſſoigned, or that the guardian will not ſue for him; and for theſe cauſes he might be admitted to ſue by either where he is to demand or to gain; but when he is *to defend a ſuit* in an action real or perſonal, *it ought always to be by guardian*, and the guardian ought to be admitted by the Court, who ought to anſwer his miſ-pleading if there be cauſe; and defendant ought always to appear by guardian, and not by prochein amy. Per three judges againſt one; and ſo a judgment in Durham was reverſed. Cro. J. 641. pl. 5. Trin. 20 Jac. B. R. Simpſon v. Jackſon. —— 2 Roll. Rep. 257. S. C. and judgment was reverſed. ——Palm. 295. S. C and judgment reverſed. S. C. cited accordingly, and ſays the precedents are ſo. * Hutt. 92. in caſe of Young v. Young. —— S. P. by Richardſon. Litt. Rep. 60. ——Cro. J. 441, 442. S. P. ——Cro. C. 161. pl. 2. Goodwin v. Moore. S. P. Mich. 5 Car. B. R. ——Admittance ad proſequend' is good, even where the infant is defendant; for it is to proſecute his plea by which he defends himſelf againſt the plaintiff. 8 Mod. 25. Hill. 7 Geo. 1. Spiller v. Adams.

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17. In *waſte by infant againſt his guardian*, one came as prochein amy by the ſtatute Weſtm. 2. and prayed to be received, for that the infant was eſſoigned. It was replied, that this appeared not judicially to the Court, and that [though] ſuch ſuggeſtion had uſed to be made in aſſiſe and mortdanceſtor, becauſe the eſſoining might be enquired of, there being a jury the firſt day, but that otherwiſe it was in this caſe of waſte; but reſolved that the prochein amy ought to be admitted upon the ſaid ſuggeſtion in this caſe, becauſe the writ is brought againſt the guardian, who perhaps had eſſoined the infant, and he ſhall not take advantage of his own wrong; and the Court awarded the prochein amy to be admitted. 2 Inſt. 261.

18. An infant appeared by *guardian, and coming to age continued ſtill by his guardian*, whereas he ſhould then have been by his attorney, and judgment was given for him, and the judgment was affirmed in error. Bulſt. 171. Trin. 9 Jac. Anon.

He may appear and profecute as plaintiff or demandant, either by

19. If infant be plaintiff, he muſt ſue by *prochein amy*, and if defendant, by *guardian*, and not in perſon, and the Court ought to aſſign the guardian. Arg. Roll. Rep. 304. Hill. 13 Jac. B. R. in caſe of Holland v. Lee.

prochein amy or by guardian at his election. Jo. 177. Young v. Young.——Infant may ſue by guardian, and the father not being thought proper, he being a defendant, the eldeſt ſix clerk was appointed. N. Ch. R. 44. Offley v. Jenny and Baker.——He ſhall ſue by prochein amy, though his prochein amy cannot anſwer for him as a guardian ſhall in caſe of infants being defendants. Sty. 369. Paſch. 1653. B. R.

20. One cannot anſwer for an infant as guardian either in Chancery or any other court, except he be *aſſigned guardian by the Court*; for if he might, that were to make himſelf his guardian, and that might prove to the damage of the infant, therefore if one will ſue an infant, he muſt *move the Court to aſſign a guardian* that may anſwer for him, but an infant may ſue by prochein amy, though his prochein amy cannot anſwer for him. Per Roll Ch. J. Sty. 369. Paſch. 1653. Anon.

2 Lev. 38. Baddington v. Freeman. S. C.—— Vent. 185. S.C. & S.P. Freeman v. Baddington.

21. *Feme covert*, an infant, is *ſued with her huſband*, he cannot make an *attorney for her*, but ſhe muſt appear by guardian. 2 Keb. 878. pl. 52. Hill. 23 & 24 Car. 2. B. R. Freeman v. Bodington.

22. The Court will admit one to *ſue by guardian* upon a motion, though not preſent, nor any affidavit made. Cumb. 256. Paſch. 6 W. & M. in B. R.

23. The writ and *ſuit of an infant is ſubject only to the direction of the prochein amy*, and not of the infant. 1 Salk. 176. Paſch. 12 W. 3. B. R. Toler's caſe.

24. Infant ſuing by prochein amy, and *no entrance of the admiſſion*, is not error. Comb. 330. Trin. 7 W. 3. B. R. Read v. Waldron.

It was ſo ſaid Arg. 2 Wms.'s Rep. 297. in caſe of Turner v. Turner. Trin. 1725.

25. Where a ſuit was by a prochein amy *not ſufficient to anſwer coſts*, the Court ordered another ſhould be named. P. R. C. 296.

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26. It ſhould ſeem that an infant *may ſue* here either *by himſelf*, *by prochein amy*, *or by guardian*, as the Court pleaſes. P. R. C. 296.

27. And *ſo* it ſhould ſeem he *may defend*. And if he is of diſcretion, ſhall anſwer upon oath. P. R. C. 296.

Mich. 10 Ann. G. Equ. R. 36. S. C.

28. Any one may bring a *bill* as prochein amy to an infant without his conſent, becauſe it is at his peril that he brings it. But none can bring a bill in the name of a *feme covert* as her prochein amy without her conſent, but it will be diſmiſſed on affidavit. Ch. Prec. 376. Mich. 1713. Andrews v. Cradock.

29. *Outlawry*, or *excommengement* in a guardian, or prochein amy, *cannot be pleaded* or alleged *in diſability*, where an infant ſues

or

or defends by him; becauſe he acts in auter droit. P. R. C. 296.

30. If a prochein amy be *inſolvent* the defendant may apply to the Court to have a ſolvent one named. It was ſo ſaid by Mr. Talbot, Trin. 1725. Arg. in caſe of Turner v. Turner.

31. An infant by prochein amy brought *bill to eſtabliſh a will* of land pretended to be deviſed to him. The Court directed an iſſue, which was found againſt the plaintiff. The *prochein amy died before the coſts taxed*, and the infant came of age, and never proceeded one ſtep. The regiſter and clerk in court informed the Court that the courſe was to *diſmiſs the bill with coſts generally* without ſaying who ſhould pay them. And Ld. C. King ſaid he would diſmiſs the bill with coſts, and (as he apprehended) upon a general diſmiſſion, the defendant had election to ſue the infant or prochein amy for ſuch coſts. 2 Wms.'s Rep. 297. Trin. 1725. Turner v. Turner.

(H. 7) Dum fuit infra Ætatem. Lies in what Caſes.

1. WHERE *an infant ſeiſed of land in fee, and another, who has nothing* in the land, *jointly make feoffment* of the ſame land to another, the *infant* at his full age *ſhall have dum fuit infra ætatem alone*, without joining with the other or with his heirs. Thel. Dig. 25. lib. 2. cap. 2. ſ. 2. cites Mich. 18 E. 2. Brief, 831.

2. One Jo. brought writ of dum fuit infra ætatem *of tenements which he himſelf leaſed dum*, &c. The *tenant ſaid that the demandant and Si. his father leaſed* to him, &c. Judgment of the writ, and held no plea. Thel. Dig. 170. lib. 11. cap. 34. ſ. 52. cites Mich. 18 E. 2. Brief, 831. and ſays ſee 6 E. 3. 245.

3. If *baron and feme within age alien in fee*, and the *baron dies*, the feme may have dum fuit infra ætatem; for it is at her *election to affirm it to be an alienation*, and to take upon it or to enter. Br. Coverture, pl. 60. cites 14 E. 3. and Fitzh. Brief, 282.

S. P. of a feoffment in fee, reſerving a rent. Co. Litt. 337. a.

——*But if ſhe was of full age*, ſhe ſhall not have a dum fuit infra ætatem for the *nonage of her huſband*, though they be but one perſon in law. Co. Litt. 337. a.

4. Dum fuit infra ætatem in the per againſt N. *ſuppoſing her entry by the demandant within age*, the tenant *ſaid that he entered by the demandant and J. G. and not by the demandant alone; judgment of the writ*, and no plea, but he was compelled to anſwer over by award; for if he brings writ of the moiety, ſuppoſing the entry as above, ſuch plea may the tenant have again, and ſo has not quantum by which he was compelled to anſwer, whereupon he *pleaded the alienation of both in bar, and as to the moiety of J. G. judgment of the writ*, and *to the other moiety the demandant was of full age at the time*, &c. Priſt. Br. Enter en le per, pl. 17. cites 21 E. 3. 50.

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5. *Two*

If two jointenants, being within age, make a feoffment, though they may join in a writ of right, yet they cannot

5. *Two infants ſeiſed in fee and purchaſed jointly*, both *aliened within age*, and *the one died*, the *other brought dum fuit infra ætatem without the other by him alone*; the *tenant ſaid that he entered by the demandant and by J. G. the other infant; judgment of the writ, which ſuppoſes the entry by the one alone*, & non allocatur, but the writ awarded good. Br. Dum fuit, &c. pl. 2. cites 21 E. 3. 50.

in a dum fuit infra ætatem, for the nonage of one is not the nonage of the other. Co. Litt. 337. a.

6. By which the *tenant pleaded this matter in bar, that the demandant and J. G. purchaſed jointly and aliened to him in fee, ſo that for the moiety of J. G. judgment ſi actio, and for the other moiety, that the demandant was of full age at the time*, &c. priſt, &c. For he cannot have other form of writ; but yet it appears that this infant who ſurvived ſhall not recover the whole; for the action does not ſurvive to the one of the whole; for it ſeems if both had been alive they ſhould not have joint *dum fuit infra ætatem*, but ſeveral writs; but of diſſeiſin, if the one dies e contra. Br. Dum fuit, &c. pl. 2. cites 21 E. 3. 50.

In dum fuit infra ætatem, it was *pleaded that the demandant and another leaſed to him the land*, &c.

7. Where *two jointenants within age alien*, and *one dies*, the *ſurvivor ſhall have* dum fuit infra ætatem *of the whole*. But ſays *quære*, for it was ſaid there that the feoffment was *a ſeverance*, and ſo it is of a judgment. Thel. Dig. 25. lib. 2. cap. 2. ſ. 2. cites Mich. 18 E. 2. Brief, 831. and ſays ſee Mich. 15 E. 3. and Mich. 21 E. 3. Dum fuit infra Ætatem, 1 & 2.

judgment of the writ, and it was *replied, that the demandant and the other were jointenants, and that the other is dead*, &c. by which Herle held the writ good. Thel. Dig. 171. lib. 11. cap. 52. ſ. 11. cites Hill. 6 E. 3. 245 & 296. and ſays ſee 15 & 21 E. 3. Dum fuit infra Ætatem, 1 & 2. agreeing.

8. Dum fuit infra ætatem *againſt baron and feme in that they had not entry unleſs by R.* &c. the *feme was received* by default of the baron, *and demanded judgment of the writ becauſe ſhe was ſeiſed before the coverture*, et non allocatur; for it is no plea unleſs it be for miſchief of warranty or ſuch like; by which he *pleaded that R. was of full age at the time of the demiſe*, &c. Br. Enter en le per, pl. 7. cites 45 E. 3. 17.

9. Dum fuit infra ætatem was brought *of land and rent againſt the alienee of the father of the demandant*; and the writ was *admitted to lie of the rent*. Br. Dum fuit, &c. pl. 1. cites 46 E. 3. 34.

Where two jointenants, one within age, and the other of full age, makes a feoffment, the infant ſurviving may enter,

10. Where *two jointenants* are, the *one of full age, the other within age*, and the *infant aliens the whole and dies*, his heir ſhall have dum fuit infra ætatem for the moiety, and the other jointenant ſhall have aſſiſe for his moiety only. Thel. Dig. 25. lib. 2. cap. 2. ſ. 3. cites Paſch. 9 H. 6. 6. and that ſo it was held Hill. 39 H. 6. 42. per Choke; and ſays ſee Littleton in cap. of Diſcontinuance.

or ſhall have a dum fuit infra ætatem, but for a moiety. Co. Litt. 337. b.

11. If an infant makes a *feoffment* he may enter either within age or at full age; and if he dies his *heir* may enter, or have a dum fuit infra ætatem, &c. Litt. ſ. 406. and Co. Litt. 247. b. & 248. a.

(H. 8.) En Ventre ſa Mere. How conſidered, &c.

1. IF tenant in tail has iſſue two ſons, and enfeoffs the youngeſt ſon of the land entailed, and the youngeſt dies ſeiſed of the ſaid land, his wife being enſient, and eldeſt enters into the land, and then the iſſue is born; the iſſue *cannot re-enter becauſe the eldeſt is remitted*, and in of his antient right before the iſſue any thing had, for then there was no perſon capable by deſcent nor otherwiſe. And. 31. pl. 76. Hill. 1 & 2 P. & M. Anon.

2. *Feoffment on condition* that if feoffor or his heirs pay 10 l. that he may re-enter. He dies, leaving a *daughter*, who paid the money and enters, and then a *ſon* is born, yet the daughter ſhall retain the lands. Per Curiam. Hob. 3. pl. 5. Paſch. 11 Jac. cites 9 H. 7. 25. agreed in Shelley's caſe.

1 Rep. 95. a. 99. a.—Mo. 140. in pl. 281. cites S.C.—S.C. cited Cro. C. 87. in pl. 8.

3. A *ſurrender to the uſe of* an infant en ventre ſa mere is merely void; but if a copyholder ſays, I ſurrender my copyhold eſtate, and if my child which ſhall be born dies before his age of 21 years, that then my brother ſhall have this, this clearly may be good enough. Per Coke Ch. J. 2 Bulſt. 274. Mich. 12 Jac. in caſe of Simpſon v. Southern.

He may take by way of remainder, but not by immediate ſurrender. Per Coke Ch. J. Ibid. 275.

——Reſolved, that an infant en ventre ſa mere cannot *take an eſtate in poſſeſſion by way of purchaſe*, but he may by way of remainder. Mo. 637. pl. 877. Hill. 37 Eliz. Church v. Wyatt.

4. The defendant's wife being privement enſient at her huſband's death, the child could not be *provided for* by law, but the Court ordered the child ſhould have *ſufficient allowance*. Toth. 157. cites 3 Car. Pope v. Moore.

5. A. *mortgaged lands* upon a *condition, that if he or his heirs repay* 100 *l. at ſuch a day that he ſhould re-enter*. He *died having iſſue a daughter only, his wife being privement enſient with a ſon, the daughter* and *heir at the day pays the* 100 *l.* afterwards the ſon is born; it was reſolved in this caſe, that the ſiſter ſhould retain the land for ever againſt the ſon born, for in as much as ſhe paid the money, (and if ſhe had not paid it the land had been loſt,) if ſhe ſhould not retain the land againſt the ſon, ſhe hath no remedy for the money, and by the payment thereof, ſhe hath gained the land, and is in as a purchaſor, although ſhe was entitled to it by a condition, and as heir. Cro. C. 87. pl. 8. Mich. 3 Car. in the Court of Wards, Kirton's caſe.

S. C. cited Cart. 190. that the ſiſter ſhall retain the land.

6. A. conveys a term on truſt to raiſe 1500 *l. for ſuch child as ſhould be living at his death*. A. dies leaving no child, his wife *enſient* with a daughter, which was afterwards born. Per Somers K. this poſthumous daughter is a *child living at A.'s death* within the meaning of the truſt. Ch. Prec. 50. pl. 51. Mich. 1692. Hale v. Hale.

7. A bond being given to pay 900 l. to a daughter if there be no ſon living at obligor's death, the wife was enſient of a ſon at the

the obligor's death. Decreed the daughter not to have the 900 l. 2 Freem. Rep. 223. pl. 294. Mich. 1698. Gibſon v. Gibſon.

8. Lands on marriage are limited to himſelf and wife for life, and to the firſt, &c. ſon in tail male, remainder to the huſband in fee, *provided if huſband and wife or either of them die without iſſue male living at the time of his or her death, leaving* only one daughter unmarried, the truſtees to ſtand ſeiſed till they have [404] raiſed 1500 l. for her, and if more daughters unmarried at the death of A. and his wife, or either of them, and no iſſue male living begotten between them, then 3000 l. for ſuch daughters. A. the father dies, leaving daughters, and his wife enſeint of a ſon afterwards born; it ſeems the daughters are intitled to the 3000 l. and if ſo, Ld. Cowper thought that equity would not take it away, but would be further informed as to the value of the eſtate. 2 Vern. 578. pl. 522. Hill. 1706. Palmer v. Cracroft. & al'.

9. A child in ventre ſa mere may be *vouched*, is capable to *take*. A *bill* may be brought on its behalf, and the Court will grant an * *injunction* to ſtay waſte. The mother may juſtify *detaining of writings* on the behalf of a child in ventre ſa mere. A limitation hæredibus de corpore procreatis ſhall include iſſue after born, and ſo, e converſo, procreandis includes iſſue already born. Arg. 2 Vern. 711. Hill. 1715. and cites the caſe of Palmer v. Creaghcroft.

* Chan. Prec. 50. pl. 51. one LUTTRELL's caſe was cited in Ld. Bridgman's time, where a bill was exhibited on behalf of an infant en ventre ſa mere to ſtay waſte, and an injunction was granted upon it.

(I) *Of what* Things an Infant is *capable*.

Cro.E. 636, 637. pl. 34. S. C. adjornatur.— Cro.C. 556. ſays, that notwithſtanding

[1. AN infant is not capable of the *ſtewardſhip of the courts* of a biſhop, becauſe by intendment of law he hath not ſufficient knowledge, experience, and judgment, to uſe the office, and alſo becauſe he *cannot make a deputy*. Mich. 408. 41 Eliz. B. R. between SCAMBLER AND WATERS, adjudged per Curiam.]

the opinion cited in Co. Litt. fol. 3. and there ſaid to be reſolved 43 and 41 Eliz. betwixt Scambler v. Walter, that the grant of the office of under ſtewardſhip in poſſeſſion, or reverſion to an infant is void, becauſe he is incapable thereof, not having knowledge to execute pro commodo regis & populi; but this caſe was denied, unleſs it be with this difference, where it is granted with ſuch a clauſe to exerciſe it per ſe vel deputatum, and where he is of ſuch a tender age, that he cannot by intendment execute it by himſelf, as being an infant of 3 or 4 years of age, who has not diſcretion to execute it; but when there is a clauſe to execute it per ſe vel deputatum ſuum ſufficientem, it is good enough; for he may appoint a ſufficient deputy, and if he does not elect ſuch, it is a forfeiture of his office.

2 An infant *ſhall not be any of the* 12 *who join with the defendant in writ of debt for waging his law*, by which one was challenged for his age, and awarded to be of full age by the juſtices by inſpection. Br. Coverture, pl. 22. cites 8 H. 6. 15.

3. If a man makes *a feoffment to an infant*, and he *makes letter of attorney to take livery*, this is good. Br. Coverture, pl. 25. cites 21 H. 6. 31. Per Aſcue J.

4. Infant may be a *mayor*, *abbot* or *biſhop*, without diſability, and if he be executor he may make releaſe of the debt of the teſtator. Br. Coverture, pl. 54. cites 21 E. 4. 12, 13.

5. An infant monk, or feme covert may *caſt a protection*, and Brook ſays it ſeems to him that an infant and thoſe may be *attorney to make livery of ſeiſin*; but it was ſaid that an infant *cannot* be attorney in the law *in actions or ſuits*. Br. Coverture, pl. 55. cites 21 E. 4. 18.

6. If an infant be made *executor*, he *may make releaſe or acquittance of the debt of the teſtator*, and may *ſell the goods*, and give and diſtribute them; but a feme covert executor cannot do ſo without her baron. Br. Coverture, pl. 56. cites 21 E. 4. 24. Per Littleton.

S. P. Br. Coverture, pl. 57. cites 24 E. 3. 12, 13.—S. P. Ibid. pl. 57. cites 18 H. 6. 4. and Fitzh. Releaſe, 8.

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7. Infant grantee of an *office* in reverſion (exerciſable by deputy) to exerciſe the ſame per ſe vel deputatum ſuum ſufficientem, may *appoint a deputy*, and if he does not, or the deputy be not *ſufficient*, it is a *forfeiture* of his office, and the approbation of his ſufficiency is to be by the lord of the manor, or judge of the court, &c. and *miſdemeanor of deputy* at the infant's peril. Cro. C. 556. pl. 11. Trin. 15 Car. B. R. Young v. Fowler.

Mar. 38. pl. 68. S. C. & S.P. held by the Court clearly.——Jo. 310. pl. 24. Young v. Stowell, S. C. accordingly.

8. An infant may *preſent to a church* becauſe the ordinary gives the allowance whether the clerk be ſufficient. Cro. C. 556. pl. 11. Trin. 15 Car. B. R. in caſe of Young v. Fowler.

Noy, 41. S. P. obiter in caſe of Reeve v. Martin.

9. Infant may be a *truſtee*; per Ld. Chancellor. Vern. 343. pl. 335. Mich. 1683. in caſe of Jevon v. Buſh.

2 Vern 561. pl. 508. Trin. 1706. S. P. in caſe of Scot v. Haughton and Doctor Fuller.

10. A petition to the king to direct his judges to take a *fine or recovery* from an infant referred to the Ld. Chancellor; per Maynard Serjeant, a fine cannot be taken from an infant, nor was it ever done, but a common recovery may be had as deſired by the *king's ſpecial direction*. Vern. 461. pl. 438. Trin. 1687. Sir Humphry Mackworth's caſe.

11. An infant cannot be an *attorney* for another. Arg. Show. 167. Trin. 2 W. & M. in caſe of Coan v. Bowles.

Cro. E. 637. pl. 34. S. P. for he cannot be conceived to be of diſcretion to execute it.——He cannot be attorney, becauſe he cannot be ſworn. Mar. 92. pl. 154. Hill. 16 Car. C. B. Anon.

(I. 2) Several Ages for ſeveral Purpoſes.

1. A Male at the age of ſeven is married to a female of 14, and before the male is 13 ſhe has iſſue, this iſſue is a baſtard. Jenk. 95. pl. 84. cites 1 H. 6. 3.

If the feme of an infant under 14 has iſſue, it is a baſtard, Noy, 142. Paſch. 2 Jac. C. B. in caſe of Strange v. Foot.

2. A

Br. Age, pl. 6. cites S. C. and that there are only two ages for the male, viz. 14 and 21.

2. A feme has ſeveral ages, viz. *at ſeven years to have* * *aid to be married*, and 9 years *to deſerve dower*, and † 12 years *to conſent to marriage*, and ‡ 14 years *to be out of ward*, and ‖ 16 years *for the lord to tender marriage*, and 21 years *to make feoffment, or to deliver a deed.* *But* the *age of conſent of a man is* 14 years. Br. Gard, pl. 7. cites 35 H. 6. 40.

* Mo. 741. Arg. cites S. C. & S. P. by Wangford. † S. P. but thoſe of the ſpiritual law ſay, that it is not ſo unleſs that ſhe be then apta viro. Br. Age, pl. 41. cites 8 E. 4. 7.
‡ If ſhe attained thereunto in the life of her anceſtor. Co. Litt. 78. b. cites S. C.
‖ If ſhe were under the age of 14 at the death of her anceſtor. Co. Litt. 78. b. cites S. C.

3. And per Wang. *when the lord after* 14, *and before* 16, *has married the daughter, ſhe may enter into her land*; for the two years over and above 14 years is only time for him to tender the marriage, and this ſeems to be reaſon; for it is ſaid there, that the courſe of the Chancery is to make livery before 14 years cum exitibus, and after 14 but livery only, and not cum exitibus; and the reaſon ſeems to be, inaſmuch as after the livery made at
[406] ſuch age which ſhe ought to have livery, ſhe ſhall have the iſſues ab illo die by the law. Br. Garde, pl. 7. cites 35 H. 6. 40.

4. Infant of the age of 12 years, male and female, ſhall be compelled *to ſerve in huſbandry*. Br. Coverture, pl. 64. cites F. N. B. 190.

5. *A man*, by the law, for ſeveral purpoſes, has divers ages aſſigned unto him, viz. 12 *years to take the oath of allegiance* in the torn or leet, 14 *years to conſent to marriage*, 14 years for the heir in ſocage *to chooſe his guardian*, and 14 years alſo accounted his *age of diſcretion*, 15 *years for the lord to have aid pur faire fitz chivaler*, *under* 21 *to be in ward to the lord by knight's ſervice*, *under* 14 *to be in ward to guardian in ſocage*, 14 *to be out of ward of guardian in ſocage*, and 21 *to be out of ward of guardian in chivalry, and to alien his lands, goods, and chattels.* Co. Litt. 78. b.

Toth. 174. cites 11 Car. S. C.—— Full age for ſocage is 14 years. 13 Rep. 51. and cites D. 213.

6. *A lawful age*, in general words, (unleſs it be in a particular caſe, as guardian in ſocage,) muſt be taken and conſtrued 21 years. Chan. Rep. 100. 11 Car. fol. 341. Hartwell v. Ford.

7. Infant makes *his will, and charges his perſonal eſtate with payment of debts*, his executor ſhall pay bond debts which he had contracted, there being aſſets ſufficient. N. Ch. R. 55. 1651. Hampſon v. Sydenham.

Agreed that a female may make a will at 12, the male at 17, or if proved to be a perſon of diſcretion, at 15.

8. Eccleſiaſtical court is the proper judge of age *for making wills*, and whatever our law ſays concerning it, is only as directed by their law. 2 Show. 204. pl. 213. Mich. 34 Car. 2. B. R. Smallwood v. Berthouſe. 2 Vern. 469. Mich. 1704. in caſe of Biſhop v. Sharp.—— No diſpute was made but that a male at 14, and a female at 12, may make a will of perſonal eſtate; and it was ſaid to be ſo agreed by Ld. Wright, in caſe of Sharp v. Sharp. Chan. Prec. 316. Mich. 10 Ann. Hyde v. Hyde.

And if B. at that age makes a will

9. A. names B. an infant *executor, and then names C. executor during B.'s minority.* C.'s executorſhip ceaſes when B. is 17, and the

the property of the goods veſts then in B. per Finch C. 2 Chan. Caſes, 169. Mich. 36 Car. 2. Whitmore v. the Earl of Craven. and an executor, the executor of Whitmore v. B. ſhall have the eſtate deviſed to B. by A. 2 Ch. R 386. S. C.——Vern. 326. Weld, S. C. before North K. but no decree.——Vern. 347. decreed per Ld. Jefferies, S. C.—— 2 Vent. 367. S. C. decreed per Ld. Jefferies.

10. *Till eight years*, children are accounted *nurſe-children*. 2 Salk. 470. pl. 1. per Cur. Paſch. 7 W. 3. B. R.

11. Infant under 14 not bound by a *marriage*, but may diſſent. Arg. Cumb. 457. Mich. 9 W. 3. B. R. in caſe of the King v. Thorp.

12. *Adminiſtration granted during minori ætate of executor* ceaſes at 17, but during minori ætate *of adminiſtrator* not till 21, becauſe an executor, by the civil law, may take that office upon him at 17; but an adminiſtrator being created by ſtatute, the time of his full age muſt be granted by the common law. Cumb. 475. Paſch. 10 W. 3. B. R. Atkinſon v. Corniſh. 1 Salk. 39. Freke v. Corniſh, S. P. and ſays, the ſpiritual court will not grant adminiſtration to any under 21, by the conſtruction of the ſtatute of diſtributions, becauſe they are to give bond, &c.

13. A. was *born Feb.* 1. *at eleven at night*, and *January* 31, *at one in the morning*, A. makes a will of lands and dies, it is a good will, for he was then of age. Said per Holt Ch. J. to have been ſo adjudged. 1 Salk. 44. Mich. 3 Ann. B. R. Anon. [407]

14. An *orphan* of the city *of London* at 17 made a will of his ſhare of the legatory part of her father's perſonal eſtate, who was dead inteſtate, and held good by the ſtatute of diſtributions, but dying unmarried, and before 21, her orphanage part ſurvived, and ſhe could not deviſe it. 2 Vern. 558. pl. 506. Trin. 1706. Wilcox v. Wilcox. Infant of 14 may make a will. Comb. 50. Paſch. 3 Jac. 2. B.R. Anon.

(I. 3) Caſes wherein a Feme Covert and an Infant differ.

1. THE *deed of a feme covert* with her baron ſhall not be inrolled becauſe it is not the deed of the feme, and ſo ſee that deed of a feme covert is void. Br. Coverture, pl. 47. cites 7 E. 4. 5.

2. If an infant is made *executor*, he *may make releaſe or acquittance of the debt of the teſtator*, and *may ſell the goods*, and give and diſtribute them; but feme covert executor cannot do ſo without her baron. Br. Coverture, pl. 56. cites 21 E. 4. 24. per Littleton.

3. *Statute ſtaple nor deed inrolled* ſhall not be accepted of a feme covert by the common law; contra by the *cuſtom in London*, nor *fine*, *ſtatute*, nor *deed inrolled*, ſhall not be ſuffered by an infant. Br. Coverture, pl. 59. cites 32 H. 8.

4. If an infant *by indenture bargains and ſells* lands for money, and after *levies a fine* come ceo que il ad de ſon done, &c. this indenture is not void but voidable, and the uſe paſſes by the bargain; then the fine being levied upon it the bargain is irrevocable unleſs for

for error; as if baron and feme bargain and ſell their lands by indenture, though the indenture be void againſt the feme, yet a fine and recovery upon it ſhall bind her for ever, the indenture declaring the will of the feme how the uſe ſhall paſs. Mo. 22. pl. 73. Paſch. 2 Eliz.

3 Le. 164. pl. 215. Edmond's caſe, S. C. and per Curiam clearly, tho' here was no preſent conſideration upon which the aſſumpſit could ariſe, yet upon the whole matter the action lies, and judgment was given for the plaintiff.——4 Le. 5. pl. 22. S. C. adjudged.——Cro. E. 126, 127. in pl. 7. S. C. cited as adjudged.

5. An infant and J. S. were bound in a *bond for the debt of the infant*. The infant *at full age promiſed to ſave harmleſs* J. S. and died. An aſſumpſit lies againſt the executor of the infant; but if a feme covert being ſo bound had, *after her huſband's death, promiſed* to ſave her ſurety harmleſs againſt ſuch bond, ſuch aſſumpſit ſhould not have bound the wife. Godb. 138. pl. 164. Mich. 27 Eliz. B. R. Barton v. Edmunds.

6. If feme covert *delivers goods, treſpaſs lies;* but it is otherwiſe of an infant if he delivers them *with his own hands*. Arg. Lat. 10. cites it adjudged to this purpoſe. Paſch. 32 Eliz. Rot. 1017.

7. An infant may do *any act to his advantage*, which a feme covert cannot, as a *leaſe* made by infant is voidable only, but by feme covert is void; ſo of a *bond* by feme covert, ſhe may plead non eſt factum, but ſo cannot an infant, but he muſt plead the ſpecial matter that he was within age.

[408] 8. *Leaſe by* infant *reſerving no rent* is void; but otherwiſe of baron and feme; for baron has power, and the feme joining in the leaſe it is not void, for ſhe may affirm the leaſe by bringing a writ of waſte, or by acceptance of fealty; adjudged. Hutt. 102. Hill. 4 Car. Anon. cites 2 Rep. 61. in Wiſcott's caſe.

9. A feme covert is not capable to *make a contract*, becauſe ſhe is ſub poteſtate viri, and though it be for neceſſaries of diet and apparel, that ſhall not charge the huſband, but an infant's contract for ſuch things is good. Arg. Hutt. 107. Mich. 5 Car. in caſe of Bill v. Lake.

5 Rep. 27. Ruſſel's caſe, S. P.—But not before 17. Arg. Roll. Rep. 248. cites 5 Rep. Prince's caſe, 29. b.

10. Feme covert *executor* cannot *aſſent to a legacy*, but an infant of 18 may. Sid. 188. pl. 14. Paſch. 16 Car. 2. B. R. Cookes v. Bellamy.

Contra as to infants, per the Maſter of the Rolls, becauſe they are only inſtruments. 21 Mar. 1738. in caſe of Colton v. Hoſkins.

11. Infants and feme coverts may *execute powers*. Admitted. Arg. 9 Mod. 17. Mich. 9 Geo.

(K) *What* Things ſhall *bind* an Infant by Agreement *at* his *full Age*.

Cro. J. 320. pl. 1. Ketſey's caſe, S. C. ad-

[1. IF a *leaſe for years* be made *to an infant rendering rent*, the *rent is arrear*, and after the *infant comes of full age, and* afterwards *continues the occupation* of the land, this will make him chargeable

chargeable with the arrears incurred during his infancy. Paſch. 11 Ja. B. R. between KETTLE AND ELLIOT adjudged.] judged that he was chargeable,

becauſe he was of full age before the rent day came.———Brownl. 120. S. C. adjudged accordingly. ——2 Bulſt. 69. Kirton v. Elliot, S. C. adjudged againſt the infant, but no notice is taken there of his having attained his full age.

2. *Exchange* of an infant is good by agreement at full age. Br. Coverture, pl. 17. cites Hill. 12 H. 4.

3. If an infant *makes an indenture*, and *at the full age binds himſelf to perform it*, he ſhall not avoid the indenture Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell.

4. *And* if an infant *ſells a horſe for* 10l. and *brings debt* of the 10l. *at full age*, he ſhall not avoid the contract. Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell.

5. *So* if he makes a *leaſe* reſerving rent within age, and *accepts rent* at full age. Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell. When he came to full age, he ſaid, "God give "you joy of

"it." It was held by Mead J. that thereby the leaſe was affirmed and made good. 4 Le. 4. pl. 15. Mich. 24 Eliz. C. B. Anon.

6. If an *infant poſſeſſed of a term for years ſells it for money, and after he comes of full age receives part of the money* for it, he ſhall avoid the grant notwithſtanding; for the contract being void in the commencement, it cannot be made good by any ſubſequent act. Per totam Curiam. Dal. 64. pl. 25. 6 Eliz. Anon.

7. Father of infant leaſed the ſon's lands for 20 years; at full age the ſon, upon the back of the indenture, *releaſed to the defendant all his right*; per Wray, this leaſe by father, as guardian, was voidable only by the ſon, and then ſuch indorſement is a good aſſignment. 2 Le. 220, 221. pl. 278. Paſch. 18 Eliz. B. R. Anon. [409]

8. If infant makes a deed of *feoffment*, or leaſe for life, *to commence in futuro*, and *at full age makes livery*, G. Crook holds clearly that this is good feoffment. Quære of *feme covert*, for her deed is void. 2 Roll. Rep. 109. Trin. 17 Jac. B. R. Anon.

9. Infant, *reverſioner in fee of an advowſon*, during the eſtate for life, *grants next avoidance*, and at full age reciting the ſaid grant conceſſit & confirmavit prædictam advocationem habend' quando contigerit vacare. This is a confirmation during the life of the tenant for life. Hetl. 20. Trin. 3 Car. C. B. Stevens and Croſs v. the Biſhop of Lincoln, Holmes and Halworth. If an infant grants an advowſon, and at full age confirms it, all is void. Arg. Godb. 304. cites 26 H. 8. 2.

10. Aſſumpſit was againſt an infant that *contracted for a coach and horſes, and gave his obligation* for the money; afterwards, *on his coming to full age, he promiſed payment.* Per Cur. the *obligation is only voidable, and extinguiſhes the contract*, and ſo the aſſumpſit at full age is without conſideration. And by Wilde J. the infant may *plead non aſſumpſit*, and his infancy is ſufficient evidence; and judgment for the defendant niſi. 3 Keb. 798. pl. 55. Trin. 29 Car. 2. B. R. Tapper v. Davenant.

(L) Offence in Cheating or impoſing upon Infants. How puniſhed.

Noy, 96. S. C. accordingly.

1. H. Knowing that S. was within age, *procured him to acknowledge a recognizance of debt to him for wares ſold*; for which, after the death of S. he was fined 100l. and impriſoned. And note other ſuch caſes, viz. CALMADAY'S CASE and HERLAKENDON'S CASE were cited for precedents of the Court, that they being infants were inticed to enter into recognizances and ſtatutes by thoſe who knew them to be within age. Mo. 555. pl. 752. Paſch. 41 Eliz. in the Star-Chamber. Strangeways v. Hicks.

2. A *fine* was levied *by an infant of the age of* 13. The *Court fined* Sir Nich. Roe and the other *commiſſioners, and threatened all that had a hand* in the promoting it. Freem. Rep. 78. Trin. 1673. C. B. Petty's caſe.

(M) Pleadings.

1. CONFESSION of an infant *of a plea in formedon, which abates the action of the infant*, was taken; quod nota. Br. Coverture, pl. 81. cites 3 E. 3. and Fitzh. Enfant, 14.

2. An infant who is *vouched* may *appear the firſt day, and render the action*. Br. Coverture, pl. 58. cites 18 E. 3. and Fitzh. Voucher, 12.

3. In aſſiſe, infant *pleaded ne unques accouple*, &c. *againſt the plaintiff*, and certified it againſt him by the ordinary, and yet the aſſiſe was awarded in point of aſſiſe, becauſe the infant cannot be convicted diſſeiſor by his confeſſion or nient dedire, but by verdict or the like. Br. Coverture, pl. 38. cites 28 Aſſ. 52.

[410] 4. *Aſſiſe* is brought *by an infant by guardian*; the infant came and *diſavowed the ſuit*, and was of the age of 17 years. Perſey ſaid this ſhall not be accepted; for it may be that it is by dureſs, and this is a retraxit, which is a bar; Shard dubitavit, et adjornatur. Br. Coverture, pl. 39. cites 28 Aſſ. 52. Brooke makes a quære, and ſays, ſee 34 Aſſ. 5. that in ſuch a caſe Thorp would not ſuffer the infant to diſavow, but awarded the defendant to anſwer, quod nota.

5. An infant who brought *mortdanceſtor* by prochein amy would have *diſavowed his ſuit*, and was not ſuffered; for infant. Br. Coverture, pl. 73. cites 34 Aſſ. 5.

6. An infant plaintiff *ſhall not confeſs deed of leaſe for* term of *life without impeachment of waſte* pleaded againſt him in quid juris clamat, but it ſhall attend till his full age. Br. Coverture, pl. 7. cites 43 E. 3. 5.

7. In

7. In aſſiſe it was agreed, that *nothing ſhall be ſaid to be nient dedit of an infant*, ſo that where releaſe of the anceſtor of the plaintiff in aſſiſe with warranty was pleaded to be made to J. and his heirs, que eſtate the tenant has, and the plaintiff ſays that J. had nothing but for term of life, remainder in tail to the plaintiff, and that the ſaid J. is dead, and he entered as in his remainder, and the tenant ſaid that the remainder in fee was to the right heirs of the ſaid J. for default of iſſue of the plaintiff, and thereupon they were adjourned; and at the day of adjournment the tenant, who was an infant, ſaid that at the time of the releaſe J. was ſeiſed in fee, which matter he cannot ſay after adjournment; yet it was held that the aſſiſe ſhall be at large thereof in advantage of the infant, becauſe nothing ſhall be held to be nient dedit of him; quod nota. Br. Coverture, pl. 8. cites 44 E. 3. 10.

8. *Scire facias to execute a fine* levied *by R. M. to W.* fur conuſance de droit come ceo, &c. and *W. rendered to R. M. for life, the remainder to the father of the plaintiff, whoſe heir he is*, &c. and that *R. is dead*, and the *plaintiff as heir in tail prayed execution*, and the *tenant ſaid that R. M. who levied the fine*, had no ſuch, &c. *but for life*, the *reverſion to him, and this eſtate continued, and R. M. died, and he entered*, and the *plaintiff, who was an infant*, and *by guardian confeſſed it*, and it was held by the beſt opinion that the confeſſion ſhall not be taken, by reaſon that he is an infant. Br. Confeſſion, pl. 8. cites 48 E. 3. 33. Br. Coverture, pl. 14. cites 48 E. 3. 34.

9. For per Belk. an infant ſhall *not be bound by for nihil dicit when he is plaintiff; contra* where he is *defendant*; for there the plaintiff ought to be anſwered. Br. Confeſſion, pl. 8. cites 48 E. 3. 33. Br. Coverture, pl. 14. cites S. C.

10. And per Kirton and Belk. where an infant *avows for rent*, &c. and the *plaintiff pleads releaſe of the father of the infant*, there he ſhall anſwer to the deed. Contra Wich. Br. Confeſſion, pl. 8. cites 48 E. 3. 33.

11. But it was agreed, that in *aſſiſe* brought *by an infant*, and *recovery is pleaded againſt him*, he ſhall anſwer to it. Br. Confeſſion, pl. 8. cites 48 E. 3. 33. Br. Coverture, pl. 14. cites S. C.

12. *But* if *deed with warranty and aſſets* be *pleaded*, the aſſiſe ſhall inquire of the circumſtances for the infant. Br. Confeſſion, pl. 8. cites 48 E. 3. 33. Br. Coverture, pl. 14. cites S. C.

13. *But* if ſuch deed and aſſets be pleaded *in formedon* on *præcipe quod reddat*, parol ſhall demur. Br. Confeſſion, pl. 8. cites 48 E. 3. 33. Br. Coverture, pl. 14. cites S. C.

14. And per Belk. in ſcire facias *deed of the anceſtor inrolled with aſſets deſcended* is pleaded againſt an infant plaintiff, and the infant pleads, that riens per deſcent the plea ſhall not be taken, but the parol ſhall demur. Et adjornatur. Br. Confeſſion, pl. 8. cites 48 E. 3. 33.

15. An infant *might join the miſe by battel*; for it ſhall be tried by champion; but he cannot be tried by battel in appeal; for this ſhall be done in proper perſon, and therefore the defendant *ſhall not join battel* againſt an infant in appeal. Br. Coverture, pl. 79. cites 9 E. 4. 34. [411]

16. In a *writ of right* it was agreed by Danby and Moyle, that an infant ſhall *not be permitted to confeſs the action* by reaſon of his infancy, quod nota. Br. Coverture, pl. 79. cites 9 E. 4. 34.

17. Where a man *preſcribes that an infant may alien when he can meaſure an ell of cloth*, he ought *to ſhew of what age the infant was when he aliened*, and that he then could meaſure an ell of cloth. Br. Coverture, pl. 66. cites F. N. B. Dum fuit infra Ætatem.

18. Againſt a *deed inrolled* a man may plead *infancy*, though none can plead *non eſt factum*. Per Manwood Ch. B. 2 Le. 65. in pl. 89. Paſch. 31 Eliz. in the Exchequer, in Sir Wm. Pelham's caſe.

19. Error upon a judgment in C. B. in an *ejectione firmæ* brought *by a guardian in ſocage*, becauſe he has *not ſhewn in the writ that the heir was within age at the time*, &c. But by the Court it is yet good, and judgment affirmed. Noy, 135. Trin. 7 Jac. B. R. Symonds v. Barham.

20. In *replevin againſt three*, they all made cognizance by attorney, and judgment being given for the plaintiff a writ of error was brought in B. R. and the *error aſſigned* was, *that one of the three defendants was an infant*, but it was diſallowed; for per Holt Ch. J. *this matter was pleadable in abatement, and therefore not aſſignable for error*. 3 Salk. 197. pl. 13. Mich. 2 W. 3. Score v. Bowles.

21. In *aſſumpſit for money lent, and* for money *laid out to the uſe of* the defendant's wife dum ſola. Upon non aſſumpſit pleaded it was on a reference agreed by the judges, that *the infancy* of the feme at the time of the promiſe *might be given in evidence*, as it uſually hath been of late. 1 Salk. 279. Paſch. 5 W. & M. in C. B. Darby v. Boucher.

(N) Caſes in Equity as to Infants.

And Ib'd. cites 6 Jan. 36 Eliz. Preſton v. Trinity (College) and Wood.

1. A. Being to convey lands to B. he *between the date and execution of the conveyance to* B. *conveyed the lands to J. S. an infant*, wherefore B. had an order againſt A. and the infant was concluded. Toth. 172. cites 11 Nov. 6 Eliz. Althum v. Ld. Morley.

2. An infant *plaintiff* was *committed to the* priſon of the *Fleet for not obeying a decree*. Toth. 172. cites 11 & 12 Eliz. Oliver and King v. Challoner.

3. The defendant made *ſecret conveyances (pending the ſuit) to defraud the plaintiff* being *an infant*; the defendant was bound by recognizance to diſcharge all eſtates ſo made. Toth. 172. cites 12 Eliz. Digman v. Hamon.

4. A bill of review becauſe the decree was againſt an infant; my Lord's declaration was, that it ſhall *bind an infant* as well as at full age. Toth. 133. cites Mich. 7 Car. Cromwell v. Carey.

5. A. died leaving a widow and a ſon. The widow being about to marry J. S. ſhe and the ſon and J. S. agreed by articles that J. S.

J. S. ſhould take adminiſtration, and ſhould enter into a ſtatute to pay ſo much yearly till he ſhould come of age. J. S. entered into the ſtatute and took adminiſtration, and with the perſonal eſtate purchaſed lands in fee, but died much indebted, and in arrears to the plaintiff, and becauſe the *eſtate* could not be *during the minority* of the ſon and heir of J. S. who was an infant, it was *decreed againſt the infant and his guardian*, that the plaintiff, the conuſee, ſhould hold till he is ſatisfied his debt and arrears. N. Ch. R. 45. anno 1649. Morton v. Kinman and Poplewell.

6. If an infant *ſuffers a decree* againſt him by conſent, he may at any time reverſe it for that error of his being an infant; otherwiſe if he be *defendant by an adverſary bill*, and a decree be pronounced. Per Ld. K. Bridgman, 3 Ch. Rep. 21. 10 Nov. 1666. Anon.

7. A meſſenger of the Court may be ſent to bring in an infant, and when he comes in the *court may aſſign one of the ſix clerks* as a *guardian to appear and anſwer*. Per Sir John Churchill, but not approved of per Ld. Keeper. 2 Chan. Caſes, 164. Trin. 36 Car. 2. Anon.

8. It was ſaid that there was no precedent in equity that the parol ſhould demur, but that infants were ſuable there, and Ld. North cited the caſe of Baron Weſton v. Dandy, which was thus, viz. Baron Weſton had a *debt* due to him *by bond, wherein the heir was bound*, but it happened that for *three deſcents the heir was ſtill an infant*, and ſo the parol demurred at law, till the intereſt much exceeded the penalty of the bond; and Mrs. Danby having been all along *guardian to theſe infants*, and *received the profits* of the eſtate, and converting them to her own uſe, the baron therefore brought an action againſt her, and called her adminiſtratrix to theſe children; but the baron's policy did not prevail. Vern. 173, 174. Trin. 1683. in caſe of Creed v. Covile.

9. Whether Chancery will *decree ſatisfaction of a bond-debt of the anceſtor's* out of the profits of the real eſtate, *during the minority of the heir*, where there is a deficiency of perſonal aſſets; Maſter of the Rolls declared he thought ſuch a decree juſt, and if ſuch caſe came before him he would decree accordingly; ſed dubitatur. Vern. 428. pl. 403. Hill. 1686. March v. Bennet.

10. An heir, together with other young heirs, is *drawn in to buy goods at extravagant prices, and to accept of aſſignments of bad ſecurities, joined in giving ſecurities for the monies agreed on.* He ſhall be relieved on paying the value of the goods which came to his hands, and *ſhall not be anſwerable for his companions.* 2 Vern. 77. pl. 71. Trin. 1688. Lamplugh v. Smith.

The plaintiff was likewiſe a young heir, and had been drawn in to buy ribbands and braided wares, &c. at an extravagant price, &c. the caſe being the ſame in effect with the caſe immediately preceding, had the like rule. 2 Vern. 78. pl. 72. Trin. 1688. Whitley v. Price.

11. This Court has often decreed *building leaſes* for 60 years of infants eſtates where it is for their benefit. Per Cur. 2 Vern. 225. in pl. 204. Paſch. 1691. in caſe of Cecil v. Saliſbury (Earl of).

12. A. ſeiſed of *freehold and copyhold* land ſurrenders to the uſe of his will, and then deviſes to B. *all his goods, chattels, and eſtate whatſoever,*

whatſoever, upon condition that ſhe pay his debts and legacies, and makes B. executrix and dies. On a bill by the creditors for ſale of the eſtate, the perſonal eſtate being deficient, the Court thought the words, with other circumſtances of the caſe, would paſs the lands, and decreed a ſale, and the heir to join when he comes of age, but he being an infant, day was given him to ſhew cauſe after he comes to age. Ch. Prec. 37. pl. 38. Mich. 1691. Lumley v. May.

[413] Equ. Abr. 281. (B) pl. 5. S. C.

13. *A. agreed to give her ſon other lands in lieu of lands entailed*, and gives the entailed land by will to her daughter, and the *ſon gives bond to ſuffer the entailed lands to be enjoyed as ſhe by will had deviſed them. The ſon dies, and leaves D. his ſon an infant*, who brought ejectment; the bond was not ſuable againſt him becauſe an infant. Per Cur. the infant being in poſſeſſion of the lands that came in recompence, we will at preſent only *quiet the plaintiff's poſſeſſion* in the entailed lands *till ſix months after the infant comes of age*, and then *he may ſhew cauſe* if he thinks fit. 2 Vern. 232. pl. 212. Trin. 1691. Thomas v. Gyles.

In caſes of *truſts* infants are always bound by the decree of this Court, and ſo where the *will of the anceſtor is conteſted*; and there is *ſcarce any caſe where an infant has time to ſhew cauſe but where it is neceſſary he ſhould join in a conveyance* to complete the eſtate, and where ſuch conveyance is of the inheritance, as foreclоſures, &c. Per Cur. 9 Mod. 128. Hill. 11 Geo. in caſe of Whitchurch v. Whitchurch.

14. The king as pater patriæ has the directions of charities, infants, and ideots, lunatics, &c. and ſo fall under the directions of Chancery, where the intereſt of infants is ſo far regarded that no *decree againſt an infant* ſhall be made without having a day given him to *ſhew cauſe after his full age*. By his *prochein amy* he may *call his guardian to account*, even during his minority. If a ſtranger enters and receives the profits of an infant's eſtate, he will in equity be looked upon as truſtee for the infant. Per Ld. Somers. 2 Vern. 342. Hill. 1697. in caſe of Carey v. Bertie.

But if he had been decreed to have *joined in conveyance*, there he muſt have had a day after he came of age. Ibid. ——— Chan. Prec. 37. Lumley v. May. ——— An infant heir, in caſe of a will deviſing the lands to truſtees to pay debts, who ſold the ſame, was decreed to *relinquiſh his right* to the purchaſor and his heirs when he ſhall come of age. Fin. R. 380. Trin. 30 Car. 2. Travel v. Danvers.

Though the truſtees in the caſe above of Cook v. Parſons might have ſold without coming to the Court for the directions, yet if they do come it may be a queſtion, if the infant heir ought not to have a day to ſhew cauſe. Per Ld. K. Ch. Prec. 185. S. C.

15. Lands *deviſed to be ſold for payment of debts* may be decreed to be ſold without giving the heir a day to *ſhew cauſe*, though an infant, for in this caſe nothing deſcends to him. Per Wright Keeper. 2 Vern. 429. pl. 391. Hill. 1701. Cook v. Parſons.

If an infant puts in an anſwer by guardian, and there is *a decree* againſt him, *without any day* given him *to ſhew cauſe*, ſuch anſwer ſhall not be read or admitted as evidence againſt him when he comes of age; *but if a ſuperannuated defendant* puts in an anſwer by his guardian, it ſhall be read againſt him at any time after, for he is ſuppoſed to grow worſe, and is not to have a day to ſhew cauſe. Per Lord Keeper.

16. The effects of an infant's *anſwer to a bill in Chancery* are to no other purpoſe than to make proper parties ſo as to have an opportunity to take depoſitions, and to examine witneſſes to prove the matter in queſtion, and an infant is never concluded by any matter contained in his anſwer by his *guardian*. Carth. 79. Mich. 1 W. & M. in B. R. in caſe of Eccleſton v. Speke.

Keeper. Abr. Equ. Caſes, 281. Trin. 1704. Sir Richard Leving v. Lady Caverley. ——Chan. Prec. 229. S. C. & S. P. agreed per Curiam accordingly.

17. An *eſtate is given to B. and the heirs of her body, and if ſhe left no ſons and only two daughters, the eldeſt to pay the younger* 300 *l. and to have the whole eſtate.* She leaving only two daughters, and the *eldeſt neglecting to pay the* 300 *l. the younger brought a bill for an account of profits, and for poſſeſſion of half the eſtate;* and at the Rolls obtained a decree, that the defendant ſhould pay the 300l. with intereſt from the mother's death in ſix months, or in default thereof, to account for profits of a moiety; and the moiety to be ſet out by commiſſioners, and the plaintiff to hold and enjoy it accordingly. Upon an appeal to the Lord Keeper the decree was to ſtand as to the account of profits and partition; but the defendant being an infant, the words *hold* and *enjoy*, which amount unto a foreclosure, to be ſtruck out, or defendant to have a day after ſhe comes of age to ſhew cauſe. 2 Vern. 479. pl. 434. Hill. 1704. Gundry v. Baynard. [414]

18. Regularly an infant's *anſwer by his guardian* ſhall not be *read*, but if the cauſe be brought to hearing *at his requeſt* after his full age it may. But the infant at his full age might (as his right way is) have applied to the Court, and ſet forth how he is grieved by the decree, and might have had leave to *amend or alter his anſwer* or any part of it, or put in a new one, but he not having done ſo, it ſhall be preſumed that he abides by that anſwer, and ſo it was read againſt him. Per Ld. Cowper. Gilb. Equ. Rep. 4. Hill. 6 Ann. Ld. Guernſey v. Rodbridges.

Infant is not *concluded* by any thing contained in the guardian's anſwer. Carth. 79. Eccleſton v. Speke.—— A. ſeiſed in fee deviſed his land to his wife for payment of his debts, and dies, leaving an infant his heir. The creditors brought a bill, and the infant was made defendant, who anſwered by guardian, and the eſtate decreed to be ſold. The infant was allowed to *put in a new anſwer upon her coming to age*, (the decree not being made abſolute,) and the Maſter of the Rolls ſaid, he underſtood that this was a matter of courſe, and that when the Court gave him liberty to ſhew cauſe, it was not reaſon to tie up his hands from ſhewing cauſe. Wms.'s Rep. 504. Mich. 1718. Fountain v. Cain and Jeffs.——S. P. by the Maſter of the Rolls, and ſaid he had granted the ſame upon a petition ex parte. 2 Wms.'s Rep. 403. Hill. 1726. and ſame point then decreed by Ld. C. King, aſſiſted by his Honour. Sir John Napier v. Lady Effingham. And a note is added by the reporter; that the *conſequence of putting in a new anſwer is*, that he may examine witneſſes de novo to prove his defence, which may be different from what it was before. Ibid.

19. Chancery may *decree an executor or truſtee to purchaſe* lands for an infant, and conſequently may confirm a purchaſe made by them for an infant without a decree. Gilb. Equ. Rep. 11. Hill. 7 Ann. in Chancery. Terry v. Terry and Ragget.

An executor or overſeer who has power by the will to act in every thing for the advantage of the infant, may lay out part of the perſonal eſtate in a purchaſe of lands in the infant's name. But if he lends the money on a bad ſecurity he muſt anſwer it out of his own pocket. Chan. Prec. 273. pl. 222. S. C.

20. If a man during a perſon's infancy *receives the profits of an infant's eſtate, and continues to do ſo for ſeveral years after*, the infant comes of age before any entry is made on him, yet he ſhall account for the profits throughout, and not during the infancy only; decreed. Abr. Equ. Caſes, 280. Paſch. 1699. Yallop v. Holworthy.

21. Infant *deviſee of lands in mortgage, where by an after part of the will all teſtator's debts* in general *were made payable out of other lands,*

lands, had *by her own bill ſubmitted to pay off this mortgage*; but the Maſter of the Rolls ſaid, that he muſt take care of the infant, and not ſuffer her to be caught by any *miſtake of her agent*, and ordered that paying the coſts of the day ſhe might amend her bill. 2 Wms.'s Rep. 387. Mich. 1726. Serle v. St. Eloy.

And his lordſhip's ſecretary acquainted the Court that Mr. Vernon in caſe of an erroneous decree againſt an infant uſed always to adviſe the bringing of an *original bill to ſet it aſide, but* in ſuch a bill *to allege ſpecially the errors in the former decree.* Ibid.

22. Where an infant conceives himſelf *aggrieved by a decree*, he *may apply for redreſs as ſoon as he thinks fit*, without ſtaying till he comes of age. Neither is he bound to proceed by way of rehearing, or bill of review, but may impeach the former decree *by way of original bill*, in which it will be enough for him *to ſay the decree was obtained by fraud and colluſion, or that no day was given him to ſhew cauſe* againſt it. Wms.'s Rep. 737. ſays it was ſo held Mich. 1721. in the caſe of RICHMOND v. TAYLEUR.

23. An infant, when *plaintiff*, is as much bound, and as little privileged, as one of full age. Per Ld. C. King. 2 Wms.'s Rep. 519. Hill. 1728. Ld. Brook v. Ld. and Lady Hertford.

[415] 24. Bill to have a diſcovery of the defendant's title to lands in B. mortgaged to the plaintiff, and likewiſe to have an account of the rents and profits thereof, &c. The caſe was, the defendant's father having occaſion to borrow the ſum of 300 l. the *defendant was employed by his father to ſolicit the plaintiff to lend that ſum upon a mortgage* of the lands in B. which the father made affidavit of that he was ſeiſed in fee, and that the lands were free from incumbrances; the *defendant being then about the age of* 20 *years, did carry a feoffment in fee and fine of the lands of the defendant's father to the counſel of the plaintiff*, and the *title was approved of, and the money lent, and a mortgage made* to the plaintiff, and the *defendant was a witneſs to the execution of the mortgage-deed, and likewiſe to the payment of the money.* The *defendant's father, after the defendant came of full age, took* 100 *l. more* upon the ſame mortgage, and the *defendant was privy to that tranſaction, but not a witneſs to the deed or payment of the money.* The *defendant by his anſwer ſays, that at the time of making the original mortgage, he had heard the lands were ſettled upon him after the death of his father, but had never ſeen the ſettlement.* The defendant after the death of his father refuſes to pay the mortgage, and claims the lands as remainderman in tail by virtue of a ſettlement by his grandfather upon the marriage of his father, &c. Counſel for the plaintiff inſiſted that the defendant, though an infant at the time of making the mortgage, was liable to make a ſatisfaction, becauſe he was party to the fraud, and was privy to the whole tranſaction, and aiding and aſſiſting to the cheat, and that though an infant cannot bind himſelf by contract at common law, yet he is liable to actions of tort, as treſpaſs, caſe for words, &c. So is he liable to a forfeiture upon a condition in fact, or implied, &c. So in equity he is liable to make ſatisfaction for a fraud, &c. Per Cowper C. if an infant having a remainder upon an eſtate for life be a witneſs to a mortgage made by tenant for life, I do not think this would bind the

the infant, becauſe if he was made a party to the deed, and ſealed it, yet that would not bind him, and that is a much ſtronger caſe; yet I am of opinion in this caſe the defendant is liable, and ought to make ſatisfaction to the mortgagee, becauſe at the time of this tranſaction he was very near being of full age, and ſolicited the plaintiff to lend the money, and produced this feoffment in fee to his father (which appears now to be forged), and was principally concerned all along in the fraud, when he knew at the ſame time, as he admits by his anſwer, that his father was but tenant for life, with remainder to himſelf. *If an infant is old and cunning enough to contrive and carry on a fraud*, I think in a court of equity *he ought to make ſatisfaction for it.* Decreed accordingly. MS. Rep. Mich. 1 Geo. in Canc. Watts v. Creſwell.

25. In all decrees againſt infants, even in the plaineſt caſes, a *day muſt be given them to ſhew cauſe when they come of age.* Per Lords Commiſſioners. 2 Wms.'s Rep. 120. Hill. 1722.

Where there is a decree niſi cauſa againſt an infant he may, on his coming of age and before the decree made abſolute, put in a new anſwer. Wms.'s Rep. 504. pl. 145. Mich. 1718. Fountain v. Caine.

26. If a *decree* be made *againſt an infant*, and a *bill is brought to ſet it aſide for fraud*, yet if it be not fraudulent, though it may not be in every reſpect ſo equitable as it ought to be, but the Court was fairly and fully appriſed of every thing at the making the decree, Ld. C. Macclesfield ſaid the decree might be juſt, and therefore he would not ſet it aſide, but that had any fraud or ſurprize upon the Court been proved, he would have done it. Wms.'s [416] Rep. 734. Mich. 1721. Richmond v. Tayleur.

27. An *infant's anſwer cannot be given in evidence againſt him*, becauſe *it is not the infant's anſwer, but the guardian's*, and the guardian is ſworn, and not the infant. 3 Wms.'s Rep. 237. Hill. 1733. in caſe of Wrotteſly v. Bendiſh.

Ibid. in a note of the reporter, ſays that an infant's anſwer by his guardian is not evidence againſt him, becauſe the infant is not ſworn, and *it is only for making proper parties*, and cites Carth. 79. Eccleſton v. Petty. And where an infant is defendant the ſervice of the ſubpœna to hear judgment muſt be on the guardian and not on the infant. See Wms.'s Rep. 643. TAYLOR v. ATWOOD. But where a defendant puts in an anſwer to a bill brought by an infant, who does not reply to it, in ſuch caſe it ſeems, the anſwer muſt be taken to be true, in regard the defendant, for want of a replication, is deprived of an opportunity of examining witneſſes to prove his anſwer; and he ought not to ſuffer for ſuch omiſſion in the plaintiff. So ruled at the Rolls, with ſome warmth, by Sir Joſeph Jekyll, in the caſe of THURSTON AND DECHAIR, an Infant, v. NUTTON & Ux'. Trin. 1733. In which the reporter was of counſel with the plaintiff, and much oppoſed the reading of the anſwer; for that the plaintiff being an infant could admit nothing, and it might be very miſchievous, if by reaſon of the neglect of the plaintiff the infant's guardian, or prochein amy, in not putting in a replication to the anſwer, ſuch anſwer ſhould be read, and admitted to be true, though never ſo detrimental to the infant's inheritance. Ideo quære.

28. An executor, adminiſtrator or truſtee for an infant, neglects to ſue within ſix years; the *ſtatute of limitations ſhall bind the infant.* 3 Wms.'s Rep. 309. Trin. 1734. Wych v. Eaſt India Company.

(O) Equity; where an Infant is Truſtee.

1. 7 *Ann. cap.* 19. *ſ.* 1. *IT ſhall be lawful for any perſon under the age of* 21 *years, by the direction of the court of Chancery or Exchequer, by an order made upon hearing all parties on the petition of ſuch perſon for whom ſuch infant ſhall be ſeiſed or poſſeſſed in truſt, or of the mortgagor or guardian of ſuch infant, or perſon intitled to the monies ſecured upon any lands whereof any infant ſhall be ſeiſed or poſſeſſed by way of mortgage, or of the perſon intitled to the redemption, to convey any ſuch lands as the Court ſhall by order direct, and ſuch conveyance ſhall be good in law.*

It muſt be a truſt *expreſsly limited*, and not by implication only. Quære M. 4. Nov. 1738. Warner v. Moore. ——A *feme covert infant truſtee* is not within the

2. A petition being exhibited upon this act in Chancery, ſet out the conveyances in truſt to ſuch and ſuch, and that ſuch a one being *ſurvivor was dead, and the eſtate in law devolved upon an infant*, who was in court; the declaration of truſt was alſo read, and the conſent of the next heir at law to the infant required, and then an order was made for the infant, by her guardian, to convey over the truſt-eſtate to ceſty que truſt, and the conveyance to be ſettled by the maſter. Ch. Prec. 284. pl. 226. Paſch. 1709. Anon.

ſaid ſtatute, for ſhe is not capable to do it, and the huſband is not capable. At the Rolls, eodem die in another caſe.

4. On the marriage of A. with M. a ſettlement was made, in which *A. was tenant for* 99 *years, if* he ſo long live, *remainder to truſtees during the life of A.* remainder *to the firſt, &c. ſon of that marriage in tail*, remainder *to the firſt, &c. ſon of any other marriage*, remainder over. They have a ſon, and afterwards the wife and both truſtees died. The ſon being upon a treaty of marriage with J. S. which was like to be advantageous to the family, a bill was exhibited by the father and ſon againſt the *heir of the ſurviving truſtee, an infant, to join in making a tenant to the præcipe*, in order to ſuffer a common recovery for making a ſettlement on the ſon's marriage. Ld. C. Parker decreed accordingly, and that the maſter direct a proper conveyance, in which the truſtee ſhould join. It was then inſiſted that the heir of the truſtee (though an infant) was a truſtee within the ſtat. 7 Ann. 19. and therefore it was *prayed that the infant truſtee might levy a fine*, which muſt be good unleſs reverſed during his infancy. But his lordſhip ſaid, he did not know how he could direct the judges or commiſſioners to take a fine from an infant, but let the *maſter direct a proper conveyance.* Wms.'s Rep. 536. 538. Trin. 1719. Winnington v. Foley.

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5. Infant to whom a truſt-eſtate deſcends, &c. is obliged to aſſign, &c. by the late act, and in a caſe where a freehold and *inheritance came to an infant who was a feme covert*, motion was made in C. B. for leave to examine her, and the Court made a rule to do it, non obſtante minoritate ſua. Hill. 6 Geo. C. B. Ld. Fitzwilliams & Ux.

6. Where

6. Where A. had purchaſed a burgage-tenure in truſt, and the truſtee died, and his heir, an infant, *acknowledged that he was only a bare truſtee, and proof being read that the money was paid by A. though the receipt in writing was given to the infant's father*, but A. had been always in poſſeſſion of the writings and eſtate, being 40 s. a year, Ld. C. King ſaid he was ſatisfied that this was but a truſt reſulting by reaſon of A.'s payment of the money, and it being of ſo ſmall value, and it being ſaid his lordſhip had made a like order before, he ordered (though only upon a motion or petition and reference to a maſter) that the infant convey, ſince a decree would coſt the value of the fee-ſimple; but that *for the future, where the truſt is not declared in writing, he would leave the ceſty que truſt to bring his bill and have a decree.* 2 Wms.'s Rep. 549. Trin. 1729. Ex parte Vernon.

7. A. owed ſeveral debts, and by his will *deviſed lands in fee to an infant, charged with all his legacies*; the infant is not a truſtee within the ſtat. 7 Ann. cap. 19. as to ſo much of the lands as may ſuffice for the payment of the debts and legacies. 3 Wms.'s Rep. 389. in a note of the reporter cites Trin. Vac. 1730. at the Rolls. Anon.

8. The *ſtatute* enabling infant-truſtees to convey, *extends only to plain and expreſs truſts*, not to ſuch as are implied or conſtructive only. 3 Wms.'s Rep. 387. Mich. 1735. Goodwyn v. Lyſter.

(P) Allowances in reſpect of Infants.

1. A. The father deviſed lands and 40 l. in money to his ſon and daughter; the mother and her ſecond huſband entered on the real eſtate, and poſſeſſed himſelf of the perſonal eſtate of teſtator, and paid his debts and legacies, and *bred up and educated* the infants, which amounted to more than the income of the real eſtate and the intereſt of the 40 l. The mother died, the *father-in-law* offered a fair account by his bill, ſo that he might be allowed *for neceſſaries*, and to pay the defendant, now guardian to the infants, the ſurplus, he being indemnified by this Court; which was decreed, and that the now guardian give ſecurity to pay the ſaid 40l. with intereſt to the infant according to the will. Fin. Rep. 2. Mich. 25 Car. 2. Hall v. Yates. [418]

2. Where an *infant recovers by a decree of the Court*, the Court may, with the approbation of the infant's relations, *allot the infant a maintenance, though no proviſion is in the truſt* for that purpoſe, and this is founded on natural equity. Per Cur. 2 Vern. 236. pl. 219. Trin. 1691. Engleſield v. Engleſield. Vern. 443. 446. S. C. but not S.P.

3. 600 l. per ann. was allowed by Chancery for the maintenance of an infant out of his eſtate. *A fit of ſickneſs* coſt 143 l. extraordinary, which was allowed over and above his quarterly maintenance. Per Ld. Macclesfield. Chan. Prec. 559. pl. 343. Hill. 1720. Lady Shaftſbury's caſe.

4. In a *foreclоſure againſt an infant*, though the infant *has ſix months after he comes of age to ſhew cauſe*, &c. yet he cannot ravel into

into the account, nor even redeem, but only ſhew an error in the decree. 3 Wms.'s Rep. 352. Hill. 1734. Mallack v. Galton.

5. An allowance of maintenance to a guardian *muſt be in regard to what the infant then had*, and not to what falls in afterwards. 3 Wms.'s Rep. 368. Trin. 1735. in caſe of Chaplin v. Chaplin.

See tit. Age (A), &c.

(Q) Equity. In what Caſes the Parol ſhall demur in Equity.

1. WHETHER the parol ſhall demur in *equity* in caſe of a *deſcent of a truſt* to an infant? See Vern. 173. in pl. 167. Trin. 1683. Creed v. Covile.

2. The parol ſhall not demur in *prior incumbrances*, nor in *truſt for ſales*, but in *equities of redemption* only. G. Equ. Rep. 66. Paſch. 7 Ann. in Canc.

3. Bill by a bond creditor *againſt the heir and the executor of the obligor to have a ſatisfaction of a debt due upon the bond out of perſonal and real aſſets*; the *heir inſiſts that as to him the parol ought to demur*, for that he is an infant, and the bill ſeeks to charge his inheritance, which came to him by deſcent from the obligor; the parol ſhall demur until the defendant comes to his full age, as well in this court as at law, which was not denied by Attorney General counſel pro quer'. Ordered that the cauſe ſhould ſtand in ſtatu quo until the infant heir come to full age; but as to the other defendant; the executor decree to account and make a ſatisfaction out of perſonal aſſets as far as they would go. Per King C. MS. Rep. Trin. 12 Geo. Hazard v. Dixon.

4. *Lands are given to A. and his heirs for three lives. A. dies*; his *heir* does not take by diſcent, ſo as to have his age, or to make the parol demur, but *takes as ſpecial occupant*; though had it been *in the caſe of lands in fee deſcending* on an infant, the *parol ſhould have demurred* in equity as well as at law. 3 Wms.'s Rep. 368. Trin 1735. in caſe of Chaplin v. Chaplin.

For more of Enfants in general, ſee **Age, Fines, Guardian, Recoveries**, and other proper titles.

Enterpleader.

(A) Garniſhment.

Of the *Plaintiff and Garniſhee.*

Fol. 732.

[Or of whom it ſhall be.]

[1. IF a *ſtatute be acknowledged to a dean and chapter, and delivered to B. till certain conditions performed*, though this *B. is one of the chapter*, yet if the *conuſor brings detinue* againſt him, he may ſay that it was delivered upon condition, and *garniſhment ſhall be granted againſt the dean and chapter.* 13 H. 4. 8.]

2. In detinue of a writing, the *defendant ſaid that it was delivered to him by the plaintiff and one B. who is dead, upon certain condition to be performed to deliver*, &c. and if the condition be performed or not he does not know, and *prayed garniſhment P. ſon and heir of B. becauſe the charter concerned inheritance*, and had it without averring the death returned by the ſheriff, viz. upon ſurmiſe; quod nota. Br. Garniſhee, pl. 26. cites 21 E. 3. 41.

3. If the *defendant confeſſes that the garniſhee has broke the condition*, this ſhall not prejudice the garniſhee. Br. Garniſhee, pl. 33. cites 39 E. 3. 22.

4. In detinue of goods, the *defendant ſaid that they were delivered to him upon condition, that if A. performed certain conditions to the plaintiff*, that they ſhould be delivered to A. and otherwiſe to the plaintiff, and *prayed garniſhment to A.* and had it, notwithſtanding that A. be *a ſtranger, and had no writ pending thereof.* Br. Garniſhee, pl. 38. cites 14 E. 4. 2.

(B) *How* it is to be * *prayed.*

* This by the plea in Roll ſeems to be miſprinted for [pleaded].

[1. *IN detinue*, if the *defendant ſays it was delivered by the plaintiff and another upon certain conditions*, &c. this is good, *without ſhewing what* the conditions were. 3 H. 4. 18. b. adjudged.] Br. Garniſhee, &c. pl. 17. cites S. C. and ſays the reaſon ſeems to be, becauſe the defendant and one of the parties ſhall not try the conditions in the abſence of the other. ——— Fitzh. Garniſhee, pl. 19. cites S. C.

2. Action of detinue *of a bag of evidences, and of a charter ſpecial*, and the *defendant ſaid, that they came to his hands as executor, and that F. had entered into part of the land, and prayed garniſhment by ſcire facias againſt F.* and per Marten he ſhall not have ſcire facias

facias but *where he confeſſes the poſſeſſion of the thing demanded, and makes privity of the bailment.* Quære inde; for Cockyn and Marten held that ſcire facias lay well. Br. Garniſhe, pl. 1. cites 3 H. 6. 35.

[420]* (C) What ſhall be a good *Counterplea* of Garniſhment.

Br. Garniſhe, &c. pl. 6. cites S.C. & S.P. per Marten. ——But garniſhee cannot plead ſuch plea, becauſe by ſuch plea he varies in the bailment from what was pleaded by the defendant. Br. Garniſhe, &c. pl. 39. cites 20 E. 4. 13.

[1. *IN detinue upon a delivery to redeliver*, if the *defendant ſays it was delivered by the plaintiff and another*, &c. it is a good *counterplea* to the garniſhment *that the delivery was by himſelf alone, abſque hoc* that it was delivered by him and the other, &c. 3 H. 6. 29. b.]

2. In detinue of a writing, the *defendant ſaid that it was bailed to him upon condition by the plaintiff and he who is named in the writing, and prayed garniſhment againſt him, and he had another writ againſt the defendant of the ſame writing returnable now, and was demanded, and was nonſuited*, and yet notwithſtanding the nonſuit garniſhment was granted againſt him. Quod nota. Br. Garniſhe, pl. 14. cites 41 E. 3. 24.

3. In detinue, *the plaintiff counted of a bailment by J. G. to the defendant to bail to the plaintiff*, and the *defendant ſaid, that the ſame J. G. had brought another writ of detinue againſt him returnable at the ſame court, and counted upon a bailment made by himſelf to the defendant to rebail to him*; the *plaintiff ſaid, that it was bailed to the defendant to bail to him, abſque hoc that it was bailed to the defendant upon certain conditions performed to rebail to the ſaid J. G. modo & forma*, & alii e contra. Br. Enterpleader, pl. 4. cites 3 H. 6. 43.

4. Detinue *of two obligations, one in which he was bound to T. H.* and *another by which T. H. was bound to him*, the *defendant ſaid, that they were delivered upon certain condition*, &c. and prayed garniſhment againſt *T. H.* and had it, who came by ſcire facias, and *ſaid that the obligations were delivered to the defendant upon condition that if the plaintiff ſtand to the arbitrement of A. B. of all actions*, &c. *and this award performed of his part, that then every one ſhall have livery of his own obligation, and if the one fulfils the award and the other breaks it, that he who fulfils it ſhall have livery of both obligations, provided always that the ſaid award be made before Eaſter next, and ſaid that the arbitrator did not make any award before Eaſter, and prayed livery of his own obligation.* Port. upon his conuſance prayed livery of the obligation of the plaintiff, and had it, and further prayed livery of the other obligation; for he ſaid that the obligation was delivered upon condition to ſtand to the arbitrement, &c. as above, and this fulfilled as above that then the obligation ſhould be delivered as above generally, and *ſaid that after Eaſter they awarded that the ſaid T. H. ſhould do ſuch things, and ſhewed what,*

what, which are not done, and that the plaintiff ſhould do ſuch things and ſhewed what, abſque hoc that the obligation was delivered to the defendant upon condition to ſtand to the award of the ſaid arbitrator with ſuch proviſo as above, and prayed livery. Markham ſaid, you ought to ſhew that you have performed the award of your part; Newton ſaid, no; but Paſton contra, and that he ought to ſhew it, for it is ſhewn that he ought to perform the arbitrement. Port. ſaid, I plead ſo for my ſpeed, but not de rigore juris only. Brooke ſays, it ſeems that he ſhall ſhew it de rigore juris, and the other ſhall maintain the ſame iſſue, alleging the condition to be performed of his own part. Br. Garniſhe, pl. 31. cites 21 H. 6. 52.

5. In detinue the defendant *prayed garniſhment*, and had it *againſt the baron and feme*, which was *challenged inaſmuch as it ſhall be intended of the livery of the baron only, and he ſhall have action*, and therefore he ſhall be warned only, and yet well here; for *the one is original* and *the other is judicial*, and there is a *diverſity where two are warned where only one ſhould be warned*, and *where one is warned alone where two ſhould be warned.* Br. Garniſhe, pl. 43. cites 8 E. 4. 15. [421]

(D) Garniſhment.

[What Pleas the Garniſhee may plead.]

[1. THE garniſhee ſhall *not* plead *other plea but conditions performed.* 20 H. 6. 29. b.] Fitzh. Garniſhe, pl. 9. cites S. C.

[2. The garniſhee ſhall *not* ſay *that he hath performed the condition* contained in the obligation for which the writ is brought. 20 H. 6. 29. b.] Fitzh. Garniſhe, pl. 9. cites S. C. & S. P. but he muſt plead that the condition upon which the obligation was delivered is performed.

3. Detinue againſt an abbot, the defendant prayed garniſhment againſt R. by reaſon of delivery upon condition, &c. and R. came and *ſaid* upon the ſcire facias *that the abbot is depoſed, judgment of the writ of ſcire facias*, and the opinion of the Court was, that he ſhall not plead in abatement of it, quod nota; for per Babb. it is his own writ, and by him he ſhall not plead in abatement of the writ of deliverance. Br. Garniſhe, pl. 4. cites 3 H. 6. 4.

(E) What Pleas the Garniſhee may plead.

[1. IN *detinue*, the defendant ſays it was *delivered by the plaintiff and B. upon condition*, and prays garniſhment. *B.* comes and *ſays that he ſolely delivered it*, and it is not a plea, for he is warned to *anſwer whether the conditions are performed or not*, and therefore the *plea varies.* 12 E. 4. 13. b. Curia. Dubitatur *, 3 H. 6. 50. † 14 H. 6. 21.] * Fitzh. Garniſhe, pl. 4. cites S. C. † Fitzh. Garniſhe, pl. 7. cites S. C. —— Br. Enterpleder, pl. 15. cites

[2. The

S. C. that if garnishee comes and says that it was delivered by him alone, the plaintiff shall recover the writing; for by the garnishment the defendant is out of court, and cannot rejoin to the plea of the garnishee. Br. Enterpleader, pl. 15. cites 14 H. 6. 11. —— Br. Charters de terre, pl. 43. cites S. C. —— S. P. Br. Garnishe, pl. 39. cites 20 E. 4. 13. —— Br. Enterpleder, pl. 24. cites S. C. —— S. P. for if he should be allowed to plead so, the plaintiff should have delivery against the defendant, and yet the garnishee should have action against the defendant * also, he having as here charged himself to both. Per Paston; and by him the garnishee cannot vary from the condition alleged by the defendant; for should he do so, the plaintiff should have delivery as above, and the defendant shall be charged by his folly; quod Cockain did not deny. Br. Garnishe, &c. pl. 6. cites 3 H. 6. 50. —— And nota, that where the *defendant* in writ of detinue *admits the writ and the count*, and prays garnishment, the garnishee when he comes shall not plead in abatement of the writ or the count which the defendant has admitted; quod nota per Curiam. Br. Garnishe, &c. pl. 6. cites S. C. —— He shall not plead to the writ, nor cast *protection* after appearance. Br. Garnishe, &c. pl. 9. cites 20 H. 6. 28. by Newton and Askew.

‡ Br. Garnishment, pl. 12. cites S. C. —— Fitzh. Garnishment, pl. 28. cites S. C.

‖ Br. Garnishe, &c. pl. 30. cites S. C. —— Fitzh. Garnishe, pl. 16. cites S. C.

¶ Fitzh. Garnishment, pl. 7. cites S. C. —— Br. Enterpleder, pl. 15. cites S. C.

[2. The garnishee shall *not say* they were *delivered upon other conditions than the defendant hath said*, for the garnishment is only to know whether the conditions are performed, and if the defendant hath mistaken the conditions he shall be charged by both, and so the garnishee at no mischief. ‡ 40 E. 3. 11. b. 3 H. 6. 50. ‖ 21 H. 6. 35. ¶ 14 H. 6. 11. b. Contra 43 E. 3. 28. b.]

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Fol. 733.

[3. The garnishee cannot plead that they were *delivered to the defendant and a stranger* not named. 3 H. 4. 7. b.]

N. B. There is no pl. 4. in Roll.

Br. Garnishe, &c. pl. 27. cites 7 H. 4. 34. —Fitzh. Garnishe, pl. 6. cites S. C.

[5. *But* vide 7 H. 6. 3, 4. b. 40. b. that the defendant says, that it was *delivered upon condition, without shewing any condition, and* when the *garnishee* comes he *shall shew the conditions*, and the *plaintiff may say* it was delivered *upon other conditions in certain, and traverse* other conditions alleged.]

—— In detinue the *garnishee shewed two conditions, and that he had performed them, and demanded delivery*; the *plaintiff said, that they were delivered upon those conditions and others, which the garnishee has not performed, absque hoc that those are all*, &c. Br. Garnishe, pl. 41. cites 9 H. 6. 14.

Fitzh. Garnishment, pl. 16. cites S. C. —Br. Garnishe, &c. pl. 30. cites 21 H. 6. 36. —— And see pl. 1, 2. supra in the notes.

[6. In detinue upon a bailment *in one county*, the *defendant says* it was *bailed by him in another*, &c. the garnishee cannot *traverse the bailment in this county*, for it is *admitted by the defendant*. 21 H. 6. 35. adjudged.]

[7. The garnishee shall not plead *a grant of the plaintiff by deed after the delivery*, that he should have the deed *upon certain conditions* performed, *which he had performed*. Contra 20 H. 6. 29.]

Br. Garnishe, pl. 12. cites 40 E. 3. 11. S. P. —Fitzh. pl. 28. cites S. C.

[8. The garnishee cannot plead an *accord between himself and the plaintiff after the delivery to do other things*, &c. *without writing*. 40 E. 3. 12.]

† Br. Garnishe, pl. 16. cites S. C. —

[9. The garnishee may plead the *release* of the plaintiff *after the delivery of all debts and claims*, and bar him. † 49 E. 3. 13. b. Dubitatur,

dubitatur, 39 E. 3. 23. adjudged of all actions releaſe. Contra † 20 H. 6. 28. b.]

Fitzh. Garniſhe, pl. 32. cites S.C.—Br. Garniſhe, &c. pl. 33. cites S. C.

† Br. Garniſhe, pl. 9. cites S. C.——Fitzh. Garniſhe, pl. 9. cites S. C.

[10. The garniſhee may plead a *releaſe* of the plaintiff made to him. 3 H. 6. 18.]

[11. *So* he may plead his releaſe *of all actions perſonal after the conditions broke.* Dubitatur, 14 H. 6. 11.]

In detinue of a certain deed obligatory, the garniſhee pleaded releaſe of all actions perſonal meſne between the delivery and the releaſe, judgment ſi actio, and was held good by Markham and Paſton in avoiding circuity of action; for otherwiſe the plaintiff ſhould recover in this action, and ſhould after be barred in debt upon the obligation. But by Newton and Aſcue contra. For each is actor againſt the other, and one actor cannot plead in bar againſt the * other, and each of them ſhall make title to the writing, and either of them may recover damages. Br. Garniſhe, &c. pl. 9. cites 20 H. 6. 28. and takes notice that it is not adjudged, but cites 39 E. 3. 22. that it was adjudged a good plea.

[12. *But not* ſuch releaſe made of actions perſonal *before the conditions broke.* 14 H. 6. 11.]

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[13. The garniſhee cannot plead *that the writing is not his deed generally or ſpecially*, for though it be an eſcrow, yet if the condition be performed the plaintiff ſhall have it. 9 H. 6. 55. b. 11 H. 6. 6.]

[14. *As* he cannot plead that he was *under age at the making* the obligation, for this is in bar of the thing. 11 H. 6. 11.]

15. Detinue by A. upon bailment in indifferent hands, and the *defendant had garniſhment againſt the executors of the other party, who appeared* by the garniſhment, and the *plaintiff ſhewed indenture of the bailment, in which it appeared that the plaintiff and R. were obliged in the writings demanded*, by which the *garniſhee pleaded it to the counterplea, becauſe R. is not named, by which his releaſe may diſcharge all the actions*, and by this the plaintiff took nothing by his writ, quod nota. But *this is rather by the confeſſion of the plaintiff than by the plea.* Br. Garniſhe, pl. 32. cites 24 E. 3. 24.

Br. Brief, pl. 198. cites S. C. and ſays that the executors came and ſaid that they had another co-executor, viz. D. who is alive, not named; the plaintiff cites Paſch. judgment of the writ; and it was doubted if any other garniſhment ſhould iſſue, and ſhewed indenture of the bailment, &c.——Thel. Dig. 199. lib. 13. cap. 12. ſ. 1. 24 E. 3. 5. 24. S. C. and Hill. 12 H. 4. 18.

16. Detinue *of a writing of a ſtatute merchant*, the *defendant prayed garniſhment* and had it, and at the day the *garniſhee came, and the defendant made default*, and the *plaintiff prayed diſtreſs to deliver to him the writing, and the garniſhee to him likewiſe*, and yet becauſe the *plaintiff had counted before of garniſhment to deliver upon condition*, therefore by award *they enterpleaded* before any livery, and thereupon the *garniſhee pleaded releaſe of the plaintiff of all actions made meſne between the making of the writing and the livery*, and yet becauſe the detinue is determined thereby, therefore the plaintiff was barred by award, and this is good to avoid circuity of action. Br. Charters de Terre, pl. 39. cites 39 E. 3. 22.

17. In detinue the *defendant prayed garniſhment, becauſe the writing was delivered to him upon certain condition*, &c. *and ſhewed what*, and had it, and the *garniſhee ſhewed another condition*; there per

Thorp the plaintiff ſhall recover and the garniſhee is at no miſchief; for he may have another writ againſt the defendant, and recover againſt him by his pleading of the falſe condition. Br. Garniſhe, pl. 11. cites 40 E. 3. 11.

18. Detinue *of a writing, the defendant alleged delivery to him upon condition*, and prayed garniſhment and had it, and the *garniſhee confeſſed the condition, but ſaid, that accord was made between them that he ſhould make eſtate of the manor of D. for life the remainder to the plaintiff, and that the plaintiff ſhould be there, and then the deed ſhould be delivered to him, and* ſaid *that he was always ready and the plaintiff did not come, and prayed livery of the writing*, and becauſe it was *accorded in another matter than the condition pleaded* by the defendant, and *he did not ſhew writing of this accord*, and alſo he might have made the eſtate the remainder to the plaintiff though the plaintiff did not come, therefore the plaintiff recovered by award; for he *did not ſay in the negative that if the plaintiff did not come that no eſtate ſhould be made.* Br. Garniſhe, pl. 12. cites 40 E. 3. 11.

19. In detinue of *an obligation*, the *defendant ſaid that it was delivered by the plaintiff and T. B. upon certain conditions, and he did not know if the conditions were performed or not, and prayed garniſh-*
[424] *ment againſt T. B.* who came upon the ſcire facias, and *ſaid, that it appeared by the obligation that he and three others were bound who are not warned;* judgment if he ſhall anſwer; et non allocatur; for *it may be that the garniſhee only ſealed and delivered the deed, and the other three not*, and therefore he was awarded to anſwer. Br. Garniſhe, pl. 16. cites 49 E. 3. 13.

20. Garniſhee *pleaded releaſe made to him by the plaintiff after the obligation of all debts, treſpaſſes, and claims*, and the beſt opinion was that it is no plea; for *nothing is demanded againſt him in this action, but againſt the defendant, and the obligor cannot be damnified in this action*, as he ſhall be in debt, and therefore it is a good plea in debt upon an obligation, but not in this garniſhment, et adjornatur, &c. Br. Garniſhe, pl. 16. cites 49 E. 3. 13. and by 20 H. 6. 28. every one is actor againſt the other, therefore no plea, and ſee 39 E. 3. thereof.

21. Garniſhee pleaded in abatement of the writ *that the bailment was made to the defendant, and to another not named*, &c. Quære. Thel. Dig. 199. lib. 13. cap. 12. ſ. 2. cites Mich. 3 H. 4. 5.

22. In detinue the *garniſhee* came *and pleaded to the writ becauſe the bailment was by two, and the one alone brought the action*, and though garniſhee cannot plead to the writ which the defendant has affirmed, and to which he is a ſtranger, yet becauſe it is apparent, therefore per Cur. *both ſhall bring the action in common* by the opinion of the Court, and this as amicus curiæ. Br. Garniſhe, pl. 22. cites 12 H. 4. 18.

Thel. Dig. 200. lib. 13. cap. 12. ſ. 3. cites 3 H. 6. 38. S. C.

23. In detinue *of an obligation the defendant ſaid, that it was delivered to him by the plaintiff and one Hillibrond, upon certain condition to be performed, to deliver to the plaintiff, but if not then to the defendant, and he did not know if the conditions are performed*, &c. and prayed a ſcire facias againſt Hillibrand to warn him, and had it, and

and the *garniſhee* came and *ſaid that where the ſcire facias is Hillibrondius, his name is Hillibrondus*, judgment of the writ. Strange ſaid, *he is obliged* to me in an obligation *by the name of Hillibrondius*; judgment, &c. and the opinion of the Court was, that the garniſhee ſhall not have the plea. Br. Garniſhe, pl. 2. cites 3 H. 6. 37.

24. In detinue the defendant prayed garniſhment upon condition to deliver, &c. by which upon the ſcire facias returned the *garniſhee* came and *pleaded that the plaintiff is excommunicated*; judgment if he ſhall be anſwered; and per Cur. he ſhall have the plea, and is party well enough before that he has made title to the writing; for judgment of the damages ſhall be given againſt him, by which the *plaintiff ſhewed letters of abſolution pending the writ*; Weſtbury demanded judgment of the writ becauſe he was once diſabled pending the writ, et non allocatur. Br. Garniſhe, pl. 3. cites 3 H. 6. 40. Thel. Dig. 199. lib. 13. cap. 12. ſ. 3. cites S. C.

25. Where *writ* is brought *againſt an abbot, garniſhee cannot ſay that the abbot is depoſed* in abatement of the ſcire facias. Thel. Dig. 199. lib. 13. cap. 12. ſ. 3. cites 3 H. 6. 41. Such plea is not good either in abatement of the ſci. fa. or of the original. Thel. Dig. 186. lib. 12. cap. 17. ſ. 9. cites S. C.

26. *Detinue by a feme ſole* where the *count was that the bailment was made by the plaintiff*, the garniſhee was *not received to ſay that the feme was covert with ſuch a one at the time of the bailment* in abatement of the writ or count. Thel. Dig. 200. lib. 13. cap. 12. ſ. 3. cites 3 H. 6. 51.

27. In detinue the *defendant prayed garniſhment by delivery of the writings upon condition*, and had it; the *plaintiff counted of delivery at D. in Middleſex*, and the *garniſhee ſaid that at another time the plaintiff brought ſuch a writ againſt the defendant, and ſuppoſed the bailment at C. in London; judgment of the writ* ſuppoſing it in Middleſex. Babb. [bid him] anſwer, for the defendant has admitted the writ good, therefore you ſhall not abate it. Br. Garniſhe, pl. 27. cites 7 H. 6. 34. Thel. Dig. 200. lib. 13. cap. 12. ſ. 4. cites Paſch. 7 H. 6. 36. S. C. [425]

28. The garniſhee ſhall not plead *falſe Latin* to the writ *as party*, but as amicus curiæ. Br. Garniſhe, pl. 42. cites 9 H. 6. 39. S. P. And ſo of matter apparent in the count, but no foreign matter. Thel. Dig. 200. lib. 13. cap. 12. ſ. 5. cites S. C.

29. In attaint it was agreed arguendo that *garniſhee ſhall not plead to the writ of detinue to abate it*, but *in a thing apparent as amicus curiæ*, and *not foreign matter*, and he *ſhall have oyer of the declaration*, but the *plaintiff ſhall not declare de novo againſt him*; but per Babb. if he *comes at the firſt day he* ſhall have oyer of the declaration, but if he comes by the exigent, not. Br. Garniſhe, pl. 8. cites 9 H. 6. 38 & 39.

30. In detinue if the *defendant prays garniſhment becauſe the obligation in demand was delivered to him and one C. upon certain conditions*, &c. and the *garniſhee* comes and *ſays that he alone delivered the obligation*, the *plaintiff ſhall recover the writing*; for now they do not agree in the livery, and the defendant is out of court by

the garniſhment, and cannot reply or rejoin to the plea of the garniſhee; quod nota. And if the defendant ſays falſely it is his folly, and if the garniſhee ſays falſely this is his folly. Br. Charters de Terre, pl. 43. cites 14 H. 6. 11.

31. *Scire facias* iſſued *againſt the feme and another as executors* of ſuch a one; the *feme ſaid that ſhe was covert with ſuch a one who is in full life*, &c. Thel. Dig. 200. lib. 13. cap. 12. ſ. 6. cites Hill. 21 H. 6. 29. Quære.

32. Per Newton, *where defendant alleges the delivery to be by the plaintiff and J. N. upon certain conditions, and does not ſhew what in certain*, there the *garniſhee may vary* from thoſe conditions; *but where* the defendant *ſays that the bailment was made by the plaintiff and J. N. upon condition by the plaintiff alleged*, and prays garniſhment, there the *garniſhee cannot vary from the conditions* alleged by the plaintiff; and ſo to the place, where the defendant ſays that the day, year and place in the declaration, the plaintiff and J. N. bailed upon certain condition, and prays garniſhment, there the garniſhee cannot vary from the place, and this affirmed to be the entry per Brown prothonotary; by which it was agreed, that the plaintiff recover againſt the defendant his chattels, and his damages againſt the garniſhee, and 14 H. 6. 11. agrees with Newton. Br. Garniſhe, pl. 30. cites 21 H. 6. 35.

33. In detinue the *garniſhee ſhall plead recovery of the writings in demand, in action of detinue againſt the defendant and the plaintiff before the bailiffs of D. in D. upon ſuch an action, where the bailiffs of D. had conuſance of the plea*, and a good plea. *Quære*, if the defendant ſhall not be charged again, becauſe he has not denied the detinue now? and if the recovery be good, by reaſon that the ſheriff in juſticies granted this conuſance to the bailiffs? Br. Garniſhe, pl. 46. cites 34 H. 6. 47.

34. In detinue the *defendant prayed garniſhment and had it*, and came the *garniſhee*, and *ſaid that at another time he brought ſuch an action by juſticies* before the ſheriff, *where the defendant had garniſhment of the now plaintiff who made default, and* this *garniſhee there recovered the thing in demand againſt the now defendant, and prayed thereof livery*, and it was in doubt if the defendant ſhall have charged himſelf to the plaintiff now by his folly, becauſe he [426] had not pleaded the ſame recovery in bar. Quære; for it ſeems that as long as *execution is not made* a man ſhall repair to his *new original*, and then ſhall plead de novo, quære, for now the defendant had notice that the judgment was given againſt himſelf, nota. Br. Detinûe, pl. 11. cites 34 H. 6. 47.

35. In detinue of charters the *defendant prayed garniſhment againſt J. N.* and had it, and the *garniſhee* came and *ſaid that J. P. gave the land to the feme now plaintiff and her firſt baron, and to the heirs of the baron, and the baron died without iſſue, and the garniſhee is heir to him, and the donor delivered the evidences to the baron in ſalvation of his inheritance, after whoſe death his feme got the evidences and took another baron now plaintiff, who aliened in fee and delivered the evidences to the defendant, and the garniſhee as coſin and heir of the firſt baron*, and ſhewed how coſin entered for alienation

to his diſinheritance, and ſo it belonged to him to have the evidences, &c. And per Laken, the feme ſhall have the charters for term of her life, but Littleton contra, and that by the alienation they belonged to the heir; Laken ſaid, no, Sir, for we cannot have cui in vita after the death of the ſecond baron; but Littleton ſaid, yet we may have them during the life of the ſecond baron; *but* by him in this caſe, becauſe the eſtate was made to her and her firſt baron, and to the heirs of the baron without deed, and the ancient charters delivered to the baron alone in ſalvation of his inheritance, the feme can have none of them. Contra of the deed of the ſame eſtate, though it had been delivered to the baron alone; for all that touches his eſtate ſhe ſhall have, and no more. Br. Charters de Terre, pl. 11. cites 34 H. 6. 1.

39. The *garniſhment* iſſued *againſt baron and feme upon ſurmiſe that both were parties to the bailment*, and the *baron* came and *prayed judgment of the writ of ſcire facias* brought againſt him and his feme, &c. Yet he was put to anſwer, but with a ſaving to them Thel. Dig. 200. lib. 13. cap. 12. ſ. 8. cites Mich. 8 E. 4. 16.

40. The garniſhee ſhall plead *outlawry* in the plaintiff. Thel. Dig. 200. lib. 13. cap. 12. ſ. 7. cites 11 E. 4. 14.

(E. 2) Writ, Proceſs, &c. in Garniſhment, againſt whom.

1. IN detinue the *defendant prayed garniſhment againſt the baron and feme*, and had it, and the *baron returned dead*, and a new garniſhment iſſued againſt the feme, quod nota. Br. Garniſhment, pl. 15. cites 44 E. 3. 33, 34.

2. *Obligation was delivered upon condition*, viz. *if the obligor plaintiff pay* 20 *l. to J. K.* that the *deed ſhall be delivered to him*, or *otherwiſe* to deliver it *to the obligee*, and the *obligee brought* action of *detinue*, and the *defendant prayed garniſhment againſt J. K. to ſay why he did not receive the money, and the plaintiff to have delivery of the deed*, and had it, and the *ſheriff returned nihil*, and *at the alias he returned that J. K. was dead*, by which *garniſhment iſſued againſt the heir and executors*, and the *ſheriff returned that he had neither heir or executors, and that the biſhop of D. adminiſtered* becauſe he died inteſtate, by which *proceſs iſſued againſt the biſhop, who came by attorney, who received the* 20 *l. upon condition*, that is to ſay, if his maſter ought to have them to retain them, and otherwiſe re-deliver them to the Court, and found thereof ſurety. Br. Garniſhe, pl. 44. cites 48 E. 3. 30.

3. Condition of the delivery of a deed is *to deliver it to the maker, if he by reaſonable garniſhment levy a fine to the obligee*, 15 *Paſch.* &c. and *the obligee ſued writ of covenant* to levy the fine, and the *ſheriff returned the obligor ſummoned*, this is not ſufficient garniſhment; for he ought to be warned by the party himſelf. Br. Conditions, pl. 39. cites 11 H. 4. 18. [427]

4. In detinue of charters the defendant prayed garniſhment againſt J. N. and had it, and *four ſcire facias's, and all returned nihil,*

nihil, and the plaintiff prayed delivery of the writing; Hank. ſaid, you cannot; for he ought to be warned, and it was ſaid to him by the Court, that *he ſue till he be warned*, quod nota. Br. Garniſhe, pl. 21. cites 12 H. 4. 9.

5. In detinue *the defendant prayed garniſhment againſt two*, and the *one was dead*, by which *new garniſhment* iſſued againſt him who was alive, *without proceſs againſt the executors* of the other who was dead. Br. Garniſhe, pl. 23. cites 12 H. 4. 23.

6. In detinue of two writings the defendant *prayed garniſhment againſt two*, and had it, and the ſcire facias *returned that the one was warned and the other dead*, and the ſcire facias was abated as it ſeems; for it was awarded that he ſhould ſue a *new ſcire facias*, and it does not appear if againſt the executors only, or againſt the one, and the executors of the other. But by 19 H. 6. 32. *the one had idem dies, and a new ſcire facias againſt the other.* Br. Garniſhe, pl. 24. cites 14 H. 4. 1.

7. By the *death of garniſhee*, the writ ſhall not abate, but *reſummons ſhall iſſue againſt the defendant*, and *ſcire facias againſt the executors of the garniſhee.* Br. Garniſhe, pl. 7. cites 9 H. 6. 36.

8. In detinue of an obligation the *defendant ſaid, that it was delivered to him by the plaintiff and one C. upon certain condition*, &c. and becauſe *C. is dead* prayed garniſhment againſt his executors, and had it, and it does not appear if they were named or not; it ſeems they were not. Br. Garniſhe, pl. 34. cites 14 H. 6. 11.

And ſuch a caſe the ſame year, fol. 55. where he who was warned was compelled to anſwer, quod nota, and quære; for it was ſaid there, that the contrary thereof was adjudged anno 24. Ibid.

9. In detinue the defendant prayed *garniſhment againſt two*, and ſcire facias iſſued, and the ſheriff *returned the one warned and the other dead*, by which iſſued *ſcire facias againſt the executors* of the deceaſed, and *idem dies to the other* who was returned warned. Per Markham, by the death of the one the firſt ſcire facias was abated, therefore the new ſcire facias ought to have been awarded againſt the one, and the executors of the other; but Newton and tot. Cur. was againſt him, and that it was well as above, quod nota. Br. Garniſhe, pl. 29. cites 19 H. 6. 9.

10. If the *ſheriff returns the garniſhee warned*, and *does not ſay by tales*, &c. *probos et legales homines*, yet this is good if the garniſhee appears; contra if the garniſhee makes default. Br. Garniſhe, pl. 45. cites 33 H. 6. 31.

11. In detinue the *defendant ſhewed that the writing was delivered by the plaintiff and J. N.* and *prayed garniſhment* againſt him *in the county of E.* which was *returned nihil*, and *alias iſſued*, and *returned as above*, by which he *prayed garniſhment in the county of N. upon ſurmiſe of aſſets there*, and had it. Br. Garniſhe, pl. 36. cites 6 E. 4. 11.

(F) Garniſhment.

Judgment.

[1. IF the *garniſhee comes at the day*, and the *plaintiff and defendant make default*, the garniſhee ſhall recover. 40 E. 3. 39.] S. P. and the plaintiff and defendant were in miſericordia. Br. Garniſhe, &c. pl. 13. cites 40 E. 3. 29. and ſo are all the editions, but it ſeems it ſhould be as here in Roll, 40 E. 3. 39. and there the Year book ſays, et ſic vide & nota, &c. Mich. 39 E. 3. fol. 29. the garniſhee cannot have judgment to recover by the default of the defendant. —— Fitzh. Garniſhe, pl. 29. cites S. C.

[2. If there be an enterpleader *in raviſhment of ward*, he that is *not party to the writ may plead the releaſe of the plaintiff*. 20 H. 6. 29.] Fitzh. Garniſhe, pl. 29. cites S. C.

[3. If the *garniſhee* be *returned warned*, and *does not appear*, no *damages* ſhall be recovered. 20 E. 4. 13. b.]

(G) In what *Actions*.

[1. IF *one brings detinue upon a bailment, and the other upon a trover*, there ſhall be an enterpleader. 39 H. 6. 36. b.] Br. Enterpleder, pl. 17. cites S. C. —— Fitzh. Enterpleder, pl. 9. cites S. C. —— In this caſe, and ſo if the defendant is charged with a ſeveral bailment by each of the plaintiffs, there they ought to have ſeveral actions. Roll. Rep. 130. and ſays, that according to this are 19 H. 6. 3. 9 H. 6. 17. 17 H. 6. 22. and 39 H. 6. 36. but the reporter adds a remark, that 39 H. 6. is adjudged contra as to the trover.

2. If *A.* brings *quare impedit againſt B. of the advowſon of C.* and *B. brings ſuch a writ againſt A.* there *if A. will aver that the ſecond quare impedit is brought of the ſame avoidance as the firſt is brought*, then they ſhall enterplead upon the writ of elder date, and otherwiſe not. Br. Enterpleder, pl. 26. cites 19 H. 6. 68.

3. *In writ of ward and account* garniſhment does not lie, *but* if *two ſeveral writs of ward* are brought there lies enterpleader, and in *debt* garniſhment does not lie. Br. Garniſhe, pl. 38. cites 14 E. 4. 2.

4. If *garniſhee* will *bring detinue againſt the defendant*, then the plaintiff in the firſt action and he ſhall enterplead; quod nota. Br. Enterpleder, pl. 24. cites 20 E. 4. 13. Br. Garniſhe, pl. 39. cites S. C.

(H) For what *Cauſes*.

[Or the Reaſon of Enterpleader.]

[1. THE cauſe of enterpleader is, *for that the defendant ſhall not be charged to two ſeverally where no default is in him.* 39 H. 6. 36. b.] Fitzh. Enterpleder, pl. 9. cites S. C.

2. In detinue of charters againſt one, *the defendant cannot have ſcire facias to warn a ſtranger to ſee if he can make title, if he does not confeſs the poſſeſſion of the charters demanded and make privity of bailment*, contra Babb. and Cockayne, therefore quære; and per Marten, they may *open the bag*, contra Babb. and Cockayne. Br. Enterpleder, pl. 3. cites 3 H. 6. 35.

3. *But* it ſeems there, that *no enterpleader can be unleſs both the parties have ſeveral actions pending*. Ibid.

(I) Upon *what Delivery*.

S.C. & S.P. cited Roll. Rep. 130.

[1. ENTERPLEADER ſhall be upon a *joint* delivery *or ſeveral*. 39 H. 6. 36. b.]

Fol. 734.

(K) At what *Time* it ſhall be made.

Fitzh. Enterpleder, pl. 9. cites S.C.

[1. IF the *goods* [*the writs*] *are not returned at one time, but one declared the laſt term*, and the *defendant imparled, and now the other brings an action*, yet they ſhall enterplead. 39 H. 6. 36. b.]

(L) *In what Caſes* there ſhall be an Enterpleader.

Fitzh. Enterpleder, pl. 14. cites S. C.

[1. IF *two bring ſeveral detinues againſt J. S. for the ſame thing*, if the *defendant will acknowledge the action of one without a prayer of enterpleader*, they ſhall not enterplead upon the requeſt of the other, for the *enterpleader is given for the ſecurity of the defendant, that he be not twice charged*, and he hath waived that benefit. 18 E. 3. 22. b.]

2. Though the garniſhee cannot vary in the bailment from the plea of the defendant, as to ſay that the delivery was by him alone, where defendant had pleaded that it was by the garniſhee and the plaintiff, yet he may have writ of *detinue againſt the defendant* alſo, and there the plaintiff and he ſhall enterplead. Br. Garniſhe, &c. pl. 39. cites 20 E. 4. 13.

3. Where the *garniſhee comes*, and the *defendant makes default*, yet none of them ſhall have delivery of the writing, but ſhall enterplead. Br. Garniſhe, pl. 33. cites 39 E. 3. 22.

4. Detinue *of two obligations*, the *defendant ſaid, that M. had another writ againſt him of the ſame obligations returnable the ſame day, which two plaintiffs delivered to him the writings upon condition*, &c. and he is ready to render to whom the Court ſhall award, and the plaintiffs appeared, and were awarded to enterplead. Br. Enterpleder, pl. 8. cites 12 H. 4. 18.

5. *But* if the writs had been *returned at divers days*, another proceſs ſhould have been awarded. Ibid.

[430] 6. If *ſeveral præcipe* quod reddats *are brought againſt one tenant*, they ſhall not enterplead though damages are to be recovered, but

when

when one has recovered, the tenant is diſcharged againſt the others. Br. Enterpleder, pl. 4. cites 3 H. 6. 43.

7. If *one* be *found heir to the tenant of the king in one county*, and *another found heir in another county*, there they ſhall enterplead before any of them ſhall have livery. Br. Enterpleder, pl. 5. cites 9 H. 6. 17.

8. Where they *do not agree in bailment*, they ſhall not enterplead; for here *is no privity*, and if the defendant ſays falſely it is his folly, and if the garniſhee ſays falſely it is his folly. Br. Enterpleder, pl. 15. cites 14 H. 6. 11.

9. If *I bail deeds which concern the land of my ſecond feme, to rebail to me or my heirs, and die*, and my *heir by my firſt feme brings detinue*, and the *heir by the ſecond feme likewiſe*, they ſhall enterplead. Per Forteſcue, quod Curia conceſſit. Br. Enterpleder, pl. 11. cites 19 H. 6. 3, 4. 19.

10. It was agreed arguendo, that if *diem clauſit extremum iſſues*, and *one is found heir*, and *a melius inquirendum iſſues*, and *another is found heir*, and *both come into the Chancery and pray livery*, they there ſhall enterplead before either of them ſhall have livery. Br. Enterpleder, pl. 6. cites 35 H. 6. 19.

11. Detinue *of a cheſt with charters*, the *defendant ſaid* at the diſtreſs *that it came to him as executor, and that J. N. had brought ſuch a writ againſt him of the ſame cheſt and charters in the ſame county, returnable at the ſame day* that the diſtreſs in the other was returned, *and brought the cheſt into court, and prayed that he might enterplead*, and they were *awarded to enterplead upon the eldeſt writ, and not upon the original returned now.* Br. Enterpleder, pl. 7. cites 37 H. 6. 23. & 33 H. 6. 25.

12. *And* per Cur. if the writs had been *in divers counties, or returnable at divers days*, they cannot enterplead, but the writs ſhall be awarded returnable at one and the ſame day, and then they ſhall enterplead. Ibid.

13. *But* if they *vary in declaration, as* the *one declares of a cheſt ſealed, and the other of a cheſt, and ſhews what is in the cheſt*, they ſhall not enterplead. Ibid.

14. *But* it was ſaid, that 38 H. 6. *two writs* were brought *in two counties*, and *each declared by invention*, and they were awarded to enterplead. Ibid.

15. Enterpleader ſhall *not* be granted *unleſs defendant alleges that both parties demand one and the ſame thing.* Br. Enterpleder, pl. 22. cites 8 E. 4. 6. by all the juſtices.

16. Traverſe, *two offices were*, by the *one* it was *found general tail and a daughter heir*, and by the *other ſpecial tail* and the *daughter traverſed*; for *the other claimed as coſin and heir male.* Per Coniſbie, *where two claim by one and the ſame anceſtor* they ought to enterplead. Br. Enterpleder, pl. 16. cites 21 H. 7. 35.

17. *And* per Palmes, where *one is found heir and within age*, and *another is found heir to this ſame and of full age*, they ſhall enterplead; for it is to one anceſtor, and by one title. Ibid.

18. *Contra* where they claim *by ſeveral titles* as here, to which Grevel and Coniſby agreed. Ibid.

(M) In what Caſes for *a Collateral Reſpect.*

* Againſt one and the ſame perſon. Br. Enterpleder, pl. 5. cites 9 H. 6. 17.

[1. IF *two bring* * *ſeveral detinues*, they ſhall not enterplead, if their *writs be not returnable at one and the ſame day.* 9 H. 6. 18. Curia.]

[2. If two bring ſeveral detinues, and the defendant prays that they may enterplead, *they may enterplead if they are preſent in proper perſon.* 17 E. 3. 70. b.]

[3. *But not if* they or *any of them are not* preſent in proper perſon. 17 E. 3. 70. b.]

[4. *But* a *writ ſhall iſſue to warn them to come in proper perſon* at a day. 17 E. 3. 70. b.]

Fitzh. Enterpleder, pl. 16. cites Hill. 30 E. 3. 5.—if *two bring ſeveral writs of ward againſt one and the ſame defendant*, there *upon the matter ſhewn in form* by the defendant, there the plaintiffs ſhall enterplead the one with the other. Br. Enterpleder, pl. 27. cites 24 E. 3.

[5. If *ſeveral perſons bring ſeveral writs of right of ward, returnable at the ſame day*, and the defendant pleads, &c. and prays that they may enterplead, yet they ſhall not enterplead without ſuing a *ſcire facias againſt them, to whom the plea is not pleaded, to be in court at a certain day.* 30 E. 3. 4. b. adjudged.]

6. If *ſeveral writs* of detinue [are brought], and the *one declares of bailment in the county of M.* and the *other in the county of D.* there they ſhall not be compelled to enterplead, but the *defendant ſhall anſwer to both*; for it is in ſeveral counties, and was of a box of charters. Br. Enterpleder, pl. 14. cites 14 H. 6. 2.

7. If *two bring ſeveral actions of detinue of a box ſealed with certain charters, the one of bailment in one county*, and the *other of bailment in another county*, yet if the defendant prays it they ſhall enterplead as well as if both actions were in one and the ſame county; for the *bailment is not material, but the detinue.* Br. Enterpleder, pl. 19. cites 5 E. 4. 25.

(N) In what Caſes

Privity upon Actions.

[1. IF two bring *ſeveral detinues* of charters, and the *one counts of a bailment to re-deliver*, and *the other* demands them *by title to the land*, they ſhall not enterplead, becauſe there is not any privity of bailment between them, and the defendant is not chargeable to him who makes title to the land but for the land, but to the other for the bailment, and *if he re-delivers to his bailor*, he

he is not chargeable to the other, and ſo he is at no miſchief. * 19 H. 6. 3. contra † H. 6. 17.]

* Br. Enterpleder, pl. 11. cites 19 H. 6. 3. 19.

S. C.——Fitzh. Enterpleder, pl. 7. cites S. C.——Br. Traverſe per, &c. pl. 68. cites 19 H. 6. 3. 19.

† Br. Enterpleder, pl. 5. cites S. C.——Fitzh. Enterpleder, pl. 5. cites S. C.

[2. In a detinue *one* plaintiff *demands a bag of charters*, and *another* plaintiff *demands certain charters in the bag*, as belonging to him, *againſt an executor*, becauſe they were in his hands, *but not upon any bailment*, quære whether they ſhall enterplead. 3 H. 6. 36.] [432]

[3. If *one* brings detinue againſt B. and *counts upon a delivery to re-deliver* to him, and *another brings detinue againſt him alſo, and counts ſo alſo*, and if here be not any privity of bailment between them, yet *they ſhall enterplead to avoid the double charge of the defendant, and* alſo *becauſe the Court cannot know to whom to deliver the deed if both recover.* ‖ 3 H. 6. 44. Curia, for *perhaps the defendant found it.* Dubitatur, 11 H. 6. 19. b.]

‖ Fitzh. Enterpleder. pl. 2. cites S. C.—— Br. Enterpleder, pl. 4. cites S. C. —— Ibid. pl. 11. cites 19 H. 6. 3. 4. 19.——Br. Traverſe per, &c. pl. 68. cites 19 H. 6. 3. 29.

[4. [*And*] upon ſuch ſeveral detinues, if the *defendant ſays that he found it*, and *traverſes the bailment*, they ſhall enterplead, for then he is chargeable as well to the one as to the other. § 7 H. 6. 22. ¶ 19 H. 6. 3. Curia.]

Fol. 735.

§ Br. Enterpleder, pl. 9. S. P. [without any mention of the traverſe] where the two writs were returnable the ſame day, cites S. C. ——Fitzh. Enterpleder, pl. 3. cites S. C.

¶ Br. Enterpleder, pl. 11. cites 19 H. 6. 3, 4. 19.——Fitzh. Enterpleder, pl. 7. cites S. C. ——Br. Traverſe per, &c. pl. 68. cites S. C.

[5. *So* if he *ſays* that *they delivered it jointly*, *abſque hoc* that they delivered it as they have counted. 19 H. 6. 3. b.]

Br. Enterpleder, pl. 11. cites 19 H. 6. 3, 4. 19.—Fitzh. Enterpleder, pl. 7. cites S. C.——Br. Traverſe per, &c. pl. 68. cites S.C.

[6. *But* it is *otherwiſe if he does not traverſe the bailment*, for if there was a bailment he is chargeable only to the bailor, and may plead in bar againſt the others ** 7 H. 6. 22. †† 19 H. 6.]

** Fitzh. Enterpleder, pl. 2. cites S. C.—— †† Fitzh. Enterpleder, pl. 7. cites S. C.——Br. Enterpleder, pl. 11. cites S. C.

[7. If *two detinues* are *ſeverally* brought *againſt an executor*, becauſe of his poſſeſſion, they ſhall enterplead, becauſe he is not more chargeable to one than the other. 9 H. 6. 18.]

Br. Enterpleder, pl. 5. cites 9 H. 6. 17. S. P.

[8. *So* for the ſame reaſon, if they are brought *againſt a man who found* the thing demanded, they ſhall enterplead. 9 H. 6. 18.]

Br. Enterpleder, pl. 5. cites 9 H. 6. 17. S. P.

[9. In detinue, if they *count of ſeveral bailments*, the *defendant may ſay it came to his hands as executor*, *abſque hoc* that he had it of their delivery, and then the plaintiffs ſhall interplead. 19 H. 6. 3.]

Fitzh. Enterpleder, pl. 7. cites S. C.

[10. If

* S. P. agreed per Cur. and yet there is no privity by which they ſhould enterplead. Br. Enterpleder, pl. 4. cites 3 H. 6. 43.——S. P. [without any mention of the ſeveral writs being brought at the ſame day.] Br. Enterpleder, pl. 5. cites 3 H 6. 43, 44.

† Br. Enterpleder, pl. 5. cites S. C.

‡ Fitzh. Enterpleder, pl. 7. cites S. C.

[10. If two bring *ſeveral writs of ward* againſt me *at the ſame day*, they ſhall enterplead. * 3 H. 6. 44. † 9 H. 6. 17. b. Curia. ‡ 19 H. 6. 3. b.]

[11. *But otherwiſe* if they *bring raviſhment of ward.* 9 H. 6. 18. b.]

[433]

It was agreed, Arg. that the defendant in writ of detinue ſhall not have a ſci. fa. to warn a ſtranger *without alleging privity of bailment.* Br. Garniſhe, &c. pl. 5. cites S. C. ——— Br. Enterpleder, pl. 4. S. P. cites 3 H. 6. 43.

[12. In detinue, if the plaintiff *counts of a delivery to re-deliver, the defendant ſhall not have a ſcire facias againſt any* other *but him that was privy* to the delivery. 3 H. 6. 44.]

Br. Enterpleder, pl. 10. cites S. C. and that the ſcire facias iſſued well; for non conſtat judicialiter whether the two actions are of one and the ſame writing till both have counted. ——— Fitzh. Enterpleder, pl. 4. cites S. C.

[13. If two bring ſeveral writs of detinue, and *each counts upon a delivery at ſeveral places in the ſame county to re-deliver*, if *the defendant ſays* the delivery was by the plaintiffs, *upon condition, and does not acknowledge whether the condition is performed*, they ſhall enterplead, becauſe the *defendant cannot traverſe the place* of the delivery, this being in the ſame county. 8 H. 6. 30. b. adjudged.]

‖ Br. Enterpleder, pl. 10. cites S. C.—— Fitzh. Enterpleder, pl. 4. cites S. C.

[14. But it had been *otherwiſe if* deliveries had been *in ſeveral counties*, for there the defendant might have traverſed the place. ‖ 8 H. 6. 31. § 14 H. 6. 2.]

§ Br. Enterpleder, pl. 14. cites S. C.

[15. If one brings detinue, and *counts of a delivery by himſelf and one J. S. in equal hands, upon condition*, &c. if *J. S. brings detinue alſo* againſt the ſame defendant, *and counts of a delivery by himſelf alone*, they ſhall not enterplead upon this matter. 14 H. 6. 11. b. Quære.]

16. Detinue of charters *by one who counted by title to the land as heir*, and *J. N. brought ſuch a writ againſt the defendant returnable the ſame day, and counted upon bailment made to the defendant*, and the *defendant brought the charters into court*, and ſaid that he was ready to deliver them to whom the Court ſhould award, and prayed that the parties enterplead, and the opinion of Babb. Fulthorp, and Martyn was, that they ſhould enterplead, but Paſton contra, becauſe the one counted upon bailment, and this is the folly of the defendant; and Brown Clerk ſaid, that 3 H. 6. they enterpleaded, where the one counted as heir, and the other upon bailment; for it *may be, that at the time of the bailment the defendant did not know of the title.* Br. Enterpleder, pl. 5. cites 9 H. 6. 17.

17. And

17. And there it was agreed, that *he who finds a deed, and an executor ſhall not be charged but only to him who right has; contra upon ſeveral bailments;* for there is folly in the defendant. Ibid.

18. Where a man is to bring a party into court by garniſhment, he ought to make privity of the bailment, viz. *that it was bailed by both upon condition,* &c. and pray ſcire facias againſt the other. Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

(O) At what *Time* it ſhall be. [434]

[1. IN *ſeveral writs of ward by divers againſt one man,* if they pray that they may enterplead, though *all the writs* of the plaintiffs *are returnable at one day,* and ſo *they have day all to this day,* yet *proceſs ſhall iſſue to warn them, and they ſhall not enterplead before garniſhment.* 30 E. 3. 5. b.]

2. In detinue, the *defendant prayed garniſhment,* and had it, and ſcire facias, &c. and *at the day another man brought another writ* of detinue *returnable the ſame day,* and *all appeared,* and the *defendant prayed that they might enterplead,* and per Littleton and Choke they cannot; for the *defendant is out of court* to pray it by reaſon of the prayer of the firſt garniſhment; *quære.* Br. Enterpleder, pl. 23. cites 11 E. 4. 11.

3. If A. be *found heir to B. by one office of land held of the king in capite, and C. is found heir to him likewiſe to the ſame land by another office,* and *both are within age,* there they have no remedy but to ſtay till full age, and then they ſhall enterplead. Br. Enterpleder, pl. 28. cites 1 H. 7. 14.

(P) Upon *what Writ* it ſhall be.

[1. THE enterpleader ſhall be *upon the original.* 22 E. 4. 49.]

[2. If two bring ſeveral detinues, the enterpleader ſhall be upon the original *of the eldeſt date, if the other hath not counted* upon his original.]

[3. *So* it ſhall be, *though* he that is *plaintiff in the original of lateſt date had firſt counted.* * 3 H. 6. 20. † 19 H. 6. 4. b. Curia. ‡ 39 H. 6. 37. b. || 12 H. 4. 18.]

* Br. Enterpleder, pl. 2. cites S. C. —— Fitzh. Enterpleder, pl. 1. cites S. C. —— And in ſuch caſe there is no miſchief; for he who brings the ſecond writ ſhall have every advantage which he might have had in his own proper writ in which he was plaintiff. Br. Enterpleder, pl. 26. cites 19 H. 6. 68.

† Br. Enterpleder, pl. 11. cites 19 H. 6. 3, 4. 19.

‡ Br. Enterpleder, pl. 17. cites 39 H. 6. 36. S. P.

|| Br. Enterpleder, pl. 8. cites S. C.

[4. [*But*] *if* the writs are *of one and the ſame date, he that firſt* comes and demands an anſwer, or *counts, ſhall be plaintiff,* and the enterpleader ſhall be upon his original. 19 H. 6. 4. b.] Fitzh. Detinue, pl. 14. cites S. C.

[5. *Or*

Fitzh. Detinue, pl. 14. cites S. C.

[5. *Or* otherwiſe *he* ſhall be plaintiff *whom the Court ſhall aſſign*, in ſuch caſe where the writs are of one and the ſame date. 19 H. 6. 4. b.]

6. Upon enterpleader he who has the *writ of elder date*, *firſt* counts againſt the other, and the other ſhall defend, and ſo they did. Br. Enterpleder, pl. 11. cites 19 H. 6. 3, 4. 19.

7. He who has *writ of younger date* ſhall anſwer to the other who has writ of elder date. Br. Enterpleder, pl. 17. cites 39 H. 6. 36.

[435] * All the editions of Br. are (plaintiff), but it ſhould be (defendant), and ſo is the Yearbook.

8. *Three ſeveral writs* of detinue *of charters* were *brought againſt one and the ſame man*, and were awarded to enterplead at the prayer of the * defendant upon the matter ſhewn, and the evidence tendered, and they enterpleaded *to the writ of elder date*, and ſo they enterpleaded, every one againſt the other ſeverally, and the bar of the one is his title againſt the plaintiff, and the other, and ſo *three iſſues*. Br. Enterpleder, pl. 20. cites 4 E. 4. 9.

(Q) Upon an Enterpleader, *who ſhall keep* the Thing demanded.

[1 *IN ancient time* the thing demanded ought to *remain in court*. 12 H. 4. 6.]

† Br. Garniſhe, pl 22. cites 12 H. 4. 6. S. C.

[2. *But now* the uſe is, that the *defendant ſhall keep it* till it be tried, and not the Court. † 12 H. 4. 39 H. 6. 38.]

[3. *In ſeveral rights of ward*, if the *parties* are awarded to enterplead, they *may pray that the defendant find ſureties to keep* the infant, *and to have him in court at a day*, and it ſhall be granted. 30 E. 3. 5. b.]

[4. *But* the *plaintiffs ſhall not find ſureties not to take* the ward *in the mean time*. 30 E. 3. 5. b.]

Fitzh. Garniſhe, pl. 22. cites S. C.

[5. *Pending the writ* for the thing, the *defendant cannot deliver* it *to any party without award* of the Court. 12 H. 4. 6. b. Curia.]

[6. If the *defendant prays garniſhment*, and the *garniſhee* comes and *pleads againſt the plaintiff*, the defendant cannot after deliver the writing to the plaintiff. 39 E. 3. 23.]

7. *Ward by the king againſt E.* who *ſaid that ſhe did not claim any thing but by cauſe of nurture, and that H. S. had brought ſuch a writ againſt her, and that the infant is here ready at the bar*, as he ought upon this plea, *ready to deliver to whom*, &c. and therefore day was given to a certain day to enterplead, &c. and at the day they *both appeared, and prayed that the infant might be delivered to them in common quoſque*, &c. et non allocatur; for it is not forma juris. Br. Enterpleader, pl. 12. cites 24 E. 3. 38. 65.

8. In detinue the defendant prayed garniſhment againſt D. and had it, and at the day the *garniſhee came*, and the *defendant made default*, and *neither the plaintiff nor the garniſhee could have livery before*

before they had enterpleaded, quod nota, by which the *garniſhee barred the plaintiff by his releaſe of actions.* Br. Enterpleder, pl. 13. cites 39 E. 3. 22.

(R) *Pleader by* the *Defendant after* an *Enterpleader.* [436]

[And to what Purpoſes the Defendant ſhall be ſaid to be in Court or not.]

[1. *WHEN* the *defendant hath prayed garniſhment he is out of court to plead any plea.* 12 H. 4. 6. b.] When he hath prayed garniſhment

and has proceſs againſt the garniſhee. Br. Garniſhe, &c. pl. 20. cites S. C.

[2. *But* he hath a day in court *to deliver* the writing *to whom the Court ſhall award* it. 12 H. 4. 6. b.] Br. Garniſhe, &c. pl. 20. cites S. C.

[3. The defendant *is not demandable before judgment* given, but then he is, becauſe he is to deliver the thing demanded. 12 H. 4. 7. b.]

[4. *After the garniſhee comes in, and pleads againſt the plaintiff*, the *defendant cannot ſay the conditions are broke on the part of the garniſhee, and ſo the plaintiff ought to have judgment.* 39 E. 3. 23. Curia.]

5. In detinue of an obligation, *defendant ſaid that it was delivered to him by the plaintiff and one M. to hold till certain conditions were performed, and then to deliver to the plaintiff*, and prayed ſcire facias againſt M. to enterplead, and *brought the writing into court, which was not ſealed, and ſaid that he is ready to deliver it to whom the Court ſhould award*, &c. and by the opinion of the Court, becauſe it is not ſealed, the parties cannot enterplead upon it; for it is not ſuch a deed as the plaintiff demands, and if the plaintiff ſhall grant it, he ſhall not recover other deed; quære inde; and ſo ſee that upon ſuch demand of enterpleader, the deed *ought to be brought into court*; nota. Br. Enterpleder, pl. 1. cites 2 H. 6. 16.

6. *Two perſons brought ſeveral writs* of detinue againſt the defendant *of a charter*, the *one* conveyed *as heir to the brother, and the other as heir to the ſiſter*; the defendant *ſaid, that no ſuch brother*, and ſo to iſſue. Br. Enterpleder, pl. 2. cites 3 H. 6. 20.

7. In detinue of an obligation the *defendant prayed garniſhment, and ſhewed the writing*; the *plaintiff ſaid that the writing which the defendant ſhewed is only an eſcrowe without ſeal, and not the obligation which he demanded*, and the *defendant ſaid that it is the ſame obligation which was bailed to him.* And per Marten, if the garniſhment ſhall be granted upon eſcrowe, the plaintiff by this accepts it to be the deed which he demands, quære; for the *defendant here confeſſed the detinue of the obligation implicative.* Br. Garniſhe, pl. 40. cites 2 H. 6. 16.

(S) Judgment.

[1. IF an *enterpleader* be *prayed by the defendant between the plaintiff and T. S. upon the count of the plaintiff, which ſuppoſes it to be delivered to him or T. S. upon condition*, and the *plaintiff and T. S. appear* at the return, and the *defendant makes default*, yet they ſhall enterplead, and the *plaintiff ſhall not have judgment*. 39 E. 3. 22. b. becauſe the plaintiff himſelf hath ſuppoſed it to be upon condition.]

[2. If *two bring ſeveral detinues for one thing*, and the *defendant prays that they enterplead, and delivers the thing to the Court*, and *before the award of the enterpleader one diſcontinues his ſuit*, the other ſhall not have judgment to recover, becauſe they were not awarded to enterplead. 11 H. 6. 19. b.]

[3. But *otherways* it had been *if he had diſcontinued* his ſuit *after the enterpleader awarded*. 11 H. 6. 19. b.]

[4. If a *recovery* be *had upon an enterpleader, judgment ſhall be* given *to recover the thing* demanded *againſt the defendant*, and *not againſt the garniſhee*. * 3 H. 6. 18. † 7 H. 6. 45. 30 E. 3. 6. b. adjudged.]

* Fitzh. Judgment, pl. 1. cites S. C.——† Br. Garniſhe, &c. pl. 28. cites S. C.——S. P. Br. Detinue, pl. 47. cites 1 E. 5. 3.——Br. Charters de Terre, pl. 5. cites 9 H. 6. 36.——Br. Garniſhe, &c. pl. 7. cites S. C.——So upon judgment given for the plaintiff upon a *demurrer* in law. Br. Garniſhe, &c. pl. 10. cites 27 H. 6. 2.

[5. *So* the *garniſhee* ſhall recover it *againſt the defendant*. 3 H. 6. 40. b.]

[S. 2] [Damages.]

In detinue of writings after that the garniſhee has pleaded, if the plaintiff recovers the judgment of the writings it ſhall be againſt the defendant, and of the damages againſt the garniſhee. Br. Detinue, pl. 9. cites 33 H. 6. 27.

[6. If the *defendant prays garniſhment to know whether the conditions are performed*, and the *garniſhee comes and ſays nothing*, yet the plaintiff ſhall not recover any damages againſt the defendant, becauſe he *was not bound to deliver it till very notice of the performance* of the condition. 9 H. 6. 39. b.]

Fol. 737.

In detinue *of two writings*, where the *defendant prayed garniſhment*, and the ſcire facias ſerved againſt the *garniſhee*, and he *made default*, there the *plaintiff recovered againſt the defendant*, but no damages. Br. Detinue de biens, pl. 25. cites 21 H. 6. 35.——S. P. and per Aſcue, where the *garniſhee appears* and the *plaintiff makes default*, the garniſhee ſhall recover againſt the plaintiff his damages, ad quod non fuit reſponſum. Br. Damages, pl. 73. cites 21 H. 6. 35, 36.——If he comes and ſays nothing the plaintiff ſhall recover the writing detained, but without damages. Br. Damages, pl. 90. cites 36 H. 6. 26.

[7. If the *garniſhee comes the firſt day*, and *cannot deny the conditions to be broke, or makes default*, the plaintiff ſhall not recover any damage againſt him, becauſe he hath *not delayed him*, which is the cauſe that damages are given againſt a garniſhee. 8 H. 6. 11.]

[8. If

[8. If *two bring detinue* * againſt another, and *they enterplead*, he that *recovers* ſhall recover *damages againſt the other*. 8 H. 6. 5. 9 H. 6. 18.]

* By ſeveral writs. Br. Damages, pl. 10. cites 9 H. 6. 18.

——Br. Damages, pl. 68. cites 8 H. 6. 4, 5. S. P. accordingly, becauſe each is actor againſt the other; per Strange.

[9. If the *garniſhee pleads with the plaintiff*, and it is *found againſt him by verdict*, the plaintiff ſhall recover damages againſt him. 49 E. 3. 13. b. 7 H. 6. 45. b. 8 H. 6. 5. 10 H. 6. 8. b. † 20 H. 6. 29. b.]

† Fitzh. Garniſhee, pl. 9. cites S. C.—— S. P. Br. Garniſhee, pl. 47. cites 1 E. 5. 3.——Judgment ſhall be of the thing detained againſt the defendant, and of the damages againſt the garniſhee. Br. Detinue de Biens, pl. 47. cites 1 E. 5. 3.——Br. Charters de Terre, pl. 5. cites 9 H. 6. 36.——Br. Garniſhe, &c. pl. 7. cites S. C.——S. P. but the body of the garniſhee ſhall not be put in execution becauſe he was not party to the firſt writ, quod nota, but it ſhall be of goods or chattels or land. Ibid. pl. 28. cites 7 H. 6. 45.——Br. Executions, pl. 49. cites S. C.

[10. The *ſame law if* he plead with the plaintiff, and it be *adjudged againſt him by the Court*. 49 E. 3. [13.] 3. b. ‡ 3 H. 6. 18.]

‡ Fitzh. Judgment, pl. 1. cites S. C.—— Plaintiff *demurred* in law *to the plea of the garniſhee, and adjudged for him*, and judgment was given of damages againſt the garniſhee. Br. Garniſhe, &c. pl. 10. cites 27 H. 6. 2. and cites 49 E. 3. to the contrary, becauſe it is upon demurrer, which is the default of the Court; for there is no other delay in the garniſhee, but in default of the Court by their not giving judgment immediately.

[11. *So* if it be adjudged againſt him *upon default*. ‖ 8 H. 6. 5. *But* the garniſhee, if it paſs with him, *ſhall not recover* damages *againſt the defendant*. Contra, 3 H. 6. 40. b.]

Br. Garniſhe, &c. pl. 10. cites 49 E. 3. 4. that the garniſhee was warned and made default, and the plaintiff recovered the writings, but no damages againſt the garniſhee, nor againſt the defendant.

‖ Br. Damages, pl. 68. cites S. C. for by the interpleader of the garniſhee the defendant is wholly excuſed of damages, and the garniſhee has taken matter on himſelf.

[12. [*But*] *if* the inqueſt paſs *for the garniſhee, he ſhall recover* damages *againſt the plaintiff*. § 8 H. 6. 5. 13 H. 4. Damage, F. 131. 9 H. 6. 39. ¶ 20 H. 6. 29. b.]

§ Br. Damages, pl. 68. cites S. C.—— Fitzh. Damages, pl. 21. cites S. C.

¶ Fitzh. Garniſhe, pl. 9. cites S. C.——S. P. Br. Detinue de Biens, pl. 47. cites 1 E. 5. 3.——Br. Garniſhee, pl. 7. cites S. C.

[13. *So* if *two bring detinue againſt another*, and upon his prayer *they enterplead*, if the *inqueſt paſs for him who enterpleads upon the original of the other*, he ſhall recover damages againſt the other. ** 8 H. 6. 5.]

** Br. Damages, pl. 68. cites S. C.—— Fitzh. Damage, pl. 21. cites S. C. S. P. and not againſt the defendant ——Br. Enterpleader, pl. 5. ſays quod nota, and cites 9 H. 6. 17.——See pl. 8. S. C. & S. P.

[14. The *recovery againſt the garniſhee is for the delay* after the writ purchaſed. 8 H. 6. 11.]

Br. Damages, pl. 68. cites 8 H. 6. 5. of which 8 H. 6. 11. is a continuation.——Fitzh. Damage, pl. 21. cites 8 H. 6. 4. which is the commencement of this caſe cited here.

S. P. *and where the garniſhees had aſſiſe againſt the plaintiff of theſe charters now in demand and recovered by default*, yet the plaintiff ſhall not recover his *damages* in this action of detinue to the value of the land; per tot. Cur. Br. Charters de Terre, pl. 18. cites S. C.

15. Detinue *of a box of charters againſt P.* who came and *ſaid that the box was delivered to him by the plaintiff and two others*, and prayed ſcire facias againſt them, and had it, who *came and made title to the land and prayed livery*, and the *plaintiff ſhewed feoffment made to one que * eſtate he has*, and prayed livery, and it was long in doubt whoſe deeds were in the box, and to whom they belonged, and at laſt Thirn. *opened the box and delivered to every one the evidences which to him belonged*; quod nota; and the plaintiff recovered damages againſt him who came by ſcire facias, &c. Br. Garniſhe, pl. 18. cites 7 H. 4. 7.

† S. P. Br. Detinue de biens, pl. 9. cites 27 H. 6. 2.—— Br. Garniſhe, pl. 10. cites S. C.

16. In detinue the *defendant ſaid the writing was delivered to him by the plaintiff and one R. upon certain conditions to be performed to deliver to the plaintiff, and if not to deliver it to the ſaid R.* and prayed garniſhment againſt R. to know if the conditions were performed, &c. and there it was agreed that the † *judgment of the writing* upon the enterpleader between the plaintiff and the garniſhee *ſhall be againſt the defendant*, for he has the poſſeſſion thereof, *and of the damages it ſhall be againſt the garniſhee*, quod nota. Br. Detinue de Biens, pl. 3. cites 3 H. 6. 18.

17. *And* it is ſaid elſewhere, that the proceſs of the execution thereof is *diſtringas againſt the defendant* to deliver the writing, and *fieri facias againſt the garniſhee* of the damages. Ibid.

18. If a man brings ſeveral writs of detinue againſt three, and they enterplead, he for whom the jury paſſes ſhall have damages againſt the other; for *every one is actor againſt the other*. Br. Damages, pl. 68. cites 8 H. 6. 4, 5.

19. Where the *plaintiff recovers*, the *judgment ſhall be of the charters demanded, and if they are burnt, there he ſhall recover all in damages*. Br. Detinue de Biens, pl. 27. cites 21 H. 6. 35.

20. Note, That the *entry is that he recover the writings againſt the defendant*, and that he have delivery againſt the garniſhee. Br. Detinue de Biens, pl. 25. cites 21 H. 6. 35.

S. P. Br. Damages, pl. 67. cites 7 H. 6. 4. —S. P. and if it be found for the garniſhee, he ſhall recover damages againſt the plaintiff, quod nota. Br. Damages, pl. 140. cites 1 E. 3. 3, 4.——S. P. Br. Damages, pl. 68. cites 8 H. 6. 4, 5.

21. The *judgment of the writings ſhall be againſt the defendant*, and *of the damages againſt the garniſhee if he pleads*; quod nota. And there it was *upon demurrer*, and the plaintiff recovered damages againſt the garniſhee. Br. Damages, pl. 11. cites 27 H. 6. 2.

22. *And* the ſame year, fol. 4. the *garniſhee was returned warned*, and *made default*, and therefore the plaintiff recovered, and no damages againſt the garniſhee, nor againſt the defendant; for there he is not delayed by the garniſhee. Br. Damages, pl. 11. cites 27 H. 6. 2.

23. *And* in the ſame caſe above it was ſaid, that where the *judgment* is upon demurrer *upon the plea of the garniſhee*, the plaintiff ſhall recover no damages; for there the delay is in defectu Curiæ. Br. Damages, pl. 11. cites 27 H. 6. 2.

24. In

24. In detinue, the defendant prayed garniſhment, and had it, and the *ſcire facias returned* the *garniſhee did not come*, by which the plaintiff *recovered the thing demanded, and no damages* againſt the defendant, nor againſt the garniſhee. Brooke ſays, it ſeems that the defendant appeared at the firſt day. Br. Damages, pl. 191. cites 27 H. 6. 4.

(T) [How, pl. 2. And] *How much* Damage. [pl. 1.] [440]

[1. IF the plaintiff *counts* but *to the damage of* 20 *l.* yet *more* damage *may be given* to him *againſt the garniſhee*, for he does not declare this againſt the garniſhee. 8 H. 6. 5.] Br. Damages, pl. 68. cites S. C. accordingly by Martin and Strange, and ſays that at another day Paſton and Strange held that he ſhall recover according to the diſcretion of the juſtices. Quære. ——Fitzh. Damage, pl. 21. cites 8 H. 6. 4. S. C.

[2. In *ſeveral writs of ward* brought *by two*, if the *defendant prays that they enterplead*, and after *the plaintiffs agree, and pray that it be delivered to them in common*, yet the Court ſhall not ſuffer it. 24 E. 3. 24. b.] Fitzh. Enterpleader, pl. 17. cites S. C.

(U) When the Recovery is had, what *Remedy* there ſhall be *againſt him that has the Thing*.

[1. A *Scire facias* ſhall be awarded againſt the defendant who has the cuſtody of the thing demanded. 39 H. 6. 38.]

[2. A *diſtreſs* ſhall iſſue againſt him to deliver the thing. 40 E. 3. 39.] Fitzh. Garniſhe, pl. 29. cites S. C. ——Br. Charters de Terre, pl. 5. S. P. cites 9 H. 6. 36. ——Br. Garniſhe, &c. pl. 7. cites S. C. ——Ibid. pl. 13. S. P. cites 40 E. 3. 29. but it ſhould be 40 E. 3. 39. as in Roll.

3. In detinue of charters the *defendant alleged livery by the plaintiff and two others, and prayed garniſhment againſt them*, and had it, and at the day *they made title to the charters, and the plaintiff made other title*, by which the Court had the box, and delivered to every man thoſe which to him belonged. Br. Enterpleader, pl. 25. cites 7 H. 4. 3.

4. Where the *plaintiff recovers*, the *judgment ſhall be of the chattels demanded*, and *diſtreſs ſhall iſſue againſt the defendant to deliver the chattels*. Br. Detinue de Biens, pl. 25. cites 21 H. 6. 35.

5. A man ſhall not have *ſcire facias* in detinue of charters *to warn a ſtranger*, unleſs he acknowledges the poſſeſſion of the charters, and makes privity of bailment; per Marten; and by him the Court may *open the bag to ſee what belongs to him, and what to the other, in the abſence of the one party*, which Cokain and Babb. expreſsly denied, and ſaid that they cannot judge to whom they belong by ſeeing them, and that ſcire facias lies againſt a ſtranger; quære inde. Br. Charters, pl. 2. cites 3 H. 6. 35. Br. Scire Facias, pl. 4. cites S. C

6. The granting of *ſcire facias upon garniſhment in detinue againſt the heir of J. N. and againſt the ordinary, upon a ſurmiſe that he is dead without executors*, is not error; per Brian. Br. Error, pl. 195. cites 14 E. 4. 1.

For more of Enterpleader in general, ſee other proper titles.

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[441]

Entry.

(A) *Congeable.*

In what Caſes. [And how.]

[1. IF the *conuſee of a ſtatute ſues an extent*, by which *the lands* of the conuſor *are ſeiſed* into the hands of the king, and after a *liberate is ſued*, the conuſee *may after enter* into the land *before the liberate executed*, for this liberate is a ſufficient warrant for his entry. Dubitatur, P. 38 Eliz. B. R. between * BUTLER AND WALLIS. Intratur, 37 El. Rot. 206. M. 40, 41 Eliz. B. R. (†) between SIR THOMAS GERRARD AND CANDISH, per Curiam, where the entry was not good, becauſe the liberate was void, being made to the ſheriff to deliver the land to himſelf.]

* Cro. E. 463. (bis) pl. 15. S.C. per 3 juſtices, but Gawdy e contra.

† Fol. 738.

[2. If the *king ſeizes* certain lands, upon which an *ouſter le mayn is ſued* to the eſcheator *to deliver this land to the party again*, he may after *enter* into the land *before any execution of the writ.* P. 38 El. B. R. agreed, becauſe there is a *judgment given before that* the *hands of the king ſhall be removed.*]

Cro. E. 463. (bis) pl. 15. S. P. per Curiam, in the caſe of Butler v Wallis.

[3. Upon an *elegit*, if the *ſheriff takes an inquiſition*, though the ſheriff does not deliver the land to the party plaintiff, yet the *plaintiff may enter preſently* after the inquiſition taken, *before the return thereof* to the Court, *without any liberate* to him directed. Hill. 8 Car. B. R. between LISTER AND BROMLY, per Curiam. Intratur, M. 8 Car. Rot. 68. where an action on the caſe was brought againſt the ſheriff, for returning that he had delivered the land to the plaintiff upon the inquiſition taken, where he refuſed

to

to deliver it, and ſo the return falſe, though it was objected he might have entered; but the Court ſaid, this was only in mitigation of damages, and his return falſe, and therefore an action upon the caſe lay againſt him.]

4. In aſſiſe, the *lord diſtrained* for rent, *pending aſſiſe of the ſame rent*; the aſſiſe ſhall abate; quod nota; for *diſtreſs* is in law an entry into the rent, as it ſeems. Br. Aſſiſe, pl. 302. cites 29 Aſſ. 52.

5. In aſſiſe, *tenant in tail is bound in a recognizance*, and the *land is delivered in execution by elegit*, as the moiety of the land which the recogniſor had, and the tenant in tail died; the iſſue in tail may well enter; quod nota, by judgment. Br. Entre Cong. pl. 77. cites 38 Aſſ. 5.

6. In aſſiſe, *tenant in tail after poſſibility* of iſſue extinct *aliens with warranty*, he in remainder, or in reverſion, may enter notwithſtanding the favour of the warranty; quod nota. Br. Entre Cong. pl. 84. cites 43 Aſſ. 24.

7. If the *tenant in ſpecial tail has iſſue and aliens*, the iſſue cannot enter; for he cannot be heir in the life of his father. Br. Taile & Dones, pl. 31. cites 45 E. 3. 25.

8. Where a *feoffment* is made *upon condition*, which *feoffee dies ſeiſed*, ſo that there are *divers deſcents*, there if the *condition be broken before the deſcents*, or after, the feoffor or his heir may enter notwithſtanding the deſcents, for the land is bound by the conditions, as it is where a man recovers land, and does not enter till after deſcent. Br. Entre Cong. pl. 130. cites Littleton, fol. 94. [442]

9. Where a *man willed that his executors ſhould ſell*, and died, and the *heir entered and was diſſeiſed*, the executors may ſell, and therefore the *vendee may enter*, for he has title of entry only. Br. Entre Cong. pl. 138.

10. If a man *enters with force upon his diſſeiſor*, by which he is reſtored, yet the diſſeiſee [who was the firſt diſſeiſor] may enter, or have aſſiſe. Br. Entre Cong. pl. 110. cites 22 H. 6. 18.

11. *Tenant dies without heir*, by which *the lord entered by eſcheat*, there he who by *right has paramount* may enter; for a diſcent takes away an entry, but eſcheat does not take away an entry. Br. Entre Cong. pl. 112. cites 37 H. 6. 1.

12. If *diſſeiſor*, *intruder*, or *abator enfeoffs his father*, *and dies ſeiſed*, and the land deſcends to the offender, the party may enter. Br. Entre Cong. pl. 119. cites 5 H. 7. 6.

13. *So* if ſuch offender *enfeoffs a ſtranger who dies ſeiſed*, and *his heir enters and enfeoffs the offender*, the firſt diſſeiſee may enter; but againſt *ſtrangers* the deſcent ſhall hold place; per Keble, which was not denied. Br. Entre Cong. pl. 119. cites 5 H. 7. 6.

14. If *J. enfeoffs N.* and after it is *enacted that all eſtates made by J. to N. ſhall be void*; there J. may enter upon N. Br. Entre Cong. pl. 89. cites 5 H. 7. 31.

15. A man may enter after the year, or within the year, by *fine executory*. But ſee Fitzh. Entre Congeable in Fitzh. 51. that after deſcent after ſuch fine he cannot enter, but ſhall have *ſcire facias*

againſt the tertenant. Br. Entre Congeable, pl. 108. cites 15 H. 7. 5. and ſays, this appears by the argument there.

16. Leſſee for years, remainder for life, *remainder in tail to leſſee for years. Leſſee for years made a feoffment in fee with warranty*, and died. Remainder-man for life died. Reſolved, that the entry of the iſſue in tail is lawful, notwithſtanding that the *diſſeiſin was done to another eſtate* than that which was to be bound by the warranty. Le. 39. pl. 105. Paſch. 26 Eliz. C. B. King v. Cotton.

17. *What may be reduced by a real action may be reduced by an entry*, as in one acre in the name of more, and this was obſerved by the Court for an infallible rule. Noy, 108. Trin. 2 Jac. C. B. Nichol's caſe.

18. Where one has *judgment* to recover (if his entry be lawful), he may enter without *ſcire facias*, and without ſuing execution; per Cur. D. 379. b. pl. 26. Marg. cites Mich. 3 Jac. B. R.

29. If *tenant for life levy a fine*, remainder in tail may enter now, or have five years after the death of tenant for life, for they are two ſeveral titles, one by forfeiture, and the other by determination of the eſtate, and for this to have two ſeveral five years, for if he compels the remainder-man to enter preſently, he ſhall be *bound by all the charges of tenant for life.* Arg. Litt. Rep. 217. Mich. 4 Car. C. B. Thomas v. Kenns.

30. After *recovery in ejectment* one may enter *without the ſheriff*, for the aſſiſtance is only to preſerve the peace. Per Cur. 2 Sid. 156. Paſch. 1659. in a nota.

[443]

(A. 2) By whom it may be.

1. IF the *tenant in præcipe quod reddat aliens pending the writ*, and the *demandant recovers* by judgment, and the *tenant brings a writ of error* as he may well, and *recovers*, the *alienee may enter*, Br. Entre Cong. pl. 51. cites 12 Aſſ. 41.

2. If my *tenant for life* be *diſſeiſed* and *will not enter*, yet I cannot enter. Per Finch, for clear law. Br. Entre Cong. pl. 120. cites 40 E. 3. 5.

3. A man of *non ſane memoriæ made* a deed of *feoffment and letter of attorney* to deliver ſeiſin of the land in chivalry, and died, the friend of the heir within age entered; there the lord may enter for the ward, for the *feoffment is void; contrary if he himſelf had made the livery*, as it ſeems; and it ſeems here that none can enter but the *privies*, for the lord pleaded entry of the friend of the heir, and not by himſelf immediately. Br. Entre Cong. pl. 106. cites 7 H. 4. 12.

4. If *leſſee for life of a diſſeiſor makes feoffment*, and the *diſſeiſee releaſes to the feoffee, the entry* of the diſſeiſor for the forfeiture is not congeable; per Littleton. Cited D. 339. a. pl. 44. in caſe of Blackaller v. Martine.

5. *Tenant for life*, the *remainder for life, the remainder in tail*, the *remainder to the remainder for life, tenant for life, and he in remainder*

mainder for life joined in a feoffment by deed; per Curiam he in remainder in tail may enter for forfeiture of both their eſtates; for he in remainder joining, is particeps criminis. If the tenant for life himſelf had made a feoffment, he in remainder for life might not enter, becauſe he had not eſtate of inheritance. D. 239. a. pl. 44. Mich. 16 & 17 Eliz. Blackaller v. Martine.

6. Leaſe to three for 80 years, and in the end of the ſaid leaſe was a clauſe, that *if they died within the ſaid term, that then the leſſor might enter.* A grantee of the reverſion makes a *new leaſe* thereof to B. for 21 years to *begin after the expiration*, determination, or ſurrender of the former leaſe. The three leſſees died within the term. B. cannot enter before A. has entered, for it is in the election of A. if he will take advantage of the condition and defeat the leaſe, but that ought to be by entry, and none can make ſuch entry but leſſor himſelf, or by his expreſs directions. 3 Le. 269. pl. 363. Paſch. 33 Eliz. C. B. Anon.

(A. 3) Barred. By what Act.

1. IN aſſiſe, it was held and adjudged, that where one abated upon another, and the *abator or diſſeiſor made a feoffment* or leaſe for life, and ſo over, ſo that one is in by defeaſible title, and hath cauſe of warranty by reverſion or ſuch like, that in this caſe *he upon whom* the abatement or diſſeiſin was made *cannot enter upon him, who has warranty againſt other perſons*, notwithſtanding that there be not any deſcent to take away the entry, but only the loſs of the warranty. Br. Entre Cong. pl. 48. cites 1 Aſſ. 13. and 11 E. 2. accordingly. Contrary at this day. [444]

2. He who *diſtrains* for rent, and has clauſe of re-entry in his leaſe for non-payment, cannot re-enter; quod nota, by reaſon that he has diſtrained. Br. Entre Cong. pl. 53. cites 14 Aſſ. 11.

3. In aſſiſe, the tenant *pleaded in bar that he was bound in a ſtatute merchant in 20l. to the plaintiff who ſued execution*, and had this land in execution, and after granted to the defendant by indenture, that if he paid the 20l. at a certain day he may enter, and that he paid and entered, and a good bar. Br. Aſſiſe, pl. 227. cites 20 Aſſ. 7.

4. If the *diſſeiſee releaſe all actions perſonal*, yet he may enter; quod nota. Br. Entre Cong. pl. 54. cites 17 Aſſ. 25. *So of releaſe of all actions.* Br. Entre Cong. pl. 109. cites 19 H. 6. 4. *For* the right, nor the entry, is not releaſed by theſe words, all actions.

5. In aſſiſe an *infant* may enter notwithſtanding *collateral warranty* be deſcended upon him, *where his entry was lawful before*; per Shard, Stanton and Birton; and hence it ſeems, that the contrary is law, if his entry was not lawful before. Br. Entre Cong. pl. 65. cites 28 Aſſ. 28. S. P. Br. Entre Cong. pl. 102. cites 18 E. 4. 13. *And* he may enter within age, or at full age, at his pleaſure, to defeat the warranty. ——— *But* it ſeems that *if a deſcent be* had *meſne between the full age and the entry*, he cannot enter. Br. Entre Cong. pl. 102. cites 18 E. 4. 13. ——— *Contrary upon a recovery or* an *eſtate conditional.* Br. Ibid.

6. In aſſiſe, *tenant for life is diſſeiſed*, he in *reverſion may enter*; per Perſey, which was denied by Fincheden; quod nota bene inde. Br. Entre Cong. pl. 11. cites 45 E. 3. 21.

7. In writ of entry in the per & cui, if the *tenant vouches him in the per*, he *may enter into the warranty and plead to the writ by falſifying the entry*, quod tota Curia conceſſit. Br. Enter en le per, pl. 21. cites 22 H. 6. 13.

(A. 4) Revived.

1. *DISSEISOR is diſſeiſed*, and *ſecond diſſeiſor levies a fine*, and the year and day paſs *without claim of firſt diſſeiſee*, but *ſecond diſſeiſee makes claim* within the time, now the firſt diſſeiſee is bound as to the entry upon the laſt tenant in poſſeſſion; but if *ſecond diſſeiſee enters*, as he may by reaſon of his claim, now the firſt diſſeiſee ſhall enter upon him; Arg. Mo. 346. cites 6 E. 2. Fitzh. tit. Continual Claim.

Admitted Arg. Mo. 349.

2. *Tenant makes feoffment pending the writ*, and the *demandant recovers*, the feoffee is bound as to the demand; but if the firſt tenant reduce the poſſeſſion by *reverſing the recovery for error*, the feoffee upon the ſame tenant ſhall re-enter; Arg. Mo. 347. cites 21 E. 3. and 12 Aſſ. pla. ultimo.

3. In aſſiſe it was found by verdict, that *tenant in tail aliened in fee*; the *alienee died ſeiſed, and three heirs after him*, and the *iſſue of the third heir had the deed of tail in his hand*, and being in his bed dying, ſent for the iſſue in tail, and ſaid to him, that he had right to have the tenements compriſed in the deed by force of the tail, and delivered him the deed, and *ſurrendered the land* to him [445] *by parol, and after died in the houſe of the ſame tenements*, and the iſſue in tail entered by this render by the tail, and the heir of him who ſurrendered ouſted him, and he him re-ouſted, and the heir of him who ſurrendered brought aſſiſe, *and the ſurrender was awarded good*, and the entry of the iſſue in tail good, and the plaintiff barred of the aſſiſe. Br. Entre Cong. pl. 70. cites 34 Aſſ. 2.

4. If land be *given to A. and to B. and C. his feme, and to the heirs of the body of the baron and feme*, and after the *donor releaſes to A. and to B. and C. and their heirs*, and the *baron and feme have iſſue*, and the *baron dies*, and *A. aliens the moiety in fee*, * C. may enter by reaſon of the tail for the alienation to her diſinheritance; but if the iſſue dies after without iſſue, then the alienee of A. may re-enter; for the *alienation of A. was good before to ſever the jointure for term of life, and to give his part of the fee-ſimple*, and therefore when the tail is extinct the fee-ſimple ſhall take place. Br. Entre Cong. pl. 136. cites 45 Aſſ. 7.

* Ibid. pl. 87. cites S. C.

5. If an infant *be a diſſeiſor, and another* man *diſſeiſe him and dies ſeiſed*, and *his heir* is *in by deſcent*, the entry of the firſt deſſeiſee is taken away; *but if the infant enters* or recovers, the firſt diſſeiſee may enter; and ſo ſee that the entry of one ſhall give advantage to a ſtranger. Br. Entre Cong. pl. 38. cites 4 H. 6. 7. 3.

6. A *diſſeiſor made a gift in tail, remainder over in fee*, if the *donee dies* and *his heir is in by deſcent*, the entry of the diſſeiſee is taken away; *but if the iſſue dies without iſſue*, and he in *remainder enters*, the entry of the diſſeiſee is revived, for *he is in as purchaſor*. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

7. *But if a deſcent be had from the diſſeiſor to his heir*, by which the entry of the diſſeiſee is taken away, and after the *iſſue dies without heir*, ſo that the *lord enters by eſcheat*, yet the entry of the diſſeiſee is not revived, for he affirmed the firſt eſtate. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

8. *But if the diſſeiſor himſelf dies without heir, and the lord enters by eſcheat*, the diſſeiſee may enter, for *there was no deſcent*. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

9. *And* if a *feme* be a *diſſeiſoreſs*, and *dies ſeiſed*, and *her baron is tenant by curteſy*, the diſſeiſee may enter upon him. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

10. *But if* the *tenant by the curteſy dies, and the heir of the feme enters*, the entry of the diſſeiſee is not lawful upon him; which was agreed by all the Court, quod mirum! for per Littleton, in this laſt caſe, the *deſcent* is *only of a reverſion*, which *does not take away an entry*. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

11. If a *diſſeiſor* be, and he *aliens*, and *alienee dies ſeiſed*, and *his heir enters*, the entry of the diſſeiſee is tolled; but if the *diſſeiſor be heir to the alienee*, then he may enter becauſe he was party to the wrong; per Moyle for law, which was not denied. Br. Entre Cong. pl. 3. cites 33 H. 6. 5.

12. *Tenant in tail makes feoffment with warranty*, and dies; the iſſue recovers by *formedon* becauſe *no aſſets* deſcended; yet *if aſſets deſcend afterwards* the tenant ſhall have ſci. fa. to re-have the land. Arg. Mo. 347. cites Pl. C. 110. [a. Mich. 2 M. 1.] Fulmerſton v. Steward.

(A. 5) Scire Facias. In what Caſes Entry is not lawful without a Scire Facias. [446]

1. IT is agreed in treſpaſs that where a man *recovers land and makes a feoffment*, and after the *judgment is reverſed by error*, the party cannot enter before he has had a *ſcire facias againſt the feoffee*, for he was not a party to the reverſal. Br. Entre Cong. pl. 132. cites 4 H. 7. 10, 11.

2. *But* where *attainder* of treaſon or ſuch like is *reverſed by parliament*, the party *may enter* without a ſcire facias *againſt the patentee*, and *otherwiſe upon the king*. Br. Entre Cong. pl. 132. cites 4 H. 7. 10, 11.

(B) Where an Entry *into Part* ſhall be an Entry *for the Whole.*

4 Le. 14. pl. 50. Hill. 31 & 32 Eliz. C. B. Anon. S. P. ——4 Le. 3. pl. 35.

[1. IF a *diſſeiſor leaſes ſeveral parcels* of land *to ſeveral men for years*, and after the *diſſeiſee enters upon one in the name of all*, this is a good entry for the whole, becauſe *there is but one tenant* to the præcipe, who is the diſſeiſor, who is only tenant *of the freehold.* P. 6 Ja. B. between DAMPORT AND HONOUR.]

Hill. 27 Eliz. Holland v. Hopkins, S. P. but ſays quære if the leſſees of diſſeiſor had been tenants for life; becauſe he might have his action againſt them. ——Co. Litt. 252. b. S. P. and ſame diverſity, and in the caſe of leaſes for years the diſſeiſee might have one aſſiſe againſt the diſſeiſor, becauſe he remained tenant of the freehold for all the acres, and therefore one entry ſhall ſerve for the whole.——But entry into the franktenement of one perſon is not an entry into the franktenement of another perſon. And. 28. in pl. 64. Mich. 14 & 15 Eliz. ——Same diverſity as above as to leſſees for years and leſſees for life. D. 337. b. Marg. pl. 37. cites Mich. 42 & 43 Eliz. B. R. Goodman v. Gerners, and Dalton v. Brown.——As to leſſees for years, the entry upon one in the name of all lands in the ſame county was held good by Jones, Doderidge and Crew, becauſe the freehold is in one only and within the ſame county. D. 337. Marg. pl. 37. cites Hill. 22 Jac. and Paſch. 1 Car. B. R. Argoll v. Cheyney.——Palm. 402. S. C. held accordingly.——Lat. 71. S. C.

The entry in this caſe is good for no more than the acre entered into, and ſo it is though the ſeveral acres lay all in one county; for each diſſeiſor is a ſeveral tenant of the freehold, and the entry of a man to recontinue his inheritance muſt enſue his action for recovery of the ſame, and as he muſt have ſeveral actions againſt them for recovery of the land ſo his entry muſt be ſeveral. Co. Litt. 252. b.——Dal. 88. pl. 2. Anno 15 Eliz. Anon. S. P.

[2. [*But*] if a man be *diſſeiſed of two ſeveral acres by two ſeveral perſons*, and after enters into one acre in the name of both, this is not any entry into the other acre. M. 8 Ja. between CHAMPERNOON AND HALL, per Curiam.]

3. *Two purchaſed to them and to the heirs of one*, and *ceſty que vie aliened the whole*; the other may *enter into* the whole, the *one moiety for diſſeiſin* to him, *and the other for alienation* to his diſinheritance. Br. Entre Cong. pl. 52. cites 13 Aſſ. 7.

4. In aſſiſe, if my *father dies ſeiſed of one acre* of land *in D. in his own right, and of another acre* of land *there jointly ſeiſed with his* [447] *wife, who ſurvives him*, and I *enter into the acre of which my father was ſole ſeiſed in the name of all* the lands and tenements whereof my father died ſeiſed in D. this does not give any entry but in this acre, and not in the other, becauſe I have no right to enter into the other living my mother; quod nota. Br. Entre Cong. pl. 80. cites 39 Aſſ. 16.

5. If I have *title to two acres* of land *in one vill*, and my title *is taken away in the one acre*, but not in the other; if I *enter into that where my entry is tolled, claiming the other acre alſo*, and in the name of both acres, *this is not any poſſeſſion* in me but only of that acre where I have entered, *but if my entry had been congeable in the ſame acre* into which I entered *claiming the other* acre at the time of my entry, *this had been a good entry* and a good poſſeſſion of both acres to have an aſſize. Keilw. 20. b. pl. 5. Hill. 12 H. 7. Anon.

Br. Entre Cong. pl. 35. cites 22 H. 6. 10. per Paſ.

6. If a man be *diſſeiſed of two acres in ſeveral counties*, and the diſſeiſee enters *into one* acre *in the name of both* acres, yet this entry ſhall

ſhall not extend to the acre lying in another county, in which acre entry was not made. Perk. ſ. 229.

ton and Portington, S.P.

7. It is ſaid that if a man be *diſſeiſed of two acres* in one county, and he *entered into one* of the acres, *claiming the ſaid acre only*, and *maketh a deed of feoffment of both acres unto a ſtranger, and makes the livery* of ſeiſin according to the deed *in the acre in which he entered*, that both acres ſhould paſs unto the feoffee, becauſe that this claim is nothing to the purpoſe, becauſe he had right of entry before, &c. and both acres are in one county, ſo as his entry into one acre ſhall be entry into both acres, notwithſtanding the claim, &c. againſt which it may be ſaid that the acre into which the feoffor did not enter ſhall not paſs by the feoffment; for when a man is out of poſſeſſion of a thing ſeverable, he is at liberty to continue his poſſeſſion in it, in which part he will, and ſhall not be compelled for to re-continue his poſſeſſion unto all in deſpight of him. Perk. ſ. 232. cites 9 H. 7. 25.

If one *diſſeiſes me of two ſeveral acres in one county*, and I *enter into one of them generally, without ſaying in the name of both*, this ſhall reveſt only that acre wherein entry is made. Co. Litt. 252. b.

8. If *lord and villein* be, and the *villein purchaſe two acres of lands in fee lying in one county*, and poſſeſſion of them is executed to him accordingly, and the *lord* of the villein *enter into one acre, not claiming the other acre*, and afterwards makes a deed of feoffment of both acres unto a ſtranger, and makes livery of ſeiſin in the acre in which he hath entered according to the deed, yet the acre into which he did not enter ſhall not paſs by the feoffment, &c. Perk. ſ. 234.

9. An entry of a man to re-continue his inheritance or freehold *muſt enſue his action* for the recovery of the ſame; as if three men diſſeiſe me ſeverally of three ſeveral acres of land, being all in one county, if I enter into one acre in the name of all the reſt, this is only good for that acre which I entered into; for every diſſeiſor hath a ſeveral freehold, and therefore I muſt bring ſeveral actions, &c. Co. Litt. 252. b. cites Mich. 14 & 15 Eliz. Ld. Arundel's caſe.

10. So if one diſſeiſe me of three acres of lands, and after leaſes theſe three ſeveral acres to three ſeveral men for their lives, there the entry of the diſſeiſee upon one of the leſſees is not good for the reſt; but if the diſſeiſor had letten theſe three acres to three ſeveral men for years, an entry into one in the name of all the three acres would reveſt the whole. Co. Litt. 252. b.

11. If *A. diſſeiſes B. of lands in three towns*, and *levies a fine with proclamations of the lands in one town to C. in fee*, and the *diſſeiſee* within five years *enters into the lands in the other two towns only (being in the poſſeſſion of the diſſeiſor) in the name of all the lands in the three * towns*, by this the eſtate of the conuſee in the third town was not deveſted, becauſe he was in by title. Keilw. 213. a. pl. 22. Mich. 14 & 15 Eliz. Brook v. Meaſon.

And. 28. pl. 64. Croke v. Maſon. S. C. this was no entry into the lands of which the fine was levied; for the conuſee was in by title. Bendl. 207. pl. 243. S. C. adjudged, and for the ſame reaſon.

* [448]

12. A *copyholder ſurrendered to the uſe of his will, and* thereby *deviſed the land to his wife for life*, the *remainder over to his ſon in tail, and died*, the *wife entered and died*, a *ſtranger did intrude upon the lands*,

lands, and thereof *made three ſeveral feoffments to three ſeveral perſons*, he in the *remainder entered upon one of the ſaid three feoffees in the name of all the lands ſo deviſed, and made a leaſe of the whole land*; and by Clench and Wray, it was a good entry for the whole, and by conſequence a good leaſe of the whole; Gawdy contrary; note, *all the lands were in one county*. Le. 36. pl. 46. Trin. 28 Eliz. B. R. Troublefield v. Troublefield.

13. The caſe was this, *three ſeveral perſons did occupy three ſeveral houſes in B. to which J. S. had right*, and *J. S. went to one of the houſes and entered, and afterwards went away, leaving him who occupied the ſaid houſe upon the land*; and *then he entered into another of the houſes, and* then *went from that, leaving him who occupied the ſame before upon the land*, and *then he entered into the third houſe, and there ſealed a leaſe for years unto another man of that houſe, and naming the two other houſes*; and the *leſſee brought an ejectione firmæ for the two houſes in which the leaſe was not delivered*, and the opinion of the Court was againſt him, that he was barred in the action; for the entry or continuance of him, who occupied the ſame before, did defeat the entry of the plaintiff or leſſor; and the plaintiff was forced to be nonſuited. Godb. 72. pl. 87. Mich. 28 & 29 Eliz. B. R. The Earl of Kent's caſe.

14. When a freehold is out of a perſon, if the *diſſeiſee enters generally into one parcel*, this ſhall not re-continue both, for it *may be that the diſſeiſor of the feoffee had a warranty*, and therefore the general entry into one parcel ſhall not re-continue both. Co. de Fin. Lect. 15.

But if the lands lie in ſeveral counties there muſt be ſeveral actions, and conſequently ſeveral entries. Co. Litt. 252. b.

15. If *one diſſeiſes me of one acre at one time, and* after diſſeiſes me *of another acre in the ſame county at another time*, in this caſe my entry into one of them in the name of both is good, for that one aſſiſe might be brought againſt him for both diſſeiſins. Co. Litt. 252. b.

16. But if I *enfeoff one of one acre of ground upon condition, and at another time I enfeoff the ſame man of another acre in the ſaid county upon condition alſo*, and *both the conditions are broken*, an entry into one acre in the name of both is not ſufficient, for that I have no right to the land, nor action to recover the ſame, but a bare title, and therefore ſeveral entries muſt be made into the ſame, in reſpect of the ſeveral conditions. *But an entry into one part of the land in the name of all the land* ſubject to one condition is good, although the parcels be ſeveral and in ſeveral towns. Co. Litt. 252. b.

17. *Where the poſſeſſion is in no man, but the freehold in law is in the heir that enters*, there the general entry into one part reduces all into his actual poſſeſſion. And therefore if the *lord enters into a parcel generally for a mortmain, or the feoffor for a conditian broken*, or the diſſeiſee into parcel generally, the entry ſhall not veſt nor deveſt in theſe or like caſes but for the parcel. Co. Litt. 15. b.

18. But *when a man dies ſeiſed of ſeveral parcels in poſſeſſion, and the freehold in law is by law caſt upon the heir, and the poſſeſſion in no man*,

man, there the *entry into parcel generally* ſeems to veſt the actual poſſeſſion in him in the whole. *But* if this *entry* in that caſe be *ſpecial*, viz. that he enters only into that parcel and no more, there it reduces that parcel only into actual poſſeſſion. Co. Litt. 15. b.

19. If a man hath *cauſe to enter into any lands or tenements in divers towns in one and the ſame county*, if he *enters into one parcel of the lands* or tenements which are *in one town, in the name of all* the lands or tenements into the which he hath right to enter, within all the towns of the ſame county, by ſuch entry he ſhall have as good a poſſeſſion and ſeiſin of all the lands and tenements whereof he hath title of entry, as if he had entered in deed into every parcel. Litt. ſ. 417.

20. If *three men diſſeiſe me ſeverally of three ſeveral acres* of land, being *all in one county*, and *I enter into one acre in the name of all* the three acres, this is good for no more but for that acre which I entered into, becauſe every diſſeiſor is a ſeveral tenant of the freehold, and as I muſt have ſeveral actions againſt them for the recovery of the land, ſo my entry muſt be ſeveral. Co. Litt. 252. b.

21. So it is if *one man diſſeiſes me of three acres* of ground *and lets the ſame ſeverally to three perſons for their lives*, &c. there the entry upon one leſſee in the name of the whole, is good for no more than that acre that he has in his poſſeſſion. Co. Litt. 252. b.

If a man be *diſſeiſed of three acres by one man*, and the *diſſeiſor lets ſeverally the ſaid three acres to three perſons for years*, there the entry upon one of the leſſees in the name of all the three acres ſhall recontinue, and reveſt all the three acres in the diſſeiſee; for that the diſſeiſee might have had one aſſiſe againſt the diſſeiſor, becauſe he remained tenant of the freehold for all the three acres, and therefore one entry ſhall ſerve for the whole. Co. Litt. 252. b.

22. If *one diſſeiſes me of one acre at one time, and* after diſſeiſes me *of another acre in the ſame county at another time*, in this caſe my entry into one of them in the name of both is good; for that one aſſiſe might be brought againſt him for both diſſeiſins. Co. Litt. 252. b.

23. If *I enfeoff one of one acre* of ground *upon condition, and at another time I enfeoff the ſame man of another acre in the ſame county upon condition alſo*, and *both the conditions are broken*, an entry into one acre in the name of both is not ſufficient; for that I have no right to the land, nor action to recover the ſame, but a bare title, and therefore ſeveral entries muſt be made into the ſame in reſpect of the ſeveral conditions. Co. Litt. 252. b.

But an entry into one part of the land in the name of all the land ſubject to one condition is good, although the parcels are ſeveral, and in ſeveral towns, and ſo note a diverſity between ſeveral rights of entry, and ſeveral titles of entry by force of a condition. Co Litt. 252. b.

24. If lands lie in ſeveral counties there muſt be *ſeveral actions*, and conſequently ſeveral entries. Co. Litt. 252. b.

25. The entry of an attorney or leſſee *into one acre in poſſeſſion of A. in the name of other lands*, ſhall veſt all in the ſame county which are *in poſſeſſion of other leſſees for years*, if the *freehold be in one perſon*. Palm. 402. Paſch. 1 Car. B. R. Argol v. Cheyney.

25. It was held, that where a man would recover the meſne profits *in an action of treſpaſs*, he muſt prove entry into every parcel,

cel, and not into one part in the name of all. Clayt. 35. pl. 61. Aug. 11 Car. Gledel's caſe.

26. If there is a manor-houſe, and demeſne land belongs to it, and one lord enters into the land, and the other lord into the houſe, the *poſſeſſion* of the *houſe* ſhall not be the poſſeſſion of the *demeſnes*, nec e converſo. 2 Sid. 75. Paſch. 1658. Crouch v. Wills.

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(C) Entry to the Uſe of another.

In what Caſes the Entry *of one to the Uſe of another* ſhall *ſettle the Poſſeſſion* in him *without Agreement*, and in what not.

Br. Continual Claim, pl. 6. cites S. C. but S. P. does not appear there. ——— Br. Entre Cong. pl. 41. cites S. C. but S. P. does not appear there.

[1. IF the *baron enters to the uſe of his feme, where the entry of the feme is lawful*, this ſettles the poſſeſſion in the feme preſently, without any agreement. 14 H. 6. 25. b.]

Br. Continual Claim, pl. 6. cites S. C. but not S. P. ——— Br. Entre Cong. S. C. but S. P. does not appear. ——— Co Litt. 245. a. ad finem. S. P. ——— Ibid. 258. a. S. P.

[2. *So* if a man enters to the uſe *of an infant* into lands where his entry is lawful, this ſettles the poſſeſſion in him before agreement by the infant. 14 H. 6. 25. b.]

Co. Litt. 245. b. ad finem. ——— Ibid. 258. a. —Mo. 450. pl. 613. S. P. admitted per Cur. ——— If one diſſeiſes me, and a ſtranger enters upon the diſſeiſor for me, this entry takes away the diſſeiſin; per Roll Ch. J. Sty. 370. Paſch. 1653.

[3. *So* if the entry be to the uſe *of one of full age*, where the entry is lawful, this veſts the poſſeſſion in him before agreement. 34 E. 3. Entry Congeable, 50.]

For the entry of one for two ſhall not be the entry of the other, where the entry is accordingly not lawful. Br. Entre Cong. pl. 69. cites 31 Aſſ. 33. and 1 H. 6. and 8 H. 6. 16.

[4. If a man enters to the uſe *of one of the plaintiffs, where the entry is not lawful*, this veſts nothing in him before agreement, becauſe he ſhall be a diſſeiſor by the agreement. 34 E. 3. Entry Congeable, 50.]

Br. Continual Claim, pl. 6. cites S. C. & S. P. ——— Br. Entry, pl. 41. cites S. C.

[5. *So* if a man enters to the uſe *of an infant*, where his entry is not lawful, this veſts no poſſeſſion in the infant. 14 H. 6. 25. b.]

So where one coparcener enters, claiming for her and her ſiſter who is an infant, ſhe of full age is a diſſeiſoreſs only, and the other who is an infant not. Br. Entre Cong. pl. 60. cites 26 Aſſ. 39.

[6. If a man *diſſeiſes me*, and *I make continual claim*, and after *he dies*, and *this deſcends to two coparceners*, upon whom *I enter*, by which the coparcenary is defeated, if after *one enters, claiming to the uſe of herſelf and her coparcener*, yet nothing veſts in the other before agreement, for their entry is not lawful. 14 H. 6. 26.]

[7. *So*

[7. So if a man enters *upon two jointenants, where his entry is lawful*, by which the jointenancy is defeated, if after one enters to the uſe of both, yet nothing veſts in the other before agreement. 14 H. 6. 25. b.]

Fol. 739.

As where diſſeiſor infeoffs baron and feme, and the diſſeiſee re-entered, and the baron re-entered claiming to him and his feme, this veſts nothing in the feme, becauſe the jointenancy was defeated by the regreſs of the diſſeiſee, and ſo he that enters by tort, as the baron here does, cannot by his claim veſt any thing in the feme covert, in infant, nor in a ſtranger to the entry. Br. Entre Cong. pl. 6, cites S. C. ——— And cites 1 H. 6. 5. to the ſame purpoſe. ——— S. P. unleſs they enter actually. Br. Continual Claim, pl. 6. cites S. C. But Brooke ſays, it ſeems if the ſtranger agrees after, this will make him a diſſeiſor. ——— Br. Entre Cong. pl. 41. cites S. C. which was in caſe of a feoffment made by a diſſeiſor to a baron and feme, and the diſſeiſee re-entered, a claim afterwards by the baron veſted nothing in the feme.

[8. If *two coparceners have* a *right of action* to certain land, *but their entry is not lawful*, and the *one enters to the uſe of both*, yet nothing veſts in the other till agreement. 27 Aſſ. 68. adjudged.]

Br. Entre Cong. pl. 64. cites S. C. & S. P. ——— Fitzh. Aſſ. pl. 261. cites S. C.

[9. If *two jointenants are diſſeiſed*, and the *diſſeiſor aliens*, and *one* jointenant *enters* upon the alienee to the uſe of both, this ſettles the freehold in both. 27 Aſſ. 68.]

[10. If a man *commands J. S. to enter* into certain lands *in his name, if he has right, otherwiſe not*, if he enters accordingly, yet if the commander had no right, no eſtate veſts in him by this entry, becauſe his command was *conditional*. 34 E. 3. 12. adjudged.]

This is at 34 Aſſ. pl. 12.

11. In aſſiſe, it was found that the *ſon infeoffed his father of two parts of the houſe, and* 20 *acres of land for term of life, and* that he infeoffed *his father and his mother for term of their lives*, and after the *ſon went beyond ſea* the *father aliened the whole*, and his *ſiſter entered in name of her brother if he be alive, and if he be dead in her own name as heir to him*, and ſhe was ouſted, and the ſon came back and brought aſſiſe of this ouſter, and recovered the whole by award, notwithſtanding ſhe was not deputed by the ſon to enter. Br. Seiſin, pl. 21. cites 11 Aſſ. 2.

12. In aſſiſe, it was found that *tenant in tail had iſſue two daughters and aliened in fee*, and *died*, and *one daughter entered*, and ouſted the feoffee, *claiming to the uſe of her and her ſiſter*; the feoffee re-entered, and ſhe who re-entered brought aſſiſe and recovered, and after *the other ſiſter entered upon her claiming as heir*, and the other ouſted her, *and* ſhe *brought aſſiſe and recovered*, by reaſon that her ſiſter entered firſt to the uſe of both, and recovered upon the ſame title, and therefore her ſiſter may enter with her; Brooke ſays, *quod mirum!* Br. Entre Cong. pl. 55. cites 21 Aſſ. 19.

13. *Guardian entered* claiming the franktenement to the heir within age, *where the entry was not congeable*, and yet becauſe the infant was not named in the aſſiſe the writ was abated, and therefore it ſeems that the franktenement is in him till he refuſes; quære; for where one coparcener entered claiming for him and his coparcener, he alone brought the aſſiſe of an ouſter after and recovered, notwithſtanding that it was pleaded to the writ that

the plaintiff entered claiming to him and his companion. But Fiſh ſaid, that he would have a writ to error, and, as it ſeems, it is clearly error where ſuch entry and claim is made, and the entry lawful. Contrary it ſeems if the entry be not lawful. Nevertheleſs, it ſeems that this caſe is not error, for the caſe was, that *baron and feme ſeiſed in tail*, the *baron made a feoffment*, and had
[452] *iſſue two daughters, who had iſſue two ſons*, the *baron died*, the *feme entered upon the feoffee of his aſſent, claiming at his will*, and *died*, and *the two daughters died*, and *one of the ſons entered* upon the feoffee, *claiming to* the uſe of *him and his companion*; the *feoffee brought aſſiſe againſt him who entered only*, and recovered by award, for the *feme by her entry was no diſſeiſoreſs*, and then ſhe did not die ſeiſed of an eſtate of inheritance, ſo that the heir may be remitted; quod nota. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

14. *And where the entry is not lawful*, there *the claim to him and his companion does not veſt ſeiſin in his companion*, and *e contra where* the entry is *lawful*. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

Br. Condition, pl. 77. cites S. C.

15. In quare impedit, the defendant made title, becauſe A. B. was *ſeiſed of the land* in fee *with the advowſon appendant*, and *infeoffed* upon condition one *R. to re-infeoff* A. B. and *his feme and G. his ſon*, and after *A. B. died*, and *G. the ſon died within age after requeſt made to re-infeoff him*, and after *J. his ſon died alſo within age*, and *W. his ſon being within age*, one *H. as his prochein amy entered*, by which the defendant as lord ſeiſed the ward, and the church voided, and he preſented; and admitted for good title to have the ward where the heir enters into the land within age by condition deſcended; quod nota. Br. Gard, pl. 58. cites E. 3. 37.

16. If *a feme covert* has title of entry into land, *or* if *infant has* ſuch *title of entry*, and the *baron or another enters to the uſe of the feme or infant*, this veſts poſſeſſion in the feme or infant; contra if the entry be not lawful, and if diſſeiſor infeoffs two, and the diſſeiſee re-enters, and after one of the feoffees re-enters, this is no remitter to his companion; contra if his entry had been lawful. Br. Remitter, pl. 42. cites 14 H. 6. 25.

17. *By re-entry of the tenant at will after a diſſeiſin* the *franktenement is not recontinued to the leſſor*, as it is by entry *of a termor*. Br. Treſpaſs, pl. 227. cites 38 H. 6. 27.

A feoffment by tenant for years is a diſſeiſin, and in ſuch caſe every one may enter on behalf of diſſeiſee where he has a right of entry. Cro. C. 170. pl. 16. Mich. 5 Car. B. R. in caſe of Edgar v. Sorrell.

18. If a man enters to the uſe *of him who has lawful entry*, this veſts the ſeiſin and poſſeſſion in him who has title of entry without other agreement. Br. Seiſin, pl. 50. cites 10 H. 7. 12.

19. *Contra if he has not title of entry*, by juſtices of B. R. for there the poſſeſſion veſts in thoſe who enter. Br. Seiſin, pl. 50. cites 10 H. 7. 12.

20. If an *infant makes a feoffment in fee*, an *eſtranger of his own head cannot enter* to the uſe of the infant; for the eſtate is voidable. Co. Litt. 245. a.

21. If

21. If an infant, or a man of full age, is *diſſeiſed*, an entry by a ſtranger, of his own head, is good, and ſo veſts preſently the eſtate in the infant or other diſſeiſee. Co. Litt. 245. a.

22. If *tenant for life makes a feoffment in fee*, an *eſtranger may enter for a forfeiture in the name of him in the reverſion*, and thereby the eſtate ſhall be veſted in him, et ſic de ſimilibus. Co. Litt. 245. a.

23. If an infant or any man of full age, have any *right of entry* into any lands, any *ſtranger* in the name, and to the uſe of the infant, or man of full age, may enter into the lands, and this regularly ſhall veſt the lands in them *without any commandment precedent, or agreement ſubſequent.* Co. Litt. 258. a.

24. If a *diſſeiſor levy a fine with proclamations* according to the ſtatute, a ſtranger without a commandment precedent, or an agreement ſubſequent within the five years, cannot enter in the name of the diſſeiſee to avoid the fine, and the reſolution was grounded upon the conſtruction of ſtat. 4 H. 7. cap. 24. Co. Litt. 258. a. [453]

25. *Guardian for nurture, or in ſocage*, may enter in the name of the infant, having a right of entry, and this ſhall veſt the eſtate in the infant *without any commandment or aſſent.* 9 Rep. 106. a. Paſch. 10 Jac. 1. in Margaret Podger's caſe.

(D) Entry to the Uſe of another.

What ſhall be a *good Agreement* to ſettle the Eſtate.

[1. IF a man *diſſeiſes another to the uſe of baron and feme*, and *they agree* to it, the eſtate is in both. 15 E. 4. 15. b. admitted.]

[2. [*But*] if a man *diſſeiſes another to the uſe of a feme covert*, the *agreement of the feme without the huſband* will not ſettle the eſtate in the feme, becauſe her agreement is void, for her will is transferred to the baron.]

[3. *But* in this caſe, the *agreement of the baron* will ſettle the eſtate in the feme, though ſhe is no diſſeiſoreſs thereby, for the whole * will of the feme is put in the baron during the coverture, and he may agree to the feoffment made to the wife; ergo. 12 E. 4. 9. b. Curia.]

Br. Diſſeiſin, pl. 97. cites S. C.—— Fitzh. Diſſeiſin, pl. 3. cites S. C. —— Br. Agreement, pl. 4. S. C.—— * The original in Roll is (agree).

[4. If the *baron diſſeiſes another to the uſe of the feme*, this ſhall ſettle the eſtate in the feme, for the baron upon a diſſeiſin by another by his agreement might have ſettled the eſtate in the feme, and *this* diſſeiſin to the uſe of the feme *is an agreement in law*; ergo. † 44 E. 3. 9. admitted. 44 Aſſ. 26. admitted. Contra ‡ 14 H. 6. 25. b. 7 E. 4. 7. b.]

† Fitzh. EntreCongeable, pl. 33. cites S. C. ——‡ Br. Continual Claim, pl 6. cites S. C. —— Br. Entre Congeable, pl. 41. cites S. C. but S. P. does not clearly appear.

Fitzh. Aſſiſe pl. 321. cites S. C. —— Br. Coverture, pl. 41. cites S. C. and Brooke ſays, et ſic vide that the feme has no power to waive the tenancy during the life of the baron.

[5. If *baron and feme enter* into land *in the right of the feme, where the feme hath not any right*, the feme is tenant of the land thereby. 35 Aſſ. 5. adjudged.]

Fitzh. Entry Congeable, pl. 33. cites 44 E. 3. 8. S. C.

[6. If the *baron ſeiſed in the right of the feme aliens in fee, and after diſſeiſes the diſcontinuee, claiming his firſt eſtate, without ſaying any thing of the feme*, this ſhall veſt nothing of the tenancy in the feme, becauſe he does not claim by expreſs words in the name of the feme. 44 E. 3. 9. adjudged per Curiam. 44 Aſſ. 26. the ſame caſe.]

[7. If a man *enfeoffs baron and feme of a manor*, and after the *baron and feme, by colour of this feoffment, enter into certain lands* which are *not parcel of the manor, but* they *thought they were parcel*, yet the feme ſhall gain nothing in the land by this, but *the whole eſtate is in the baron*. Quære, 21 Aſſ. 1.]

[454]

[8. If the *guardian enters and diſſeiſes a man, claiming* the freehold *to the uſe of the heir*, this ſhall ſettle the freehold in the heir. 27 Aſſ. 68. ſaid to be ſo adjudged.]

[9. If a man *leaſes* lands *for years to J. S. and delivers the deed to J. D. to the uſe of J. S.* and after *J. D. enters* into the land *to the uſe of J. S. without commandment of J. S. and is ejected*, and *after J. S. aſſents* thereto, he ſhall have an ejectione firmæ upon the ſaid ejectment. P. 44 El. B. R. Bishop's caſe, per Curiam.]

Fol. 740.

(E) *What* ſhall be ſaid an Entry into Lands *to reduce his Eſtate.*

[1. IF the *diſſeiſee enters* into the land, and continues in the land with the diſſeiſor, *and manures the ſame land with the diſſeiſor, claiming nothing of his firſt eſtate*, yet this is an entry that will reduce his firſt eſtate. 40 Aſſ. 38. Curia.]

28 Aſſ. pl. 42. is a D. P. and ſo is 26 Aſſ. pl. 42. nor does the S. P. appear in Br. Entre Congeable, pl. 61. nor in Br. Damages, pl. 159. nor in Br. Seiſin, pl. 23. cited by Mr. Danv. for that purpoſe and to correct the miſprinting of Roll.

[2. [*But*] if the diſſeiſee enters, and *takes the profits as leſſee at will of the diſſeiſor*, or in any manner, this will be an entry, and reduce his eſtate. 28 Aſſ. 42. adjudged, but quære.]

Co. Litt. 245. b. S. P.

[3. If the diſſeiſee *commands a ſtranger to put in the cattle of the ſtranger* in the land to feed there, this is an entry in law into the land. 1 E. 4. 3.]

[4. If *A. leaſes to B. for years*, the *remainder to C. in fee*, and *A. and B. come upon the land of purpoſe*, ſcilicet, *A. to make livery, and B. to take it*, this *ſhall not be* ſaid any *entry of B. to veſt the actual poſſeſſion in him till livery made*; for then the remainder would be void, which would be againſt the *intention of the parties*. Co. Litt. 49. b.]

[5. If

[5. If it be *agreed between the diſſeiſor and diſſeiſee, that the diſſeiſee ſhall releaſe all his right to the diſſeiſor upon the land*, and *accordingly the diſſeiſee enters* upon the land, *and delivers* the *releaſe to the diſſeiſor upon the land*, this is a good releaſe, for the entry of the diſſeiſee being for this purpoſe, ſhall not avoid the diſſeiſin, for his *intent* in this caſe *guides his entry* to a ſpecial purpoſe. Co. Litt. 49. cites P. 19 El. B. per Curiam, reſolved.]

[6. *But if* the *diſſeiſor makes a feoffment to the diſſeiſee and others*, there, though the diſſeiſee comes to take the livery, yet when the livery is made, the diſſeiſee is remitted. Co. Litt. 49. b.]

[7. [*But*] *if* the diſſeiſee comes upon the land, and *puts his foot in, but takes no profits*, but the *diſſeiſor ouſts him*, this entry ſhall not ſettle any eſtate in him, (at the election of the diſſeiſee, as it ſeems,) for the diſſeiſee may have an aſſiſe of the firſt diſſeiſin. 26 Aſſ. 42. adjudged.]

Br. Damages pl. 159. cites S. C. that this is no remitter.—Br. Entre Congeable, pl. 61. cites S. C. Brooke ſays this ſeems not to be an entry; for if it was an entry he ſhould have treſpaſs of the firſt diſſeiſin and not an aſſiſe. —— Br. Seiſin, pl. 23. cites S. C. ——Br. Entre Cong. pl. 57. cites 22 E. 3. 14. contra, that the *putting of a foot into the land* is a good entry. But quære, for it ſeems the Year-book is miſquoted.

[8. If *I have an houſe and land adjoining to the plot of land in queſtion* between me and another, and *I ſtand upon* one piece of ſtone-wall, which is *mine own ſoil, and put my hand through* a *wall* made of lime and lathes, *which ſtands upon the land in queſtion, and there delivers a leaſe ſealed to try the title*, this is a good entry, though I do not come within the plot in queſtion. M. † 1 Ja. B. between BALLARD AND RICHARDSON, per Curiam.] [455]

9. If *leſſee for life* be, the *remainder or reverſion in fee*, and *leſſee is diſſeiſed with warranty, and dies*, and after *leſſee enters or recovers by aſſiſe*, becauſe the warranty does not deſcend upon him, yet this ſhall not reduce the remainder or reverſion, but it ſhall be bound by the warranty, becauſe it was bound before the re-entry. 44 Aſſ. 35. 2 Roll. 740. Voucher (F), pl. 1.

Cited 1 Rep. 67. in Archer's caſe.

10. *But* otherwiſe it is if the *leſſee re-enters before the death of the anceſtor*, then the reverſion or remainder is not bound by the warranty, becauſe it does not deſcend upon him, and therefore the re-entry of leſſee reduces the eſtate of him in reverſion or remainder, and then the eſtate upon which the warranty was annexed is deſtroyed. 44 Aſſ. 35. 2 Roll. 740. Voucher (F), pl. 2.

11. Where *diſſeiſor infeoffs his father* or couſin, *who dies ſeiſed*, and the *diſſeiſor is heir*, the diſſeiſee may re-enter upon him; per Moile and Chocke, quod fuit conceſſum. Br. Property, pl. 7. cites 34 H. 6. 10.

12. If the *diſſeiſor dies ſeiſed*, and his *feme is endowed* by his heir, the entry of the diſſeiſee is *revived for the third part put in dower*. Br. Seiſin, pl. 18. cites Littleton, tit. Deſcents.

13. It was agreed, that if a man has *title to a moiety*, *or* to a *third part*, or *fourth part*, &c. by this he may enter *into the whole* land, and this (as it ſeems) is underſtood *before partition* of the land clearly. Br. Entre Cong. pl. 103. cites 21 E. 4. 10, 11.

14. If the *diſſeiſee, at the requeſt of the diſſeiſor, comes into the cellar to ſee it*, or to come to his houſe to his daughter's wedding, *or to dine with him*, &c. this is no entry. Pl. C. 92. b. 93. a. Trin. 3 M. 1.

15. The diſſeiſee *comes upon the land to deliver a releaſe to the diſſeiſor*; this is no entry to reveſt the land in the diſſeiſee; Arg. Le. 127. pl. 172. Trin. 30 Eliz. cites it as adjudged in C. B. in Waynman's caſe.

Gouldſb. 80. pl. 18. Sibil v. Hill, S.C. but S. P. does not appear.

16. If the *cattle of a leſſee that is ouſted eſtray into the land* whereof he is ouſted, this is not any re-entry to revive the rent, becauſe they were not put into the land by the diſſeiſee himſelf, but went there of their own accord; per Anderſon, to which Periam agreed. Le. 110. pl. 169. Paſch. 30 Eliz. C. B. Cibel v. Hills.

17. *Leſſee* being in poſſeſſion, makes feoffment and *livery in the preſence of leſſor*, which he may do, and the leſſor's preſence cannot diſturb it, but immediately, by *leſſor's being there*, this is an entry by him, and a *reveſting* the freehold in him. Cro. E. 322. pl. 10. Paſch. 36 Eliz. B. R. Read and Morpeth v. Erington.

18. A diverſity is to be obſerved between an *entry in law* and an entry *in deed*, for that a *continual claim* of the diſſeiſee being an entry in law, ſhall *veſt* the poſſeſſion and ſeiſin in him *for his advantage*, but not for his diſadvantage; and therefore if the diſſeiſee brings an *aſſiſe*, and hanging the aſſiſe he makes continual claim, this ſhall not *abate* the aſſiſe, but he ſhall recover *damage* from the beginning; but it is otherwiſe of an entry in deed. Co. Litt. 253. b.

19. If the *baſtard invites the mulier to ſee his houſe, and to ſee pictures, &c. or to dine with him, or to hawk, hunt*, or ſport with him, or ſuch like, upon the land deſcended, and the mulier comes upon
[456] the land accordingly, this is no interruption, becauſe he *came in by the conſent* of the baſtard, and therefore the coming upon the land can be no treſpaſs. Co. Litt. 245. b.

20. *But if the mulier comes* upon the ground *of his own head, and cuts down a tree, or digs the ſoil, or takes any profit*, theſe ſhall be interruptions, for rather than the baſtard ſhall puniſh him in an action of treſpaſs, the act ſhall amount in law to an entry, becauſe he has a right of entry. Co. Litt. 245. b.

21. *So* it is if the mulier *puts any of his beaſts into the ground, or commands a ſtrrnger to put in his beaſts*; theſe do amount to an entry, for although in theſe caſes the mulier does not uſe any expreſs words of entry, yet theſe and ſuch like acts do, without any word, amount in law to an entry, for acts without words may make an entry, but words without an act cannot make an entry (viz. entry into the lands, &c.). Co. Litt. 245. b.

22. If a man has *common in the land of J. S. between Lady-day and Michaelmas*, and the *commoner brings an aſſiſe* of his common, *and at Chriſtmas puts in his beaſts*, this ſhall not be any entry to abate his writ; for it cannot be intended for the ſame common; cited per Fleming Ch. J. as cited by Yelverton J. and which caſe is agreed to be good law. 2 Brownl. 238. Paſch. 10 Jac. B. R. in caſe of Rutland (Earl) v. Shrewſbury (Earl).

23. Though

23. Though a fine be a feoffment of record, yet it is but ſo by *fictione juris*. If another were in by tort, it will not amount to an entry as a feoffment ſhall; per Bridgman Ch. J. Cart. 176. Hill. 18 & 19 Car. 2. C. B.

24. Entry on the land *by a ceſtuy que truſt* is no ſufficient claim; it muſt be by *ſubpœna*; per Ld. Keeper. Chan. Caſes, 268. Mich. 27 Car. 2. Clifford v. Aſbly.

25. Though a declaration in ejectment be delivered within 20 years, and a trial, whereby there is a *leaſe, entry, and ouſter confeſſed*, yet that will not amount to an entry to bring it out of the ſtatute of limitations, though an entry be actually confeſſed, for it muſt be an actual entry, though an ejectment be a cuſtomary way of proceeding, and this has been ſo adjudged; per Holt Ch. J. 12 Mod. 573. Mich. 13 W. 3. in caſe of Hayward v. Kinſey.

26. In proving an entry and claim, it is neceſſary to prove that it be *animo clamandi*. 6 Mod. 44. Mich. 2 Ann. B. R. Ford v. Ld. Grey.

A caſual entry by hunting is not good. Lat. 25, 26. cites Pl. C. 93.

27. A *bare entry* on another without an expulſion makes ſuch a *ſeiſin*, only that the law will adjudge him in poſſeſſion that has the right, and ſo are the words *intravit & fuit inde ſeiſitus prout lex poſtulat* to be underſtood in ſpecial verdict, but it will not work diſſeiſin or abatement without *actual expulſion*. Per Holt Ch. J. 1 Salk. 246. pl. 2. Trin. 3 Ann. B. R. Anon.

(F) In what Caſes the Entry *of one* ſhall be *for another*. [457]

[1. IF a *rent deſcends to an aunt and niece as coparceners*, and the *aunt hath the niece in ward* (ſcilicet, *as guardian in ſocage* as it ſeems), *and takes the rent to her own uſe, and never claims to the uſe of the niece*, yet this ſeiſin of the aunt ſhall be an actual ſeiſin for the niece, for in law the *general ſeiſin* of one is of both, and here is not any expreſs act that her entry was to her own uſe. 36 Aſſ. 1.]

Br. Brief, pl. 307. cites S. C.

[2. If *lands deſcend to two coparceners*, and a *ſtranger abates*, and after *one enters generally* into the land, this ſhall be an entry for both, and ſettle the poſſeſſion in both. 26 Aſſ. 1. admitted.]

Br. Aſſiſe, pl. 258. cites 26 Aſſ. 2. and Roll is miſprinted.——Br. Entre Congeable, pl. 59. cites S. C. and in aſſiſe brought by her alone againſt the abator ſhe recovered by award; for ſhe had right againſt all that had no right.——See tit. Parceners (B), and (B. 2).

[3. If *lands come to two in common*, and *one enters* into it *generally*, this ſhall be an entry for both. M. 40, 41 El. B. R. between * HEMPSLEY AND BRICE, per Curiam. Hobert's Reports, 166. between † SMALES AND DALES, adjudged.]

* Cro. E. 639. pl. 41. S. C. reſolved.——Mo. 546. pl. 729. Hemley v. Briſe, S. C. and S. P. ruled accordingly.

† Hob. 120. pl. 152. S. C. adjudged accordingly; for entry generally ſhall always be taken according

to right, as being under the conſtruction of law, and therefore ever conſtrued lawful.——Mo. 868. pl. 1201. Small v. Dale. S. C. adjudged.

* Fol. 740. † Cro. E. 639. pl. 41. S.C. & S.P. reſolved.—Mo. 546. pl. 729. S. C. & S. P. ruled accordingly.

[4. If a man *deviſes land* held *in capite by knight's ſervice to* (*) *his younger* ſon, by which the deviſe is void for a third part, and the *deviſee enters generally* into the whole, this *ſhall be an entry in law for the eldeſt ſon alſo.* M. 40, 41 El. B. R. between † HEMPSLEY AND BRICE, per Curiam. Hobert's Reports, 166. between ‡ SMALES AND DALES, adjudged.]

‡ Hob. 120. pl. 152. S. C. adjudged.——Mo. 868. pl. 1201. S. C. adjudged.

Cro. E. 639. 641. reſolved by all the Court; præter Fenner.—Mo. 546. pl. 729. S. C. & S. P. ruled accordingly.

[4.] *So if* the deviſee *after his entry makes a leaſe for years of the whole*, yet this ſhall not be any explanation of his entry, but that his entry ſhall be ſaid an entry for both. M. 40, 41 Eliz. B. R. between HEMPSLEY AND BRICE.]

[5. *So* if the *deviſee levies a fine of the whole.* M. 40, 41 El. B. R. between HEMPSLEY AND BRICE.]

Mr. Danvers in his remarks on this plea ſays, vide Hob. fol. 120. and quære, whether it muſt not be intended the heir was in poſſeſſion before, or that B. made his entry firſt, and afterwards being ‖ in poſſeſſion claimed the whole; for by Co. Litt. 243. b. 373. b. where one parcener enters ſpecially claiming the whole, and takes the whole profits, ſhe gains the moiety of her ſiſter by abatement. But ſee Cart. 176. where Hob. is taken [by Bridgman Ch. J. Hill. 18 & 19 Car. 2. C. B. in delivering the opinion of the Court in the caſe of Rundale v. Ely] as here abridged.

[6. If a man ſeiſed of *lands held by knight's ſervice* in fee, *deviſes the whole to B. in fee*, and *B. after his death enters into the whole, claiming the whole to* himſelf, yet this is an entry for the heir, who is tenant in common with him for a third part, the deviſe being void for a third part, for one tenant in common cannot diſſeiſe his companion without an actual ouſter. Hobert's Reports, 167.]

‖ [458]

Noy, 51. Intr. H. 41 Eliz. B. R. Rot. 1661. Aynſworth v. Batty. S.P. exactly, only in that caſe the legacies were paid to two, but not to the other two, and ſeems to be S. C. reſolved that by the entry of one of the two who was not paid, the eſtate was veſted in all four; for they take jointly, and the eſtate of the heir diveſts him in toto.——Cro. E. 919. pl. 14. Hainſworth v. Prety. S. C. & S. P. adjudged.——Mo. 644. pl. 891. Hamſworth v. Pretty. S. C. all the ſons were paid but one, and adjudged accordingly.

[7. If a man *deviſes* certain *annuities to his four ſons out of certain lands, and* deviſes further, *that if his heir does not pay* the ſaid annuities, *then his ſaid ſons ſhall have the lands to them, and the ſurvivor of them*, and after the ſaid annuities are not paid, upon which *one of the ſons enters generally*, this ſhall be an entry for all the four ſons, inaſmuch as they are jointenants. H. 42 El. B. R. between PURSLOWE AND PARKER, adjudged.]

[8. If a man *deviſes to J. S. lands held by knight's ſervice*, and dies, *his heir within age*, and a *ſtranger enters upon the deviſee and diſſeiſes him*, and after *the lord* in chivalry *enters upon the diſſeiſor, and upon the re-entry by the diſſeiſor, brings treſpaſs againſt him*, this is maintainable, for *the entry of the lord* into his third part (the deviſe being void for that) *is an entry for the deviſee for the other two parts*, and ſo the lord and diſſeiſor are no tenants in common. P.

3 Car.

3 Car. between ROGERS AND BLYNMAN, per Curiam, reſolved upon evidence at the bar.]

9. In aſſiſe the *ſon leaſed to his father for life, and went beyond ſea*, and the *father aliened in fee*, and the *ſiſter of the ſon entered in the name of her brother if he be alive, and if he be dead in her own name*, and was ouſted, the *ſon returned* and brought aſſiſe, and recovered by award upon this entry and ſeiſin, and yet the ſon did not depute the daughter to enter; quod nota, by award. Br. Entre Cong. pl. 50. cites 11 Aſſ. 11.

Br. Aſſiſe, pl. 167. cites S. C. and adds that the feme upon this alienation may recover by cui in vita; for this ſhall not ſtay the aſſiſe.

10. In aſſiſe the *baron and feme* were *tenants in tail*, and *had iſſue two daughters*, the *baron diſcontinued and died*, and *feme by aſſent of the feoffee entered and claimed nothing but at his will*, and after *died*, *one daughter entered claiming to both*, and the feoffee brought *aſſiſe againſt her who entered only*, and all this matter found by verdict, and the writ *ſhall not abate by the not naming of the other coparcener*, but the plaintiff ſhall recover; for the entry of one for two ſhall not be the entry of the other, where the entry is not lawful. Br. Entre Cong. pl. 69. cites 31 Aſſ. 33. and 1 H. 6. 5. and 8 H. 6. 16. accordingly.

11. If a *fine* is levied *to two*, and *one does not enter, nor ſay any thing*, and *the other enters and is impleaded*, there per Hank. he may plead jointenancy with the other, notwithſtanding that *he alone counts of the poſſeſſion*, and that the other never entered. For the poſſeſſion by the fine and the entry of the one, ſhall be adjudged in law to be in both, *till the other diſagrees by matter of record*, and ſo ſee that diſagreement to relinquiſh a thing ſhall not be but by matter of record, but agreement to take a thing may be by parol or matter in deed. Br. Jointenancie, pl. 57. cites 8 H. 4. 13.

12. If *diſſeiſor*, *intruder*, or *abator*, *enfeoffs a ſtranger and dies ſeiſed*, and *his heir enters and enfeoffs the offender*, the firſt diſſeiſee may enter, but againſt *ſtrangers* the deſcent ſhall hold place. Per Keble, which was not denied. Br. Entre Cong. pl. 119. cites 5 H. 7. 6. [459]

13. If a *man diſcontinues the land of his wife upon condition*, and *dies without iſſue*, the *entry is given to the heir of the baron*, and *if he enters* for the condition broken *then may the heir of the feme enter*, for the entry of the one revives the entry of the other. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

14. *And if a recovery by erroneous judgment* be had *againſt the father, of land of the right to his wife*, and *he dies*, if the *heir of the part of the father reverſes the judgment* by error, there the *heir of the part of the mother may enter*. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

15. *And* where a man *ſeiſed of land has iſſue two ſons*, and the *eldeſt enters into religion*, and the *father dies*, and an *erroneous recovery is had againſt the youngeſt*, and the *eldeſt is deraigned*, he hath no remedy. Per all the juſtices of C. B. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

16. *But* if the *youngeſt reverſes this by error*, the eldeſt may enter, for in theſe caſes the land is put in ſuch plight as if no recovery or diſcontinuance had been, and ſo the entry of one ſhall give advantage to the other. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

17. Two *tenants for life are diſſeiſed by A. and B.* if one of the tenants for life releaſes to A. and the other tenant for life re-enters, he has the moiety in common with A. and he has reveſted the *entire reverſion* in him in whom the reverſion was before. Per Manwood J. Le. 264. pl. 354. 19 Eliz. C. Anon.

18. When an entry *is given by a ſpecial ſtatute*, there the entry ſhall not enure further than the words of the ſtatute, as land is given to the huſband and wife, and to the heirs of the body of the huſband; the huſband levies a fine and dies; the wife enters; this entry ſhall not avail the iſſue in tail; for the entry is given to the wife by a ſpecial law, and ſo where the huſband aliened the lands of the wife, and after they were divorced the huſband dies, the wife ſhall not enter by 32 H. 8. but is put to her writ of *cui in vita ante divortium*. Arg. Le. 7. pl. 10. Mich. 25 & 26 Eliz. B. R. cited in the caſe of Stonely v. Bracebridge as Sir Richard Haddon's caſe.

Mo. 457. Awdley's caſe, S. P. —Gawdy J. ſaid, that the agreement peradventure of him that had the right, if *made within the five years* after ſuch entry made in his name, would ſerve, but an agreement afterward would not ſerve; quære. Cro. E. 561. pl. 10. Paſch. 39 Eliz. B. R. in caſe of Pollard v. Audley. ——Poph. 108. Pollard v. Lutterell. S. C. agreed by the chief juſtices.

19. Tenant in poſſeſſion of lands to which another has right of entry *levies a fine with proclamation*; he who has right ought to enter in *perſon*, or make *warrant ſpecial*, or commandment to one to enter for him, otherwiſe he does not preſerve his right, and other entry by a ſtranger will not *avoid the fine*. Mo. 150. pl. 613. Paſch. 38 Eliz. B. R. Lutterel's caſe.

20. Two *copartners of a houſe. One entered generally and made a leaſe by the name of "all that his houſe*, &c." Popham and Fenner held, that the intire houſe paſſed; for when he ſays, all that my houſe, &c. that intended the whole houſe, and by his livery made he gained the intire, and gave the intire, although by his general entry it is not intended that he entered into more than to what he had right; but Gawdy e contra; for as this entry prima facie does not gain more than he had right to demand, no more ſhall this leaſe. And Foſter at the bar cited, that it was adjudged in this court in Reignold's caſe according to the opinion of Popham. Cro. E. 615. pl. 4. Trin. 40 Eliz. B. R. Gerry v. Holford.

[460] 21. The rule of the law is, that in all caſes when *copartners or jointenants* may join in action, and have one and the ſame remedy, there if one be ſummoned and ſevered, and the other ſues forth and recovers the moiety, the other may enter with her; but when they are driven to ſeveral actions, or where their remedies are not equal, there, if one recovers or continues the one moiety, the other cannot enter with her, and yet when both have recovered, they ſhall be coparceners again. 2 Inſt. 308.

(G) *Special* Entry.

[1. IF *lands deſcend to two coparceners*, and a *ſtranger abates*, and after *one coparcener enters into the whole to her own uſe*, this ſhall not ſettle any poſſeſſion in the other, but *all* the eſtate *ſhall be in herſelf* by the ſpecial entry. 26 Aſſ. * 1. adjudged.]

* This is miſprinted, and ſhould be (2).

If one enters claiming the whole and takes the profits of the whole, this will deveſt the freehold in law of the other parcener. Co. Litt. 373. b.——Ibid. 243. b. S. P.——Cro. E. 640, 641. S. P. and ſo if a title devolves or comes to two as tenants in common, if the one enters firſt and claims all before the other has entered, that will gain the poſſeſſion of the intire eſtate; but if they were once in poſſeſſion, then the claim of the one only, or the occupation of the one only, ſhall not ouſt his companion. And Ibid. cites the principal caſe of 26 Aſſ. 2.

2. If there are *two coparceners*, and *one and a ſtranger ouſts the other*, a nuper obiit lies againſt the coparcener ſole, and Brooke ſays, hence it follows that the ſtranger gains no franktenement by his entry. Br. Entre Cong. pl. 122. cites F. N. B. 197.

F. N. B. 167. (C).

(G. 2) Entry. Not neceſſary in what Caſes.

1. DISSEISEE may *enter into every parcel*, but *not into the appendancies without the manor or land to which*, &c. as common, &c. and though an advowſon may be ſevered and made in groſs, it ought to be *when the owner is ſeiſed of the land to which*, &c. and *not by preſentment when he is out of poſſeſſion*. Per Danby Ch. J. quod nota, good reaſon, and Needham J. cum illo. Br. Preſentation, pl. 30. cites 9 E. 4. 38.

If a man is *diſſeiſed of lands whereunto a common is appendant*, the *diſſeiſee cannot uſe the common till he enters* the ſoil, for *into the land to which it is appendant*, becauſe it might be a prejudice to the tenant of if the diſſeiſee might do it, ſo might the diſſeiſor, which would be a double charge to the tenant. Co. Litt. 122. b.

2. *And* where *tenant for life aliens the manor in fee*, he in reverſion cannot preſent to the advowſon before that he has entered into the manor. Per Needham J. Ibid.

But if a man is diſſeiſed *of a manor to which there is an advowſon appendant*, he may preſent to the advowſon, before he enters into the manor. Co. Litt. 122. b.

3. In treſpaſs it was agreed, that where a man *recovers by erroneous proceſs or judgment* certain land, *and makes feoffment*, and the other brings *writ of error and reverſes it*, yet he cannot enter, but ſhall have ſcire facias againſt the feoffee; for he *is in by title, and is a ſtranger to the reverſal*. Br. Scire Facias, pl. 163. cites 4 H. 7. 10. [461]

4. *But by reverſal by act of parliament* he may enter without ſcire facias; for every one is party to an act of parliament; per Townſend J. quod non negatur. Br. Scire Facias, pl. 163. cites 4 H. 7. 10.

5. Of

5. Of a thing tranſitory a man may be in poſſeſſion *without entry or ſeiſin;* per Brudnell. Br. Treſpaſs, pl. 169. cites 14 H. 8. 23.

6. *As* where *tenant in chivalry dies, his heir within age,* the lord ſhall have *raviſhment of ward without ſeiſin,* but *not ejectment* of ward of the land. Ibid.

7. If tenant in fee of a *common lord* is attainted of felony, his lands remain in him during his life *until the entry of the lord,* and where *the king is lord* until office found; but in the caſe of a common lord, after the *death of the perſon attainted,* they are in the lord before entry, and in the caſe of the king before office for the miſchief of abeyances; Arg. 2 Le. 126. in pl. 169. Mich. 28 & 29 Eliz. B. R. in caſe of Venables v. Harris.

Noy, 73. S. C. the Court ſeemed that plaintiff could not bring ejectment agree to it.

8. A feoffment is made to the *uſe of B.* per Anderſon and Walmſley J. contra Glanvil J. B. has ſuch a ſeiſin before his entry of which he may be *diſſeiſed,* and this by force of the ſtatute. Ow. 87. Mich. 41 & 42 Eliz. C. B. Green v. Wiſeman.

„ for actual poſſeſſion is not in ceſtuy que uſe by the ſtat. 27 H. 8. for he may diſ- But by Walmſley and Glanvil, he may have an aſſiſe, but not treſpaſs without actual poſſeſſion.

9. A man after an ejectment and *liberate* returned cannot *aſſign lands* before entry. Show. 290. Mich. 3 W. & M. Hannam v. Stephens.

(G. 3) Neceſſary in what Caſes.

To veſt or deveſt an Eſtate.

1. IF a *feme inheritable takes baron,* and has iſſue, and the feme dies, the *law adjudges the franktenement in the baron as tenant by the curteſy immediately without entry,* and præcipe quod reddat lies *againſt him.* Br. Præcipe, pl. 38. cites 21 E. 3. 49. and Doct. and Stud. lib. 2.

2. *Leaſe for life on condition,* that if leſſor pay to leſſee ſuch a day 20 l. that his eſtate ſhall ceaſe; now by the performance of the condition the eſtate is determined without any entry. 4 Le. 119. cites 21 H. 7. 12.

3. Where eſtate *ends by limitation* there needs no entry, becauſe not waivable as a condition is. Mo. 612. in pl. 842. 19 Eliz. cites Bracebridge's caſe.

4. Though a *leaſe* become *void on nonpayment* according to covenant, yet it ſeems there muſt be a re-entry to re-ſettle the poſſeſſion of the land. 2 Le. 143. pl. 178. 33 Eliz. in the Exchequer.

1 Rep. 175. S. C.—— Mo. 603. S. C.

5. Inheritance or *freehold* in uſe ſhall not *ceaſe* without claim or entry ſince the 27 H. 8. unleſs he that has power to ceaſe it be *tenant of the franktenement;* Arg. Mo. 663. in pl. 906. Mich. 44 & 45 Eliz. in Canc. cites 1 Rep. Diggs's caſe.

6. A man *cannot be ſaid ſeiſed* upon a *fine ſur render* without an entry alleged; but upon a fine * *ſur conuſance, &c. come ceo, &c.* it is otherwiſe, for that is executed. Cro. E. 903. pl. 6. Mich. 44 & 45 Eliz. B. R. in caſe of Buſtard v. Coulter.

* So upon a fine ſur conuſance de droit tantum, for theſe are

feoffments upon record, and the conuſee has a freehold in him before entry. Co. Litt. 266. b.

7. Upon a *ſurrender of a leaſe for years*, the leaſe is determined, and the poſſeſſion and intereſt is in the leſſor without entry. Cro. C. 102. pl. 1. Hill. 3 Car. C. B. Peto v. Pemberton.

Hetl. 50. 71. S. C. but no judgment. ——Hutt. 94. S. C.

and agreed, that where the leſſee for years ſurrenders, to which the leſſor agrees and accepts it, the poſſeſſion and the intereſt is in him without entry.

8. *Tenant for life levies a fine*, he having a freehold his fine diſplaces the remainder, therefore an entry is requiſite within five years after the death of tenant for life; per Hale. Hardr. 402. Paſch. 17 Car. 2. in Scacc.

So if tenant for life at the common law make a feoffment or a leaſe for

life, in ſuch caſe the firſt leſſor ought to avoid this forfeiture by entry, and it is not void by the death of the ſecond leſſor, viz. the tenant for life; Arg. Godb. 318. cites 4 H. 7. 18.——But if ſuch leaſe be made by ceſtuy que uſe it determines by his death, and the leſſee becomes tenant at ſufferance; Arg. Godb. 319. cites D. 57.

9. Upon executing the deed of mortgage, the mortgagor, by the *covenant to enjoy* till default of payment, is *tenant at will*, and the aſſignment of the mortgagee to the aſſignee, and the aſſignee's aſſigning it over again *without the mortgagor's joining*, can only make the mortgagor *tenant at ſufferance*, but his continuing in poſſeſſion can never make a *diſſeiſin*, nor deveſting of the term mortgaged; otherwiſe if the *mortgagor* had *died and his heir had entered*, for the heir was never tenant at will, but his firſt entry was tortious; or if the *mortgagee* had *entered on the mortgagor, and the mortgagor* had *re-entered*; for the mortgagee's entry had been a determination of the will, and the re-entry of the mortgagor had been merely tortious; per Holt Ch. J. 1 Salk. 246. pl. 1. Paſch. 6 W. & M. in B. R. Smartle v. Williams.

(G. 4) Neceſſary.

To bring Treſpaſs.

1. IF land deſcend to the heir he may *make leaſes* before entry, but he cannot have an action of treſpaſs before entry; Arg. Pl. C. 142. b. cites Paſch. 37 H. 6. 18. Br. Surrender, pl. 21.

2. It was agreed, that *diſſeiſee* may have treſpaſs *of the firſt entry* without regreſs, but not of the continuance of the treſpaſs after the entry; for he ſhall not puniſh diſſeiſor in charging him with damages which are the acceſſory, before he has re-entered into the franktenement which is the principal. Br. Treſpaſs, pl. 227. cites 38 H. 6. 27.

3. *Tenant*

3. *Tenant at will* may have treſpaſs without re-entry *after diſſeiſin till the will of the leſſor be determined by releaſe, &c.* and becauſe he by his entry cannot re-continue the franktenement to the leſſor, therefore * he ſhall have treſpaſs without regreſs, but he who may by his entry re-continue the franktenement and will not enter, ſhall not have treſpaſs without a regreſs; note a diverſity, per Forteſcue and Yelverton. Br. Treſpaſs, pl. 227. cites 38 H. 6. 27.

4. In treſpaſs, the *defendant ſaid that the plaintiff himſelf was ſeiſed in fee, and leaſed to the defendant for ſix years, and* after *the term ended*, the *defendant held himſelf in and did the treſpaſs, of which he has brought this action before any entry*; judgment, &c. and by all the juſtices treſpaſs vi & armis does not lie before the plaintiff has made regreſs, as here; quod nota. Br. Treſpaſs, pl. 365. cites 22 E. 4. 13.

5. *And* per Fairfax, the *ouſter of the leſſee* for years ſhall give *aſſiſe to the heir, where* his father made the leaſe, and *the ſon never entered.* Br. ibid.

6. *But where the father dies ſeiſed, and did not make the leaſe, and a ſtranger enters*, there treſpaſs does not lie without entry firſt by the heir, nor aſſiſe, but mortdanceſtor. Br. ibid.

The intereſt veſts before entry. Arg. Show. 299.

7. If A. makes a *leaſe to commence at Michaelmas*, the leſſee may *grant* the leaſe before Michaelmas, but he cannot have *treſpaſs* before entry; Arg. Pl. C. 142. b. cites 22 E. 4. 37. Br. Grants, 100.

It paſſes to B. before notice or conſent; per Ventris J. Arg. 2 Vent. 202.

8. A. *deviſed land to B. and his heirs*, and dies, it is in B. immediately, but till entry he cannot bring a poſſeſſory action, as *treſpaſs*, &c. 2 Mod. 7. cites Pl. C. 412, 413. [Mich. 13 & 14 Eliz.]

Cited per Bridgman Ch. J. who ſaid that in this caſe the heir was a ſtranger. Carth. 66, 67. Paſch. 18 Car. 2.

9. A. made a *leaſe to B. to hold to B. and his heirs at the will of A.* afterwards *B. dies.* If the heir of B. enters, treſpaſs vi & armis lies for A. before any entry. Litt. ſ. 82. and Co. Litt. 62. b.

10. When the *leaſe at will ceaſes*, he in reverſion may bring an action of treſpaſs; per Tirrel J. Carth. 62. cites Co. Litt. 62. b.

11. By the *death of tenant at will*, the tenancy is determined, and the eſtate reveſted in his leſſor to maintain treſpaſs before re-entry by reaſon of the poſſeſſion which the law caſts upon him; agreed. Lev. 202. Hill. 18 & 19 Car. 2. B. R. in the caſe of Geary v. Bearcroft.

12. If *leſſee holds over his term*, there muſt be actual entry to bring action of treſpaſs. 5 Mod. 384. Hill. 9 W. 3. B. R. Trevillian v. Andrews.

(G. 4) At what Time it may be made.

1. IF *diſſeiſor enfeoffs four*, upon whom the *diſſeiſee re-enters*, and *one of the feoffees enters again*, and the *diſſeiſee brings aſſiſe*, he cannot plead jointenancy with the other three, for by the entry of the diſſeiſee their intereſt is defeated, and therefore *regreſs of the one does not remit the others*, for the *right is determined*. Br. Remitter, pl. 16. cites 1 H. 6. 5. per Hals. J.

2. *But where four coparceners*, or others, *are lawfully ſeiſed, and are diſſeiſed*, the *entry of the one remits all the others*, for the entry is lawful and the right remains; and in the other caſes e contra; for the right, intereſt, and poſſeſſion, is defeated by the lawful entry. Ibid.

3. If a *feme ſole of full age be diſſeiſed* and *takes baron*, and the *diſſeiſor dies ſeiſed*, and the *baron dies*, the feme cannot enter, for ſhe might have re-entered before that ſhe took baron, and did not, therefore it was her folly; per all the juſtices. Br. Entre Cong. pl. 91. cites 9 H. 7. 24. [464]

4. *Contrary* if the diſſeiſin had been *during the coverture*, *or* if ſhe had been *within age* at the time of the diſſeiſin, and when ſhe took baron, there ſhe might have entered after the death of her baron. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

5. *And e contra* if ſhe be *diſſeiſed within age, and takes baron at full age, and* the *diſſeiſor dies ſeiſed*, and the *baron dies*, the feme cannot enter; which all agreed. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

6. In præcipe quod reddat the *tenant ſaid, that before the writ purchaſed, H. was ſeiſed till by him diſſeiſed, which H. entered pending the writ*; judgment of the writ; and adjudged a good plea, as it ſeems, but the reporter did not hear it. Br. Brief, pl. 356. cites 5 E. 4. 5. Br. Seiſin, pl. 37. cites S. C.

7. Leſſor may enter into the land for a forfeiture *pending the ſuit before judgment*, as well as after, if the plea be entered of record. Goldſb. 41. pl. 18. Mich. 29 Eliz. Dixey v. Spencer. Ow. 81. S.C. & S.P. held accordingly.—— 3 Le. 169. pl. 220. S. C. but S. P. does not appear.——— Mo. 311. S. C. but S. P. does not appear.——— Godb. 15. pl. 124. S. C. but S. P. does not appear.

8. A. infeoffs B. on condition to go to Rome within two years; B. ſtays in England till within two days of the end of the two years, ſo that now it is *impoſſible to perform the condition within the time*, yet the feoffor ſhall not enter till the two years ended; Arg. Mo. 328. Trin. 32 Eliz.

9. If there be tenant for life, and *tenant for life commits a forfeiture*, he in remainder for life may enter, and the caſe 29 Aſſ. 64. is not law; for the particular eſtate in poſſeſſion is determined by the forfeiture; and if he in remainder could not enter, then it ſhould be at the will of the leſſor, whether he ſhould ever enter; the ſame law is if the remainder be for years. Godb. 175. pl. 241. Paſch. 8 Jac. C. B. in caſe of Meers v. Ridout.

(G. 6) Excuſed by Act or Fear of the Party.

1. IF a man hath title to enter into any lands or tenements, if he *dare not enter* into the ſame lands and tenements, nor *into any parcel* thereof *for doubt of beating, or for doubt of maiming, or* for doubt of *death*, if he *goeth* and approach *as near to the tenements as he dare* for ſuch doubt, *and by word* claim the land to his, preſently by ſuch claim he hath a poſſeſſion and ſeiſin in the lands, as well as if he had entered indeed, although he never had poſſeſſion or ſeiſin of the ſame lands or tenements before the ſaid claim. Litt. ſ. 419.

2. If a man *fear the burning of his houſes, or the taking away or ſpoiling of his goods*, this is not ſufficient, becauſe he may recover the ſame, or damages to the value, without any corporal hurt. Co. Litt. 253. b.

3. Such doubt of *fear muſt concern the ſafety of the perſon* of a man, and not his houſes or goods, becauſe he may recover the ſame, or damages to the value, without any corporal hurt. Co. Litt. 253. b.

[465] 4. If the fear concerns the perſon, yet it muſt not be a vain fear, but *the fear muſt be ſuch as may befal a conſtant man*, as if the adverſe *party lies in wait in the way with weapons, or* by words *menace to beat, mayhem or kill him, that would enter*, and ſo in pleading muſt he ſhew ſome juſt cauſe of fear; for fear of itſelf is internal and ſecret; but in a ſpecial verdict, if the jurors find, that the diſſeiſee did not enter for fear of corporal hurt, this is ſufficient, and ſhall be intended that they had evidence to prove the ſame. Co. Litt. 253. b.

5. *Fear of impriſonment* is alſo ſufficient; for the law has a ſpecial regard to the ſafety and liberty of a man. Litt. ſ. 420.

(G. 7) Writ abated by Entry. In what Caſes.

1. WRIT of *entry in* le quibus, the tenant had not entry unleſs after the leaſe which one made who had not any thing therein unleſs as guardian, &c. was abated becauſe he might have aſſiſe or writ of entry ſur diſſeiſin, as his caſe required. Thel. Dig. 117. lib. 10. cap. 27. ſ. 1. cites Mich. 4 E. 2. Brief, 790. But ſays, that in the time of Bracton the other writ was in uſe, as appears fol. 324.

2. *In admeaſurement of paſture the tenant ſaid, that the demandant himſelf had ejected the tenant out of the common of paſture, pending the writ*, &c. And adjudged no plea; for the tenant was ſeiſed of the land by the reaſon of which he ſurcharged the paſture. Thel. Dig. 187. lib. 12. cap. 21. ſ. 4. cites 8 E. 2. It. Kanc. Brief, 846. Admeaſurement, 14.

3. If the *demandant diſſeiſes the tenant, or enters pending the writ*, it ſhall abate notwithſtanding that the *demandant* has *aliened the land after to another*. Thel. Dig. 187. lib. 12. cap. 21. cites Trin. 4 E. 3. 148.

4. In *ceſſavit after verdict* found *for the demandant* againſt the tenant en pais, the tenant was not received at the day in Bank to *plead that the demandant had diſſeiſed him*, &c. in arreſt of judgment. Thel. Dig. 187. lib. 12. cap. 21. ſ. 5. cites Trin. 5 E. 3. 201.

5. And where it appears by the writ that the *writ was upon the ſeiſin of another anceſtor* than him upon whoſe ſeiſin it is brought, it ſhall abate. Thel. Dig. 117. lib. 10. cap. 27. ſ. 2. cites Hill. 7 E. 3. 301.

6. *At the grand cape returned* the tenant was received to *ſay that the demandant had diſſeiſed him after the default made, and that the demandant is tenant by his diſſeiſin*, &c. without ſaving the default. Thel. Dig. 187. lib. 12. cap. 21. ſ. 7. cites Paſch. 8 E. 3. 388. And that ſo agrees Paſch. 9 E. 3. 455. at the petit cape returned, but he ought to ſay that the demandant is this day ſeiſed, cites 10 E. 3. 541.

7. If the *demandant enters into parcel*, pending the writ, *and thereof enfeoffs another*, the writ ſhall abate for all. Thel. Dig. 187. lib. 12. cap. 21. ſ. 8. cites Mich. 10 E. 3. 531.

8. In *writ of right of ward of the body*, if the *demandant ſeiſes the body* of the infant the writ ſhall abate. Thel. Dig. 187. lib. 12. cap. 21. ſ. 9. cites Mich. 13 E. 3. Brief, 673. and Mich. 12 H. 4. 7. where there was an enterpleader.

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9. To ſay that the *demandant after the laſt continuance diſſeiſed the tenant, and ſo is tenant*, &c. is a good plea to the writ. Thel. Dig. 187. lib. 12. cap. 21. ſ. 11. cites Mich. 18 E. 3. 57.

In *formedon*, the tenant *pleaded non-tenure, and thereupon to iſſue*, &c. And *after the tenant pleaded that the demandant entered after the laſt continuance*, &c. and held good notwithſtanding the non-tenure pleaded before. Thel. Dig. 187. lib. 12. cap. 21. ſ. 14. cites Mich. 7 H. 6. 15.

10. Entry *into parcel ſhall abate all the writ*. Per Shard. Thel. Dig. 187. lib. 12. cap. 21. ſ. 10. cites Mich. 17 E. 3. 57. and 4 E. 4. 34. Contra it is ſaid Trin. 27 E. 3. 82.

In *aſſiſe*, it is affirmed by Priſot, that the *entry of the plaintiff, pending the writ, into parcel pleaded by diſſeiſor, goes in bar for this parcel*. Thel. Dig. 187. lib. 12. cap. 21. ſ. 17. cites Mich. 35 H. 6. 13.

And *ſo* it is held *in præcipe quod reddat pleaded* by the tenant. Thel. Dig. 188. lib. 12. cap. 21. ſ. 17. cites 39 H. 6. 45. and 21 H. 6. 53. And by tenant by receipt 37 H. 6. 2.

11. In aſſiſe, the *tenant ſaid, that* the aſſiſe ought not to be, for *the plaintiff himſelf by this deed indented, which he ſhews, granted to him after the laſt continuance, that he ſhould hold the land till Michaelmas laſt paſt*, and ſo has abated his writ; judgment; Caund. ſaid, the grant proves that it was granted to the uſe of the plaintiff; and per Cur. the writ is abated, by which the plaintiff was nonſuited. Brook ſays, the reaſon ſeems to be, becauſe *this leaſe is an entry in law*, as *exchange*, or *partition*, or *aſſignment of dower* of the land in plaint, as it is ſaid elſewhere, that thoſe are entries in

in law which ſhall abate a writ. Br. Brief, pl. 308. cites 42 Aſſ. 21.

12. And if the demandant *receives parcel of the tenements of the tenant* pending the writ *by accord between them, and after leaſes this parcel to the tenant for years*, the writ ſhall abate for all, notwithſtanding that this accord was upon condition, which did not give re-entry by the non-performance thereof. Thel. Dig. 187. lib. 12. cap. 21. ſ. 8. cites Mich. 10 E. 3. 532. and ſays ſee 42 Aſſ. 21.

13. Writ of entry ſur diſſeiſin, the *tenant ſaid that the demandant with other ſtrangers, by his procurement, have ouſted the tenant pending the writ*; judgment of the writ; & non allocatur, but the writ awarded good; but if the *demandant himſelf had entered, or another to his uſe, to which he agreed*, this ſhall abate the writ; note the diverſity; quære of *commandment*. Br. Brief, pl. 87. cites 50 E. 3. 2.

14. One *leaſed for life rendering rent*, and *reſerving a re-entry for default* of payment, and afterwards *brought writ of waſte, pending which* writ *he entered, becauſe the rent was arrear*, &c. Quære if the writ ſhall abate. Thel. Dig. 187. lib. 12. cap. 21. ſ. 12. cites Paſch. 45 E. 3. 9. and ſays ſee 12 H. 4. 6. and 4 E. 4. 34.

15. The tenant ſaid, that the *demandant with others, by his procurement, had ouſted the tenant of the land pending the writ*, and no plea, without ſaying *that the demandant is, or was tenant of the land by this ouſter*. Thel. Dig. 187. lib, 12. cap. 21. ſ. 13. cites Hill. 50 E. 3.

16. If the *demandant in formedon enters* into the land in demand *to ſhew it to the ſheriff to make the view*, ſuch entry ſhall not abate the writ, clearly; quod nota per Cur. Contra elſewhere if he claims to himſelf. Br. Brief, pl. 408. cites 10 H. 6. 8.

So in aſſiſe it was agreed that if the *plaintiff comes upon the land, pending the writ, and does not claim any thing by his entry*, that ſuch entry ſhall not abate the writ, for he come there to ſhew the jury the land to have the view of it, and to give them evidence. Br. Brief, pl. 328. cites 5 E. 4. 59.

And therefore *the ſame* ſeems to be, that if he *enters to ſee if waſte be done pending the writ*, as in formedon between MORETON and in the county of Stafford. Br. Brief, pl. 328. cites 5 E. 4. 59.

* *So* where *a common way is over the land*, and the plaintiff uſes the way, without claiming any other thing. Br. Brief, pl. 328. cites 5 E. 4. 59.

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17. In formedon, if a man *enters upon the tenant*, and the *demandant proſecutes his ſuit and recovers*, this ſhall bind the tenant and him who entered; but if he who entered had *elder title before the writ of formedon*, the recovery is not good; and ſee elſewhere, that writ ſhall be brought againſt the mortgagor and mortgagee, and the lord and villein; for an entry by the feoffor, or lord of the villein, ſhall abate the writ, and ſo ſee that *the entry of a ſtranger* ſhall abate the writ in ſeveral caſes. Br. Brief, pl. 182. cites 21 H. 6. 17.

18. Where a *manor is demanded*, the *entry of* the demandant *into an acre, parcel* of the manor, ſhall abate all the writ. *But where* 20 *acres are in demand*, and the demandant *enters into one acre*, if he does not claim to enter into any more than into this acre, the

writ ſhall abate only for this acre. Per Priſot. Thel. Dig. 187. lib. 12. cap. 21. ſ. 16. cites 34 H. 6. 2. 2 H. 6. 17. 39 H. 6. 45. and 1 E. 4. 4.

19. In cui in vita *of three acres* it was agreed, that if the *demandant by another action recovers one of the three acres and enters*, it ſhall abate all the writ, becauſe it is the act of the demandant to recover it, and to enter, and therefore ſhe ſhall abate her cui in vita; quod nota, that recovery in aſſiſe of parcel of the land ſhall abate the cui in vita for all the three acres. Br. Brief, pl. 338. cites 1 E. 4. 3, 4. and 2 E. 4. 10.

In cui in vita, after iſſue and *after the laſt continuance, the tenant pleaded that the demandant had recovered parcel of* the tenements againſt him by aſſiſe, *and that the demandant had entered into this parcel by force of this recovery*, &c. And it was held that this was a good plea to all the writ, yet judgment was given for the demandant to recover ſeiſin of all. Thel. Dig. 188. lib. 12. cap. 21. ſ. 19. cites 1 E. 4. 4. Quære 2 E. 4. 11.

20. If a man brings *præcipe quod reddat of a manor*, houſe, or the like, *which is entire*, and *enters into part*, pending the writ, all the writ ſhall abate. Br. Brief, pl. 480. cites 2 E. 4. 10.

21. In formedon, the *tenant vouched A. who entered into the warranty and vouched B. and* the *demandant as to the third part granted the voucher, and to the reſt counterpleaded the voucher*, by which proceſs iſſued againſt the inqueſt *upon the voucher againſt B. and at the day A. the firſt vouchee ſaid that the demandant, after the laſt continuance, had entered into ten acres, and into the moiety of the rent parcel of the tenements in demand*, and did not anſwer to the reſt, and well, per Cur. For entry into part ſhall abate the writ in all, for he has *falſified his own writ by his own act*, and it lies well in the mouth of the firſt vouchee; for he remains tenant of this part which is counterpleaded, and he is alſo tenant of the reſt till the ſecond vouchee has entered into the warranty; quod nota. Br. Brief, pl. 332. cites 5 E. 4. 116.

22. The *being of the demandant upon the land claiming nothing* is no ſuch entry or poſſeſſion of the demandant as ſhall abate the writ. Thel. Dig. 188. lib. 12. cap. 21. ſ. 18. cites Mich. 5 E. 4. 60. And that ſo agrees Plowden in the aſſiſe of Parnel, fol. 92. for *the intent* of him who entered *ſhall be conſidered.*

23. In *ſcire facias againſt a vicar upon recovery of an annuity*, it is no plea that the *plaintiff has entered into certain land of the vicarage*, nor of the abbey, mutatis mutandis, *nor of the heir where the recovery is againſt the anceſtor*; for the *perſon is charged in writ of annuity and not the land.* Br. Brief, pl. 370. cites 10 E. 4. 10.

24. So in *aſſiſe of freſh-force* the plaintiff after the laſt continuance *entered into the cellar* of the diſſeiſor *to view the antiquity* thereof, *in order to give evidence* upon a ſubpœna delivered to him. It was adjudged that this was not ſuch an entry as ſhould abate the writ. Pl. C. 91. b. 93. a. b. Trin. 3 Mar. Panel v. Moore and Corporation of Mercers.

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25. An entry *to abate a writ* ought to be an entry into the thing demanded, which every entry will not do, as entry was *into the cellar* hanging the aſſiſe, but it was *to view the antiquity* of the cellar, and ſo did not abate the writ. Per Fleming Ch. J. 1 Bulſt.

S. C. cited 2 Brownl. 231. in caſe of E. of Rutland v. the E. of

Shrewſ-bury.

1 Bulſt. 9. Hill. 7 Jac. cites Pl. C. 92. The Parſon of Honey-Lane's caſe.

2 Brownl. 238. S. C. & S. P.

26. Several were upon the land cutting down wood, the demandant came upon the land and *admoniſhed* them *to do no more* than they could do by law at their perils; and this was adjudged no entry to *abate his writ*. Per Fleming Ch. J. 1 Bulſt. 9. Hill. 7 Jac. cites Pl. C. 93. in the E. of Shrewſbury's caſe.

27. Every entry which may abate a writ *ought to be in the thing demanded*, and therefore *if a man brings an aſſiſe of rent or common, and hanging this aſſiſe, he enters into the land*; this is not any entry which will abate the writ; per Fleming Ch. J. 2 Brownl. 237. Paſch. 8 Jac. B. R. in caſe of Rutland (Earl) v. Shrewſbury (Earl).

Bulſt. 4. &c. Shrewſbury (Earl) v. Rutland (Earl) S. C. the entry here was not as an officer but as a wrong-doer, but

28. An *aſſiſe* was brought *for the office of keeper of a park, and of the vails and fees*; and *entry into the park* will not abate the writ brought for the keeping of it, and though it was ſaid that he *took* a fee, viz. *a ſhoulder of a buck*, that does not make any matter for two reaſons; 1ſt, He has not ſhewed a warrant he had to kill the buck. 2dly, The taking of the fee is no entry into the office, but the exerciſing of that; per Fleming Ch. J. 2 Brownl. 237, 238. Paſch. 8 Jac. B. R. in caſe of Rutland (Earl of) v. Shrewſbury (Earl of).

if he had entered ad cuſtodiendum, this would have abated his writ, becauſe this would have been a claim of property.

This was only an entry to hunt, but an entry to have abated the writ ought to have been alleged that he entered to *keep*; for in every entry the *intent of the entry* is to be regarded. 2 Brownl. 231. the E. of Rutland v. the E. of Shrewſbury. —— 235. 237. per tot. Cur. in S. C.

29. Error of a judgment in aſſiſe of the office of keeper of a park granted to the demandant in reverſion, and afterwards the park itſelf was granted to another, who entered, and keeps out the reverſioner after the death of the tenant for life, for which he brought an aſſiſe, and after the verdict and before judgment entered into the *park, and hunted and killed a deer*; this entry did not *abate the writ*, or make the judgment erroneous. 1 Bulſt. 5. Hill. 7 Jac. in the E. of Shrewſbury's caſe.

30. In ejectione firmæ the entry of the plaintiff *after verdict* upon the niſi prius, and before the *judgment*, does not abate the writ, and is not aſſignable for error. Jenk. 341. pl. 100.

31. The *leſſor pending the action* brought by himſelf *for the rent, entered into the land*, and the *leſſee re-entered* upon him; the queſtion was, whether the writ once abated by the plaintiff's entry was revived by the re-entry of the defendant, and held it was not. Sty. 260. Paſch. 1651. Webb v. Wilmer.

32. In ejectment the quære was, if entry *after the day of niſi prius, and before the day in bank*, may be pleaded in abatement; and if ſuch entry *after the darrein contin'* be a plea in abatement in ejectione firmæ, ſee 18 E. 4. 19. 34 H. 6. 9. cites 2 Cro. 303. Kerſey v. Lovet. Note, This was error out of C. B. and at another day it was held per Cur. that this is not error, becauſe it is only in abatement, and a diverſity is between this and death, and cites

1 Rep. 5. and it is uſual where entry is before niſi prius to plead ſuch plea at the aſſiſes, and ſhall be tried at the aſſiſes, and if it be omitted, the advantage of it is loſt, but not in caſe of death. Sid. 231. pl. 8. Hill. 16 & 17 Car. 2. B. R. Boys v. Norcliff.

(G. 8) Writ abated by Entry of a Stranger.

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1. IN *writ againſt tenant for life*, if *he aliens in fee*, and he in *reverſion enters*, &c. Quære if the writ ſhall abate; for it is ſaid in this caſe that he in reverſion after ſuch entry may be received by default of the tenant. Thel. Dig. 190. lib. 12. cap. 29. ſ. 1. cites Mich. 18 E. 3. 48.

2. If the *mortgagor pays the money* to the mortgagee *at the day limited* pending the writ againſt the mortgagee, *and enters*, the writ ſhall abate. Thel. Dig. 190. lib. 12. cap. 29. ſ. 2. cites Mich. 39 E. 3. 36. and 18 E. 4. 27.

3. *Writ* brought *againſt a villein* ſhall *abate by the entry of the lord* pending the writ. Thel. Dig. 190. lib. 12. cap. 29. ſ. 4. cites 3 H. 6. 34. and 4 H. 6. 14.

4. It is held that where the *diſſeiſor makes feoffment over*, and the *feoffee is impleaded by a ſtranger*, if the *diſſeiſee enters upon the feoffee pending the writ againſt him*, the writ ſhall abate. Thel. Dig. 190. lib. 12. cap. 29. ſ. 3. cites Mich. 7 H. 6. 17. and ſays, it ſeems that the opinion of Hill. 3 H. 6. 34. agrees ſo *where the diſſeiſor himſelf is tenant, and the diſſeiſee enters upon him.* Trin. 5 E. 4. 6. and 15 E. 4. 4. and 22 H. 6. 26.

5. But it ſaid, that where one is *infeoffed upon condition to be performed of the part of the feoffee*, if he be impleaded by writ, and the *feoffor enters for the condition broken pending the writ*, it ſhall not abate. Thel. Dig. 190. lib. 12. cap. 29. ſ. 5. cites Mich. 15 E. 4. 5. Quære.

(G. 9) Pleadings in Writs of Entry.

1. IN writ of entry, the demandant *pleaded jointenancy by fine*, and the demandant was not received to maintain his writ, but it was abated. Thel. Dig. 226. lib. 16. cap. 7. ſ. 5. cites Mich. 17 E. 2. Maintenance de Brief, 1. and 55. Paſch. 15 E. 3.

2. Feme received, pleaded entry of the demandant pending the writ, without ſaying after the laſt continuance, and held good. Thel. Dig. 188. lib. 12. cap. 21. ſ. 20. cites Trin. 21 H. 6. 54.

3. *If the tenant enters pending præcipe quod reddat before iſſue*, the *pleading ſhall be that he entered pending the writ; but if he enters after iſſue*, the entry *ſhall be that he entered after the laſt continuance.* Br. Brief, pl. 2. cites 26 H. 8. 3. Thel. Dig. 188. lib. 12. cap. 21. ſ. 23. cites S. C.

4. Upon *pleading a conveyance by bargain and ſale*, actual entry ought to be pleaded, and poſſeſſion by 27 H. 8. of uſes is not ſufficient. Noy, 6. per the juſtices. Anon.

5. A *tortious entry* is not to be pleaded in bar of an *action veſted*; Arg. Skin. 210. pl. 4. Mich. 36 Car. 2. in caſe of Pool v. Archer.

6. *As* in *debt for rent* upon a leaſe for years *due at Lady-day*, an *entry after* our Lady-day ſhall not be pleaded in bar; Arg. Skin. 210. in S. C.

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(G. 10) Bar of Action; in what Caſes.

1. WHERE a man *recovers an advowſon, or brings præcipe quod reddat of land*, and *before judgment or execution enters and makes a leaſe* of it, *or takes a leaſe* of it *for years, execution by elegit*, or the like, *or accepts dower in part, pending cui in vita*, or *takes part in exchange or in partition*, it is a bar for the time. Br. Barre, pl. 33. cites 24 E. 3. 3.

2. If *diſſeiſee re-enters, he ſhall not have treſpaſs of the firſt damage*, for it was folly that he had not taken the aſſiſe; per Thirn. Br. Treſpaſs, pl. 72. cites 2 H. 4. 11.

3. In writ of entry, the *tenant pleaded entry by the demandant pending the writ*, the *demandant ſaid that the tenant was tenant of the franktenement the day of the writ purchaſed, and yet is*, & non allocatur; for if the demandant entered, and the tenant re-entered, it ſhall not make the writ good which was once abated; per Fitzherbert and the beſt opinion. Br. Brief, pl. 1. cites 26 H. 8. 1.

(G. 11.) Entry in Nature of Aſſiſe. Writ and Pleadings.

1. IN writ of entry in nature of aſſiſe *againſt A. and B. by ſeveral præcipes de quibus, A. and B. diſſeiſiverunt the demandant*, and adjudged good *without ſuppoſing the ſeveral diſſeiſins*. Thel. Dig. 113. lib. 10. cap. 23. ſ. 16. cites Hill. 8 R. 2. Br. 929. and ſays it is ſo in formedon, writs of entry, and writs founded upon diſſeiſin; per Belknap.

2. It was ſaid, that in writ of entry in nature of aſſiſe *by tenant in tail, or for life*, the writ *ought to comprehend their title*, and the eſtate which they claim. Thel. Dig. 105. lib. 10. cap. 14. ſ. 9. Hill. 21 H. 6. 28.

(G. 12) Sur Diſſeiſin; Writ and Pleadings.

1. IF a man *gives in tail, or* aliens *in fee upon condition*, if *the condition be broken*, the donor, feoffor, or his heir, may have ad terminum qui præteriit, per Mowbray, quod Chelr. and Finch. omnino negaverunt. Per Grene, if J. *leaſes for term of years, and the term expires*, and a ſtranger enters, the leſſor ſhall have ad terminum

minum qui præteriit; contra upon eſtate upon condition, if the condition be broken there is no other remedy but entry, quod Skipw. & omnes conceſſerunt by their judgment. Br. Enter en le per, pl. 27. cites 33 Aſſ. 11.

2. If *diſſeiſee releaſes to the diſſeiſor all his right*, the diſſeiſor in writ of entry after this releaſe ſhall be ſuppoſed in the per by the diſſeiſin; per Hody. Br. Releaſes, pl. 22. cites 19 H. 6. 17. 23.

3. The *reaſon for which writ of entry ad terminum qui præteriit lies againſt termor who holds over* his term is becauſe *this holding in by tort is in the law a fee-ſimple*. Br. Enter en le per, pl. 32. cites 22 E. 4. 14. 38. [471] Br. Eſtates, pl. 46. cites 22 E. 4. 38. S. C.

4. *Tenant in tail brought a writ of entry ſur diſſeiſin*, and the *writ was general*, and the 21 H. 6. 26. was vouched to be held, that the writ ought to be ſpecial, viz. to make mention of the tail; but the Court held that the general writ is good enough. And then the count ought to be ſpecial. Le. 231. pl. 314. Paſch. 33 Eliz. C. B. Brownſall v. Tyler.

(G. 13) Upon what Plea by Defendant the Demandant may enter without praying Seiſin.

1. *Formedon againſt two*, the *one diſclaimed*, and the *other pleaded non tenure*, and therefore the *demandant prayed ſeiſin* of the land, for nothing can be veſted in him who pleaded non tenure, becauſe he did not take the tenancy; but the opinion of all the Court was that the *demandant may enter*; quod nota. Br. Diſclaimer, pl. 17. cites 36 H. 6. 28.

2. Per Danby, *in action in which a man may recover damages*, and the *tenant diſclaimed*, the *demandant may aver him tenant*. But *contra where he cannot recover damages*; for he is at no miſchief; for he may enter. Br. Diſclaimer, pl. 17. cites 36 H. 6. 28.

3. And note, that upon the diſclaimer the judgment is, *that the writ ſhall abate*, and no judgment is given for the demandant, and yet he may *enter by reaſon of the eſtoppel which is between the demandant and the tenant*, but it is no eſtoppel to another. Br. Diſclaimer, pl. 17. cites 36 H. 6. 28.

4. *In quid juris clamat*, the *tenant claimed fee* which is *found againſt him*, the plaintiff *ſhall not have judgment to recover the land nor to have attornment*; for no land was in demand, and yet the demandant may enter. Br. Diſclaimer, pl. 17. cites 36 H. 6. 28. per Priſot.

5. In *formedon* the *tenant diſclaimed*, the *demandant maintained his writ, that the tenant was pernor of the profits the day of the writ, and tenant of the franktenement the day of the action accrued*; and per Littleton he ſhall not ſo *maintain his action*; for he *is not to recover damages* in this action, and therefore he may enter. But Needham J. contra, and that he may ſo maintain his writ; for he cannot enter; for the judgment upon diſclaimer is no more, but that the demandant ſhall take nothing by his writ, which is in

eſſect that the writ ſhall abate, and then cannot the demandant enter; for if he enters the tenant may have aſſiſe. Quod quære inde; for it ſeems the law is contra, for the diſclaimer eſtops the tenant to have aſſiſe. Br. Diſclaimer, pl. 24. cites 4 E. 4. 38.

6. In *formedon* the *tenant diſclaimed*, the demandant cannot enter into the land upon the tenant or any who is in by him pending the writ or after, as where the tenant aliens pending the writ or after. But he cannot enter upon him who is not in by him; as in præcipe quod reddat againſt diſſeiſor who diſclaims where the diſſeiſee has entered pending the writ, he cannot enter upon
[472] the diſſeiſee. But Danby contra, if the title of the demandant be elder than the title of diſſeiſin. Br. Diſclaimer, pl. 25. cites 5 E. 4. 1.

Of the ſeveral writs of entry of Ad Communem Legem. Ad Terminum qui præteriit. In Conſimili Caſu. In Caſu Proviſo. En le Per. En le Per, Cui & Poſt. En le Quibus. See F. N. B. and ſee Thel. Dig. 170. &c. lib. 11. cap. 54. per totum.

For more of Entry in general, ſee **Conditions**, **Deſcent**, **Ejectment**, **Eſtate**, **Fines**, **Forfeiture**, **Remitter**, **Trespaſs**, and other proper titles.

Error.

(A) In what Caſes an Erroneous Judgment may be *avoided by Plea* without Writ of Error.

[1. IF the *tenant in a cui in vita dies ſeiſed pending the writ*, and *after judgment is given againſt him* which is erroneous, and after the *recoveror ſues execution againſt the heir*, and he *brings an aſſiſe*; he ſhall not avoid this judgment againſt his father, by ſaying, that his father died pending the writ; but he is put to his writ of error; for the *judgment is* not void, but *only voidable*. * 28 Aſſ. 17. adjudged. 32 E. 3. Aſſ. 99. Curia.]

Fol. 742.

* Br. Error, pl. 123. cites S. C. but Brooke ſays, that it ſeems if the father who died had not been tenant at any time pending the writ, but a ſtranger had been, there the judgment is void as to the ſtranger, becauſe he may always falſify the recovery.

[2. If a man *recovers in* an *ejectione firmæ*, and after his *executor ſues in execution* by ſcire facias againſt the recoveree, the recoveree cannot avoid the judgment nor ſtay execution, by ſaying the *teſtator died between verdict and judgment*, or ſuch like; but he is put to his writ of error, for the judgment is only voidable. Mich. 5 Jac. B. R. between HIDE AND MARKHAM, which concerned the Earl and Counteſs of Shrewſbury. Adjudged per Curiam; and by the clerks, ſuch pleas have been ſeveral times diſallowed.]

By ſtat. 17 Car. 2. cap. 8. ſ. 1. and made perpetual by 1 Jac. 2. cap. 7. it is enacted that in all actions real, perſonal, or mixt, the death of either party between the verdict and judgment ſhall not be alleged for error, ſo as ſuch judgment be entered within two terms after the verdict.

[3. *So* if a man recovers lands *in any real action*, and after ſues execution againſt the heir of the recoveree by ſcire facias; it is not any plea for the heir to ſay, that his *father died pending the writ*, but he is put to his writ of error. 28 Aſſ. 17. by Mowbray admitted.]

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[4. If a man *recover againſt the principal*, and ſues a *ſcire facias againſt the bail*, they cannot *ſay the principal died before the judgment*, and ſo avoid the judgment by plea; for it is *againſt the record*. Mich. 32, 33 El. B. R. between WARTER plaintiff, and PERRY AND SPRING defendants. Per Curiam.]

Cro. E. 199. pl. 20. S. C. the Court at firſt held it no plea, becauſe it goes in avoidance of the judgment, and proves it erroneous, which cannot be avoided but by writ of error, but they might plead the death of B. before the ſcire facias, and after judgment, becauſe then they could not bring in the body. But notwithſtanding the plea was afterwards received becauſe they cannot have a writ

a writ of error to reverſe the judgment. ——— 2 Le. 101. pl. 125. Walter v. Perry. S. C. and all the juſtices except Wray held the plea not good; for it is a ſurmiſe againſt the judgment, which cannot be given againſt a dead man; but it was agreed that he may plead that defendant is dead after the judgment, but it was ruled that defendants ſhould be ſworn that the plea was true. ——— S. C. cited 2 Mod. 308. and ſaid that ſuch plea was good by way of excuſing themſelves to bring in the body, but not to avoid the judgment, becauſe it is againſt the record, which muſt be avoided by writ of error.

[5. In an action upon the *caſe*, if the plaintiff be *nonſuit*, and after it is *entered*, that he *reliquit actionem ſuam & fatetur ſe nolle ulterius proſequi*, upon which *coſts are aſſeſſed*, though it be admitted that this judgment is erroneous, becauſe this is not any nonſuit as is entered; yet *in* an action of *debt for the coſts*, the defendant ſhall not avoid it by plea without a writ of error; for it is a judgment de facto not void, but only voidable by writ of error. Mich. 11 Jac. B. R. between COLES AND LOW, adjudged.]

6. If land in one county be *recovered by præcipe in another county, or if* the *tenant dies pending the writ*, thoſe ſhall be reverſed by error as may be avoided by anſwer; for thoſe *are* ipſo jure void. Br. Error, pl. 104. cites 36 H. 6. 33.

Br. Judgment, 123. cites 20 E. 4. 13. S. P.

8. If a *judgment* is given *in a court which has no juriſdiction* it may be avoided by plea; for it is coram non judice; as in the court of Marſhalſie, unleſs both the parties are de hoſtel de roy; per Croke J. Bulſt. 208. cites 22 E. 4. 31. 19 E. 4. 8. b. and 20 E. 4. 16.

Pl. C. 265. a. &c. S. C. adjudged in error in B. R. accordingly.

9. If any of the *proclamations* upon a fine be *entered to be made upon a Sunday out of term*, or *upon the 31ſt of June* (there never having been any ſuch day) they may be avoided by plea or writ of error. Dyer, 181. a. 182. b. pl. 52. &c. Paſch. 2 Eliz. Fiſh v. Brokett.

Roll. Rep. 75. Bullen v. Godfry, S. C. & S. P. agreed per Cur.

10. If a *fine impoſed in a leet* be *unreaſonable or againſt law, as joint where it ſhould be ſeveral*, it may be avoided by plea and judgment of the Court in which the ſuit is depending, for there is no other remedy; reſolved. 11 Rep. 44. b. Godfrey's caſe.

11. The *bail* cannot maintain a writ of error *upon a judgment given againſt the principal*, becauſe he was not privy to the judgment, and therefore it ſhall be allowed him by way of plea in a ſcire facias. Arg. Godb. 377. in pl. 465. Paſch. 3 Car. B. R.

12. In *debt upon a bond againſt an adminiſtrator* he *pleads a judgment recovered againſt the inteſtate, and that he has not aſſets ultra*, &c. the plaintiff *replies that an action was brought againſt the inteſtate, and that he died before the ſaid judgment, and that after his death judgment was given and kept on foot per fraudem.* The *defendant traverſed the fraud, but did not anſwer the death of the inteſtate.* It was urged for the plaintiff that the judgment was ill, and that he being a ſtranger to it could neither bring error nor deceit, and had no other way to avoid it but by plea. The Court held that the plaintiff might avoid the judgment without a writ of error, eſpecially in this caſe, where it is not only erroneous but void. 2 Mod. 308. Trin. 30 Car. 2. C. B. Randal's caſe.

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In what caſes a *fine* may be reverſed by plea without writ of error, ſee tit. FINE (G. b. 3).

(A. 2) Lies; in what Caſes in general.

1. IN ſome caſe of erroneous judgment no writ of error lies, as where *judgment is* given *againſt a baſtard*, and he *dies without iſſue*. Br. Error, pl. 112. cites 15 Aſſ. 8.

2. Of a *fine levied in a franchiſe without authority* writ of error lies. Br. Error, pl. 24. cites 44 E. 3. 37. S. P. Br. Conuſance, pl. 13. cites 44 E. 3. 37.

3. If *matter of error which is not apparent is not objected to*, but paſſes without challenge, as a venire facias returned by a bailiff of a franchiſe where part of the lands are guildable, error will not lie. See Br. Error, pl. 34. cites 3 H. 4. 6.

4. Error may be *in ſuing execution*. Br. Error, pl. 7. cites 9 H. 6. 38.

5. Writ of error lies *of a void judgment* in any caſe. Br. Judgment, pl. 123. cites 20 E. 4. 15.

6. This writ lies when a man is grieved by any error *in the foundation, proceeding, judgment, or execution*, and thereupon it is called breve de errore corrigendo. But *without a judgment, or an award in nature of a judgment, no writ of error does lie;* for the words of the writ be, ſi judicium redditum ſit; and that *judgment muſt regularly be given by judges of record, and in a court of record*, and not by any other inferior judges in baſe courts; for thereupon a writ of falſe judgment does lie. Co. Litt. 288. b.

7. Error will not lie *on a conviction for keeping a gun* on the 33 H. 8. 6. Vent. 33. Trin. 21 Car. 2. B. R. Anon.

8. *Nor* on a conviction *of forcible entry upon view* of the juſtices of peace, but it may be examined on a *certiorari*. Vent. 171. Mich. 23 Car. 2. Anon.

9. Suppoſing there was a *general pardon*, and the *party did not plead, nor the judges did not take notice of it*, the party might not have remedy by writ of error. Ellis ſaid, they could *allege nothing* for error *but what did appear in the record;* to which Vaughan aſſented. Freem. Rep. 84. pl. 103. Paſch. 1673. in caſe of Philips v. Crawly.

10. It is merely a matter of favour that *judgment in inferior courts, in cauſes not ariſing within their juriſdiction*, are not avoided without writ of error, and the bringing ſuch writ does not affirm their juriſdiction. 2 Jo. 209. Paſch. 34 Car. 2. B. R. Copping v. Fulford.

11. Upon the *denial* of B. R. *to grant a prohibition*, the Houſe of Lords was moved for a writ of error, but there held that error did not lie. 1 Salk. 136. Paſch. 11 W. 3. in caſe of Biſhop of St. David's v. Lucy.

12. Error will not lie *on a new created juriſdiction* unknown to common law; for they *need not proceed purſuant to the methods of law*, nor need they indictment or jury, nor in their judgments, ſay ideo conſideratum eſt, but *may ſay they judge him guilty, and that he ought to pay ſo much* money, &c. and it is like the caſe of convictions

victions by juſtices of peace, and in both caſes the party has a good remedy by certiorari, and that is a conſequence neceſſary on all ſuch particular juriſdictions, that the record of their proceedings may be brought up to B. R. that this court may examine whether they have kept themſelves within their juriſdiction; per Holt Ch. J. in delivering the judgment of the Court. 12 Mod. 390. Paſch. 12 W. 3. Dr. Greenvill v. the College of Phyſicians.

13. Since the ſtatute 9 Annæ, cap. 20. which allows ſpecial pleadings to a *mandamus*, it was admitted that error lies of a judgment thereon, becauſe it *is now in nature of an action, and coſts are given* by the ſtatute for that ſide which prevails; *but* then it was ſaid further, that this is no argument that error lies of a mandamus *where there is no plea to it, and only a rule awarded for the mandamus*, which is not in nature of a judgment; and Ld. Ch. J. Parker (who with others aſſiſted Ld. C. Cowper at the motion) ſaid, that Chancery might ſuperſede ſuch writ of error, quia improvide emanavit, if it were ſo; and that a mandamus now is in nature of an action, and where judgment was given on ſpecial pleadings upon the late ſtatute, it was admitted lately in B. R. in a caſe there, that error lay. Wms.'s Rep. 350. Paſch. 1717. in caſe of Dean and Chapter of Dublin v. Dowgatt.

14. Where a *reference* is *to the judges on a caſe ſtated*, no writ of error will lie *on their judgment*, but if they certify their reaſons for their opinions, this Court may conſider of it. 9 Mod. 5. Trin. 8 Geo. Gore v. Gore.

15. No writ of error lies in caſes of *mandamus* or *procedendos*; for the mandamus gives the party that tries it no better right than he had before, which ſtill remains examinable and triable in a proper action, and there being no coſts, the party that ſues the writ of error can have no benefit by it. MS. Tab. March 18, 1725. The King v. Herle.

(B) In what Caſes an erroneous Judgment may be avoided *by Entry* without a Writ of Error.

Sty. 246. Ailet v. Watleſs, S.C. adjudged niſi.— See tit. Enfant (G), pl. 2. S. C.— See tit. Recovery Common (D), pl. 6. S. C.

[1. IF an *infant ſuffers a common recovery* in which he *comes in as vouchee in his proper perſon*, and not by attorney or guardian, though this ſhall not bind him but that he may in a writ of error avoid it, becauſe it is error in law, yet at his full age he cannot enter into the land and avoid it by his entry, before he has reverſed it in a writ of error, becauſe he himſelf is privy to the judgment, and may reverſe it by ſuch means, and he is not a ſtranger to the judgment, for judgments ought not to be ſubverted by matter of pais without matter of record; as a (*) *recognizance or fine* by an infant, nor any judgment in other actions given againſt an infant, *where he appears by attorney and not by guardian.* Hill. 1650. between AYLIFF AND WALKER adjudged per Curiam, upon a ſpecial verdict for land in Eſſex. Intratur Trin. 1649. Rot. 200.]

* Fol. 743.

2. If

2. If *an infant makes an attorney which is recorded, and pleads* a plea *to iſſue*, which is *found againſt him*, this is no matter in arreſt of judgment, but is put to his writ of error. Br. Error, pl. 79. cites 22 H. 6. 31. per Newton.

3. *So* per Portington, if the infant be permitted to *levy a fine*, if this be *recorded* it cannot be defeated but by writ of error; quod nemo negavit. Ibid.

(C) In what Caſes Judgments ſhall be reverſed *without a Writ* of Error.

In what Court.

[1. *IN Banco Regis in no caſe* neither in the ſame term, nor in another term, ſhall an outlawry be reverſed without writ of error *on the crown-ſide*. Mich. 14 Jac. The clerks ſaid, that ſo at all times had been their courſe, and the Court agreed thereto, and adjudged accordingly. * 19 H. 6. 2. adjudged; and by the clerks it is the courſe.]

* Fitzh. Error, pl. 26. cites S. C. in B. R. and that the Ch. Juſtices and clerks held that it could not be reverſed in that court without writ of error, but ſays that otherwiſe it is in C. B. if he comes the ſame term. ——Br. Error, pl. 199. cites S. C. that he who comes in by exigent may the ſame term reverſe utlawry for matter apparent by plea, as for omiſſion of proceſs in C. B. without writ of error; but otherwiſe upon matter in fact; but that the uſage in B. R. is, that in both caſes he is put to his writ of error. ——Br. Error, pl. 81. cites 15 E. 4. 7, 8. ſame diverſities. ——Outlawry in perſonal actions cannot be reverſed in B. R. without writ of error, by the courſe of the Court; but otherwiſe it is in C. B. per Broome, ſecondary of B. R. 2 Roll. Rep. 25. Paſch. 16 Jac. B. R. Anon. cites 4 E. 4. 10. b. 11. a. and 42. b. 43. a.

In what caſes utlawry ſhall be reverſed by writ of error, or by plea, ſee tit. Utlawry (G. b).

2. One *convicted of felony prayed his clergy*, and had it. The *indictment was removed into the crown-office;* a writ of error does not lie to avoid it, becauſe he is a clerk convicted only, and not attainted; for *when he prayed his clergy, which was allowed him, there never was any judgment afterwards given*, and of that opinion was the whole Court; but upon exceptions taken to the indictment, the ſame was diſcharged, and reſtitution awarded. Cro. E. 489, 490. pl. 6. Mich. 38 & 39 Eliz. B. R. Long's caſe.

(D) [Reverſed.]

For what Cauſe.

[1. *AT the exigent returned in Banco*, if the *defendant ſays the plaintiff appears by the attorney, and the attorney has no warrant*, this is not cauſe to reverſe the judgment without writ of error, *for perhaps he has a warrant in Chancery.* 11 H. 4. 34.]

Br. Utlagary, pl. 11. cites S. C.—Fitzh. Utlagary, pl. 40. cites S. C.

[2. *But*

* Br. Utlagary, pl. 11. cites S. C. † Where one is outlawed contrary to a ſuperſedeas, the Court in the ſame term may reverſe the outlawry without a writ of error. Br. Utlagary, pl. 19. cites 8 H. 6. 37.

[2. *But* a judgment may be reverſed in a writ of error *for an outlawry after a ſuperſedeas and mainprize.* * 11 H. 4. 34. † 8 H. 6. 37. 9 H. 6. 8. Contra Mich. 37 El. B. per Curiam.]

Br. Utlagary, pl. 11. cites S. C. ——Br. Error, pl. 48. cites S. C.

[3. *So* if the *exigent bears date before the fourth day of the pluries capias iſſued* to the ſheriff. 11 H. 4. 34.]

‡ Br. Utlagary, pl. 18. cites S. C. per Hals. Quod nota.

[4. A man *outlawed of felony* ſhall not avoid the outlawry, becauſe he *was in priſon at the time*, without a writ of error. 1 H. 7. 13. b. Contra ‡ 7 H. 6. 25.]

‖ In the large edition of Brook, the word is (tamen), but in the other editions is (tantum), viz. that there were two capias's only; but the Year-book is as in Roll, viz. that there were not two capias's awarded. See Brook, Utlagary, pl. 19. cites 8 H. 6. 37.

§ This is miſprinted in Roll, and it ſeems ſhould be (15. b. pl. 6.), and there the objection was, that there were but two capias's iſſued where there ſhould have been a third.

[5. [*So*] if a man be outlawed, *where it appears by the record* that there *were* ‖ *not two capias's awarded*, this may be annulled without a writ of error. (8 H. 6. 37. 11 H. 6. § 11.), though the ſtatute ſays it ſhall be void. Contra M. 37 El. 6.]

S. P. where the defendant came the ſame term in perſon and prayed a reverſal, becauſe it is in the ſame term; per Cott. for the ſtatute ſays, that ſuch proceſs ſhall be held for null, to which the Court, except Babb. Ch. J. agreed. Br. Utlagary, pl. 19. cites 8 H. 7. 37. ——Fitzh. Error, pl. 19. cites S. C.

[6. *So* if a man be outlawed, and *no mention* is made *of what county he was*, this may be reverſed without a writ of error. 8 H. 6. 37. Curia.

[7. [*But*] if a man be outlawed *without addition* given to him *in ſuch action*, in which action *there ought to be* an addition by the ſtatute, he ſhall not avoid it by plea without writ of error, though the ſtatute ſays that ſuch outlawry ſhall be void. 11 H. 6. 15.]

[8. [*But*] if a man *comes in ward upon the capias utlagatum*, he may reverſe the outlawry, becauſe he is *named J. S. de A. whereas he was abiding at the writ purchaſed at B.* and not at A. and this without writ of error, becauſe if he ſhould bring a writ of error, it ought to agree in the name with the record, which would be againſt himſelf. 19 H. 6. 80.]

[9. But *otherwiſe* it would be *if he had rendered himſelf gratis.* 19 H. 6. 80.]

And a ſci. fa. was granted againſt the plaintiff to ſay if he would maintain the writ, per Newton and Paſton J. For the ſheriff did wrong to arreſt him; becauſe if he be of B. he is not the ſame perſon, nota; and ſhall not be forced to a writ of error; for per Paſton the ſuing a writ of error will affirm the name, becauſe it muſt be according to the record; and ſo he was ſuffered to make attorney, and was diſmiſſed. Br. Utlagary, pl. 22. cites 19 H. 6. 80.

[10. [*But*] if a man *comes in ward upon the capias utlagatum*, he may avoid the outlawry without writ of error, becauſe he is *called J. S. de D.* where there is *no ſuch vill in the county*, becauſe if he ſhould bring a writ of error, it ought to agree with the record, and ſo he ſhould admit that there is ſuch a vill. 22 E. 4. 38.]

[11. If

[11. If a man be *convicted* upon the ſtatute of Jac. cap. 11. by two juſtices of the peace *for killing of partridges with nets, upon proof or confeſſion* of the party without indictment, this judgment may be reverſed in B. R. this being removed there by certiorari without any writ of error. Hill. 12 Car. * B. R. BERRY'S CASE, per Croke and Berkley, and they ſeemed in ſome manner *that ſuch conviction upon the ſtatute for ſhooting*, or ſuch like, might be ſo reverſed without writ of error.]

S. C. cited 2 Jo. 167. Mich. 33 Car. 2. B. R.

* Fol. 744. in caſe of the King v. Briggs, which was on a conviction for hunting in a park contrary to the ſtatute, and judgment for the penalty of 20 l. given by the ſtatute; but Pemberton Ch. J. held, that the party ought to be put to his writ of error, and he was not then permitted to reverſe or quaſh it by motion upon the certiorari, but afterwards Pemberton aſſenting, exception was taken to the ſaid judgment by motion on the certiorari.

12. A man ſhall have writ of error *upon an erroneous execution*; as upon an outlawry, as well as upon the principal judgment; per Paſton. Br. Error, pl. 70. cites 7 H. 6. 44.

13. If an *erroneous judgment* be given *upon an indictment of barretry* at the ſeſſions of peace, and the party fined thereupon, and committed till he pays it, and he removes the indictment and proceedings by certiorari, and himſelf by habeas corpus, yet he cannot be diſcharged, becauſe judgment being given thereupon he cannot diſcharge it unleſs he brings a writ of error; adjudged. Cro. J. 404. pl. 2. Trin. 14 Jac. Rice's caſe.

14. But a *record of force* made *by juſtices of peace upon the view*, if the ſame is inſufficient, may be quaſhed upon motion without writ of error; agreed per Cur. 1 Lev. 113. Mich. 15 Car. 2. the King v. Chaloner.

(E) At what *Time* a Judgment may be ſo reverſed without Writ.

[Outlawry.]

[1. AN outlawry *in Banco Regis in another term cannot* be reverſed without a writ of error. 19 H. 6. 2. My Reports, 14 Jac. HAMON.]

Fitzh. Error, pl. 26. cites S. C. —Br. Error, pl. 199. cites S. C. ——Br. Utlagary, pl. 20. cites 19 H. 6. 1, 2.

[2. [*But*] an outlawry in Banco Regis *may* be reverſed *in the ſame term* without writ of error, for all the term the judgment does not remain in pectore of the judges, this being an outlawry and judgment before the coroner. † 19 H. 6. 2. Tr. 14 Jac. B. R.]

† Br. Utlawry, pl. 20. cites S.C. contra, and he was put to his writ of error. ——Fitzh. Error, 20. cites S. C. accordingly. ——And Br. Error, pl. 158. cites 4 E. 41, 42. that in B. R. the defendant ſhall be put to his writ of error, and ſays, that the ſame term the outlawry was reverſed in B. R. upon an exigent iſſuing there, a writ of error was brought out of Chancery, directed to the juſtices of B. R. Brooke ſays, quod nota, that they reverſed their own error at the ſame term.

[3. *So* in the ſame term an outlawry returnable *in Banco* may be reverſed in writ of error. ‡ 8 H. 6. 37. ‖ 19 H. 2.]

‡ Fitzh. Error, pl. 19. cites S. C. ——‖ Fitzh. Error, pl. 26. cites S. C. ——Br. Error, pl. 199. cites S. C. ——See (C), pl. 1. and the note there.

[4. *But*

[4. *But not* there *in another term* without a writ of error. 19 H. 6. 2.]

[479] [5. An *outlawry after a ſuperſedeas cannot* be reverſed *in Banco the ſame term of the return* without a writ of error. M. 37 El. B. per Curiam, becauſe this *is not their judgment, but* the judgment *of the coroner.*]

Litt. Rep. 150. S. C. 6. *In the ſame term* an outlawry may be reverſed in C. B. for error. Het. 93. Paſch. 4 Car. C. B. Anon.

Litt. Rep. 150. S. C. 7. Or *in any term, if* it be *void upon any ſtatute;* as for want of proclamations, &c. Het. 93. Ibid.

(F) *Upon what Judgment.*

[1. IF the plaintiff be *nonſuit at the niſi prius*, upon which *coſts are taxed by the ſame jury*, by the ſtatutes of H. 8. and Ja. and judgment given for them againſt the plaintiff, the plaintiff may have a writ of error upon this judgment. Tr. 3 Jac. B. R. admitted per Curiam.]

[2. If a man brings a *writ of falſe judgment in Banco upon a judgment* given *in ancient demeſne, and reverſes the judgment there*, a writ of error lies upon this judgment, for this is a matter of record. M. 40 & 41 El. B. R. by two juſtices.]

Cro. J. 95, 96. pl. 24. Quarles v. Searle, S. C. held accordingly by three juſtices, contra Williams; [3. If a *manor court holds plea of a thing out of their juriſdiction, and gives judgment* thereof, though this is void, being coram non judice, yet a writ of error lies, and error may be aſſigned in this. M. 3 Ja. B. R. between QUARRELS AND SEARLE, for by the writ of error he ſhall be reſtored to all that he hath loſt, where, by the action of treſpaſs, he ſhall recover all in damages.]

and though a writ of error be brought, that does not affirm the juriſdiction of the inferior court, nor is any affirmative, but that it may be ſaid to be a void judgment, and yet the writ of error well lies of a void judgment.

But in a præcipe quod reddat T. S. was vouched, who entered into warranty, and pleaded to *iſſue*, which was *miſjoined or ſome other the like default*, and it was found againſt him; now if judgment is given againſt him, in ſuch caſe he cannot have a writ of error, by all the juſtices in Bank, notwithſtanding the ſtatute 32 H. 8. cap. 32. [30.] for this is out of the ſtatute, which only gives the writ where a verdict is found for or againſt the demandant or tenant, and a vouchee is neither of them. And. 26, 27. pl. 60. Hill. 7 E. 6. Anon.

4. If a *verdict* paſſes *againſt the vouchee*, yet he ſhall have a writ of error notwithſtanding the ſtat. 32 H. 8. cap. 30. per the juſtices of C. B. Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. in a nota.

Bendl. in Keilw. 207. b. S. C. in totidem verbis. — Inſufficient trials are not remedied by any ſtatute, for the ſtat. 38 H. 8. cap. 30. does not extend to verdict given between the demandant and vouchee, nor to any default in the original writ, or in the return thereof, or the want of an original, or in the count, or to any inſufficiency

5. And alſo note, that if any *default is in any original writ, or* in the *return thereof, or* in the *verdict, or* in the *judgment, or* in the count, *ſo that it plainly appears by the* count *that the plaintiff has no cauſe of action;* and if a verdict and judgment is given upon ſuch originals for the plaintiff, yet the defendant ſhall have writ of error, notwithſtanding the ſaid ſtatute, and theſe defaults are not remedied by the ſame ſtatute. Bendl. 37. pl. 67. Mich. 1 & 2 P. & M.

ſufficiency in the trial, verdict, or judgment, &c. And the ſtat. 18 Eliz. ſalves many ſuch defects, but does not remedy any inſufficient trial, but this remains as at common law. 5 Rep. 36. b. Trin. 30 Eliz. in the Exchequer, in Baynham's caſe, als' Baynham v. Brook.

6. It doth not lie of a judgment upon an *aſſiſe of freſh-force*, but a writ of falſe judgment, as it ſeems. F. N. B. 19. (I). [480]

7. If one be *outlawed upon an indictment of treaſon, felony, or treſpaſs*, but the *proceſs* and order *preſcribed by the ſtatute of* 6 *H.* 8. *cap.* 1. *and* 8 *H.* 6. *cap.* 13. are not obſerved, the outlawry may be reverſed by writ of error, which writ ex merito juſtitiæ ought to be granted. 3 Inſt. 31. cites it as adjudged. Mich. 26 & 27 Eliz. in writ of error coram rege in Ninian Menvil's caſe.

8. A writ of error lies to reverſe an *attainder of high treaſon*, though ſome have held the contrary, by reaſon of 33 H. 8. cap. 28. [20.] that every attainder of treaſon by the common law ſhould be as effectual as if by authority of parliament, for the ſtatute *is to be intended of lawful attainders by due courſe of law, and not of erroneous or void attainders*; and ſo it was held in a parliament held the 28 Eliz. when it was enacted, that no attainder of high treaſon, where the party was executed for the ſame, ſhould be avoided by plea or error; but this act extended only to attainders before that time where the party had been executed, not to attainders after. 3 Inſt. 215.

If the judgment be given by him that has authority, and it be erroneous, it was at common law reverſible by writ of error, only the ſtat. 25 Eliz. cap. 2. ſecures all former attainders, where the party is executed, from reverſal by writ of error, but meddles not with other attainders, neither doth the ſtat. 33 H. 8. cap. 20. take away writs of error upon attainder of treaſon, as hath been reſolved againſt the opinion of Stamf. P. C. lib. 3. cap. 29. Co. P. C. p. 31. But it is true that the ſtatutes 26 H. 8. cap. 13. and 5 & 6 E. 6. cap. 11. take away from a perſon outlawed in treaſon the advantage of reverſal of an outlawry, becauſe the party outlawed was out of the realm, but extends not to other offences. Hales's Hiſt. of Pl. Cr. 353, 354. cap. 26.

9. If a man be *attainted by a judgment upon an indictment*, he ſhall not have writ of error without making a *petition to the king* for the having it; becauſe it ſo highly concerns him; per Coke and Doderidge. Roll. Rep. 175. pl. 12. Paſch. 13 Jac. B. R. Gargrave's caſe.

Ibid. ſays, that ſo are 22 E. 3. 3. and 32 E. 3.

10. Error was brought to reverſe a *judgment upon an indictment for recuſancy*; it was doubted whether any exception be good upon ſuch conviction; for the ſtatute 3 Jac. is preciſely that it ſhall not be void or diſcharged for default of form, or other matter, until after conforming himſelf by coming to the church. But afterwards, becauſe the *judgment was not ideo capiatur*, and the omiſſion thereof is apparent to the king's prejudice, and for that upon every conviction in indictment, the judgment is quod capiatur, for this cauſe the judgment was reverſed. Cro. C. 504, 505. pl. 6. Winchester (Marquis's) caſe.

Jo. 407. pl. 5. The King v. Ld. St. John, S. C. and reports that the writ of error was brought by *the king*; and held that it would lie for him; for he *is not concluded by the ſtatute* 3 Jac.

11. Error was brought to reverſe a *judgment* entered *in an inferior court, that the plaintiff recuperare debeat*, whereas it ought to be recuperare debet. Roll Ch. J. ſaid, that this is no judgment, and ſo no writ of error lies thereupon, for the writ ſuppoſes a judgment, becauſe

Ibid. Roll Ch. J. ſaid, that 3 Jac. in Cam. Scacc. the very caſe was ſo ad-

judged.— See (M) pl. 15. where it is held that *recuperare debeat* is only an award.

becauſe the words of the writ are ſi judicium redditum ſit. Sty. 265. Paſch. 1651. Shedlock v. Lapere.

12. It was ſaid by the Attorney General that no writ of error lies upon a judgment given *upon the ſtatute of Winton*. Freem. Rep. 435. pl. 588. (bis) Mich. 1676. Anon.

Becauſe it is no judgment; but the ſtatute 3 Jac. cap. 4. gives proceſs upon it for the forfeiture, and the party's remedy is in the Exchequer to quaſh it there. Raym. 433. Paſch. 33 Car. 2. B. R. Phorbes's caſe.

13. A writ of error lies not upon an *indictment of recuſancy and conviction by proclamation*. Vent. 355. Trin. 33 Car. 2. B. R.

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6 Mod. 178. S. C. held accordingly.

14. The defendant was *convicted at the ſeſſions for a ſcold*, and adjudged to be ducked; ſhe brought a writ of error (by leave of the Attorney-General), and the Ch. J. ſaid the Court was well enough poſſeſſed of the cauſe by writ of error, but the *beſt way was by certiorari to remove it into the crown-office, and then bring a writ of error coram nobis reſident'*, and upon that the courſe is to give a rule to aſſign error, and then to move for a peremptory rule, and in default thereof to have a non proſ. and then an award of execution. 1 Salk. 266. pl. 12. Trin. 3 Ann. B. R. The Queen v. Foxby.

15. A writ of error does not lie on a *mandamus*. 8 Mod. 29. Hill. 7 Geo. D. and Chapter of Dublin's caſe.

As to reverſing of *attainders*, ſee tit. Attainder (D).

(G) *Of what* Judgments. [In reſpect of the Court where given.]

* Br. Error, pl. 95. cites 37 H. 6. S.C. & S.P.

[1. IN judgment *in pleas upon patents*, pleas of *debt*, *attachment of treſpaſs*, and ſuch like, *given in Chancery*, among them *of* Chancery, and upon *ſcire facias upon recognizances*, a writ of error lies. * 37 H. 6. 14. b. D. 14 El. 315. 100. 11 E. 4. 9.]

Br. Error, pl. 95. cites 37 H. 6. S.C. & S.P.

[2. *But* no writ of error lies *upon a judgment upon a ſubpœna in Chancery*, for as to this it is not a court of record. 37 H. 6. 14.]

Br. Error, pl. 32. cites S. C. See (D), pl. 11.

[3. A writ of error lies upon a judgment *given in a franchiſe* by virtue of conuſance of pleas. 2 H. 4. 4. b.]

[4. No writ of error lies upon a judgment *given by the juſtices of the peace*. 4 H. 6. 24.]

[5. A writ of error lies upon a judgment *in Bank*. 4 H. 6. 24.]

6. If the *ſheriff refuſes the challenges, the party ſhall have error*. Br. Waſte, pl. 58. cites M. 2 H. 4. 2.

7. Of *error in the court of pie-powders* lies writ of error, and not writ of falſe judgment, which proves that it is a court of record, and this per Littleton, quod non negatur. Br. Error, pl. 162. cites 6 E. 4. 3. and 7 E. 4. 23.

8. Where

8. Where falſe judgment is given upon a *writ of juſticies* directed to the ſheriff, no writ of error lies, though the judgment be of debt or treſpaſs above 20s. F. N. B. 18. [H].

9. Upon a judgment in a re-diſſeiſin *before* the ſheriff a writ of error lies. 6 Rep. 12. a.

10. A writ of error lies upon a judgment given in a court of *pie-powders*. Jenk. 211. pl. 48.

11. A writ of error lies *out of the petty bag* into B. R. upon an error in fact. Vent. 103. Mich. 22 Car. 2. B. R. Foxwith v. Tremain.

12. If there be a *conviction of forcible entry upon view of the juſtices of the peace* no writ of error lies upon it, but it may be examined in a *certiorari*. Vent. 171. Mich. 23 Car. 2. B. R.

13. Upon a judgment given *by the cenſors of the college of phyſicians againſt one for mal-practices* no writ of error will lie, becauſe it is a *court inſtituted de novo*, and by the inſtitution they are not bound up to the formalities of other courts, viz. as to draw up their judgments with *ideo conſideratum*, &c. but it is ſufficient for them to ſhew the conviction in other words. But the *conviction may be removed into B. R. by certiorari, and there quaſhed for inſufficiency*. Per Holt Ch. J. Carth. 494. Paſch. 11 W. 3. B. R. Dr. Groenvelt v. Dr. Burnell. [482]

(H) In what *Court* [it lies].

[1. D. 14 El. 315. 100. A *judgment given in Chancery upon a ſcire * facias upon a recognizance*, was *reverſed in Banco Regis*, yet both courts were before the king himſelf. 29 Aſſ. 47. adjudged. My Reports, 11 Jac. B. R. per Coke.] * Fol. 745.

S. P. by Coke Ch. J. Roll. Rep. 287. pl. 5. Hill. 13 Jac. B. R. in caſe of the Bp. of Briſtol v. Proctor. ——4 Inſt. 80. cap. 8. S. P.

[2. It lies in *parliament*. 37 H. 6. 13. b. 11 E. 4. 9.]

[3. No writ of error lies in Banco or Banco Regis upon a judgment given within the cinque ports. D. 23 El. 376. 23. adjudged.]

[4. *But* by the cuſtom of the cinque ports, a falſe judgment given there may be reverſed *per cuſtodem ſive guardianum, 5 portuum*, apud curiam Shepeway. D. 23 El. 376. 23.] As to errors in judgments in cinque ports, ſee tit. Courts of Cinque Ports [E. 7].

[5. A writ of error lies of Banco Regis of a judgment given *in Lancaſter*. 18 El. 4. 12.] Br. Error, pl. 175. cites 18 E. 4. 12. S. P. [and Roll ſeems miſprinted (El) for (E).]

[6. *So* of any *county palatine*, for this is excepted out of their charters. Davis, 1. County Palatine, 62. D. 15 El. 320. 19.] As to writs of errors to the counties palatine, ſee tit. Court of County Palatine (S. 6).

[7. A writ of error is in Banco upon judgment in a county palatine, *becauſe theſe counties were derived out of the crown.* * 19 H. 6. 12. 6 H. 4. 4.]

* Br. Error, pl. 74. S. C.—That error in county palatine ſhall be redreſſed here in England; [but ſays not in what court, whether in C. B. or B. R.]—Br. Cinque Ports, pl. 8. cites S. C.

[8. If the judgment be given in the court of *Stannaries of the dutchy of Cornwal*, no writ of error lies upon this in Banco, or Banco Regis, becauſe it hath not been uſed; but of this there may be an *appeal to the guardian of the ſtannaries, and from him to the prince, and when* there is *no prince* to *the king's counſel.* M. 13 Jac. B. R.]

Doderidge ſaid, that it had been adjudged by all the juſtices in town, TREWMAN'S CASE, that no writ of error lies of a judgment given in the Stannaries in Cornwall. Win. 8. Paſch. 19 Jac. in the caſe of Ewer v. Vaughan.

† Br. Error, pl. 127. cites S. C.—Per Cur. Le. 55. in pl. 69. cites 15 E. 3. Error, 72.——And 3 Le. 159. pl. 207. cites S. C.——Upon a falſe judgment in C. B in Ireland error muſt be ſued in B. R. there, but on judgment given in B. R. there, error muſt be ſued in B. R. in England. F. N. B. 22. (E).——Vaugh. 290. Vaughan Ch. J. cites it as ſaid by ‡ Sir Edward Coke in Calvin's caſe, fol. 18. a. that albeit no reſervation were in King John's charter, yet by judgment of law a writ of error did lie in B. R. of England of an erroneous judgment in B. R. in Ireland. Whereupon Lord Hobert obſerves, that a writ of error lies not therefore to reverſe a judgment in Ireland by ſpecial act of parliament, for it lies at common law to reverſe judgments in any inferior dominions; and if it did not, inferior and provincial governments, as Ireland is, might make what laws they pleaſed; for judgments are laws when not to be reverſed.

[9. A writ of error lies in B. R. upon a judgment *given in Banco Regis in Hibernia.* D. 1. County Palatine, 62. † 34 Aſſ. 7. adjudged. 37 Aſſ. 5.]

‡ [483]

‖ Br. Error, pl. 137. cites S. C.

[10. A writ of error lies *in parliament upon a judgment in Banco Regis, given either in a writ of error or upon an action originally commenced there.* D. 23 El. 375. 19. ‖ 1 H. 7. 19.]

Br. Error, pl. 74. cites S. C.——Br. Cinque Ports, pl. 8. cites S. C.

[11. If a judgment be in any court *in Wales*, a writ of *error lies* thereof *before the juſtices errant.* 19 H. 6. 12.]

Br. Error, pl. 74. cites S. C. but by Newton if there are no ſuch juſtices there it ſhall be redreſſed here in curia regis; but Brooke ſays, quære inde; for by Forteſcue and others, it ſhall be redreſſed in parliament.——Br. Cinque Ports, pl. 8. cites S. C. accordingly.

[12. *But no writ* of error *lies* thereof *in any court at common law at Weſtminſter*, becauſe it lies before the juſtices errant. 19 H. 6. 12. b.]

Wales was a kingdom by itſelf and never derived from the crown, as Lancaſter, Cheſter, and Durham were; per Forteſcue. Br. Cinque Ports, pl. 8.——S. P. and therefore regularly no writ of error did lie of a judgment in Wales, but otherwiſe of the counties palatine. 2 Inſt. 223. cap. 42.——But Keilw. 202. b. in pl. 19. Mich. 11 H. 8. it was ſaid by Brudenell, ex aſſenſu Brook, Fitzherbert, and all the king's counſel, that Wales is parcel of the realm of England, and that writ of error lies in England for an erroneous judgment given in Wales, though not of ſuch judgment given in the Iſle of Man, which was no parcel of the realm, and ſo of Gaſcoigne and Calice.

[14. *But*

[14. *But* a writ of error *lies in parliament* upon a judgment given before the juſtices errant in Wales, becauſe the parliament is more high. 19 H. 6. 12.]

But as to more relating to error of judgments in Wales, ſee tit. Wales (C), and the notes there, on ſtat. 34 & 35 H. 8. cap. 26.

[15. A writ of error lies *in Banco upon a judgment* given *before the judges of aſſiſe.* 11 H. 3. Rot. 7. admitted that it was well brought.]

Le. 55. pl. 69. Paſch. 29 Eliz. C. B. The A. Bp. of York v. Morton, S. P. adjudged that it did not lie in the ſaid court. ——3 Le. 159. pl. 207. S. C. in totidem verbis.

[16. A writ of error does *not* lie *in Chancery upon a judgment* given *in Banco.*]

[17. *But* vide 17 E. 3. 5. 19. 21. where a *writ of error upon a judgment in Banco* was *returnable in Chancery, and* there the *record* was *returned accordingly*, and the *Chancellor delivered it over to the Chief Juſtice de Banco Regis.* 17 E. 3. 46. 30 E. 3. 14.]

[18. A judgment *in aſſiſe cannot be reverſed by the Chancellor before the council*, for this is not any place for it. 34 E. 3. 14. by the juſtices.]

There is no ſuch year in the Year-book.

[19. Upon a judgment *given in the huſtings* of London, a writ of *error lies at St. Martin's before certain juſtices.* 18 E. 3. 8.]

20. Where writ of error is ſued in London of error before the mayor, this ſhall be ſued at *St. Martin's*, and then the mayor and aldermen ſhall have *day by* 40 *days to be adviſed* of their records, and then the *recorder ſhall record it ore tenus*, and there were diverſe opinions if the party after this might allege *diminution* or not. Br. Error, pl. 18. cites 34 H. 6. 42.

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21. 31 *E.* 3. *ſtatute* 1. *cap.* 12. *enacts*, that *where a man complains of error in the Exchequer, the Chancellor and Treaſurer ſhall cauſe to come before them, in any chamber of council nigh the Exchequer, the record of the proceſs, taking to them the juſtices and other ſage perſons; and ſhall cauſe to be called before them the Barons of the Exchequer, to hear the cauſes of their judgments; and if error be found, they ſhall correct and amend the rolls, and ſend them into the Exchequer to make execution.*

The chancellor and treaſurer are judges, and the other are only aſſiſtants. Br. Judgment, pl. 125. cites 8 H. 7. 13.

16 *Car.* 2. *cap.* 2. *ſ.* 2. *The not coming of the Ld. Chancellor and Ld. Treaſurer at the day of the return of any writ of error on the ſtatute of* 31 *E.* 3. *cap.* 12. *ſhall not cauſe any abatement or diſcontinuance; but if either of the Chief Juſtices, or the Lord Chancellor or Ld. Treaſurer ſhall come to the Exchequer chamber at the day of the return the ſuit ſhall proceed.*

S. 3. *Provided that no judgment be given, unleſs both the Ld. Chancellor and Ld. Treaſurer be preſent.*

22. Writ of error lies in England of a judgment in *Calais.* Br. Proceſs, pl. 181. cites 21 H. 7. 31.

Br. Contempt, pl. 7. cites S. C. ——4 Inſt. 282. cap. 68. S. P. ——S. C. & S. P. cited Raym. 174. Arg. ——Vaugh. 291. cites 2 R. 3. 12. S. P.

23. If *falſe judgment* be given *in London, or other* place which is a *court of record*, the party grieved ſhall have a writ of error, and this writ may be returned into C. B. or B. R. at the pleaſure of him who ſues the ſame. F. N. B. 20. (D).

24. Judgment in a *quare impedit before judges of aſſiſe*, and a *writ awarded to the archbiſhop*, and for damages *a ſcire facias to the ſheriff*; the defendants bring error, and remove the record into Banco Regis, and the writ was directed to the chief juſtice de Banco. Dyer, 76, 77. Mich. 6 E. 6. Henſlow v. Keble.

And. 12. pl. 26. S.C. awarded accordingly, after argument and conſideration. ——Bendl. 153. pl. 213. Ap-Richard v. Jones. S. C. awarded accordingly.——D. 250. pl. 85, &c. S. C. held accordingly.

25. Error was brought in C. B. by A. and B. againſt J. S. of a *judgment in an aſſiſe of novel diſſeiſin given by the juſtices of aſſiſe at Monmouth*; the defendant demurred, and adjudged that a writ of error did not lie here. Mo. 78. pl. 208. Trin. 8 Eliz. Price v. Jones.

26. It was held by all the juſtices, that a writ of error does *not lie in C. B. upon* an erroneous *judgment given in any inferior court of record*; and this was, as was ſaid, upon great advice. Cro. E. 26. pl. 6. Paſch. 26 Eliz. C. B. Roe v. Hartly.

*[485] *Adminiſtrators* are within the benefit of this act. 6 Rep. 80. cites it as adjudged in the Exchequer chamber, 36 Eliz. in Ld. Mordant's caſe.

27. 27 *Eliz. cap.* 8. *ſ.* 2. *Reciting that erroneous judgment in B. R. were only to be reformed in parliament*, enacts, that *where any judgment ſhall begin in B. R. in any action of debt, detinue, covenant, account, action upon the caſe, ejectione firmæ, or treſpaſs, firſt commenced there, other than ſuch only where the queen ſhall be party; the plaintiff or defendant, againſt whom judgment ſhall be given, may ſue forth out of Chancery a ſpecial writ of error directed to the Ch. J. of B. R. commanding him to cauſe the ſaid record, and all things concerning the ſaid judgment, to be brought before the ſaid juſtices of C. B. and Barons of the Exchequer into the Exchequer-chamber, to be examined by the ſaid juſtices of C. B. and Barons; which juſtices of C. B. and ſuch Barons of the Exchequer as are of the degree of the coif, or ſix of them, ſhall thereupon * have power to examine all ſuch errors as ſhall be aſſigned or found in ſuch judgment, and thereupon to reverſe or affirm the judgment other than for errors concerning the juriſdiction of the court of B. R. or for want of form in any writ, return, plaint, bill, declaration, or other pleading, proceſs, verdict, or proceeding; and after that the judgment ſhall be affirmed or reverſed, the record and all things concerning the ſame ſhall be brought back into B. R. for execution, &c.*

A *ſcire facias* was awarded againſt the defendants upon a recognizance, which they entered into as bail for a plaintiff in a writ of error that he ſhould proſecute it with effect, or pay the money, if the judgment was affirmed; they plead, that he did proſecute it with effect, and that the judgment was not yet affirmed; the plaintiff replied *proteſtando*, that they did not proſecute with effect, *pro placito*, that the judgment was affirmed by the juſtices of the common bench, and barons *de gradu de la coif, et hoc paratus eſt verificare per recordum*; to which the defendants demurred generally, becauſe it was *not alleged, that there were ſix juſtices and barons preſent when the judgment was affirmed*; for 27 Eliz. cap. 8. which gives them authority, requires that there ſhould be ſix at the leaſt. Sed non allocatur; for the defendant ſhould then have pleaded *nul tiel record*; for if there were not ſix, their proceedings were *coram non judice*. Vent. 75. Paſch. 22 Car. 2. Barret v. Milward.

S. 3. *Such reverſal or affirmation ſhall not be ſo final, but that the party grieved may ſue* in parliament *for the further examination of the judgment.*

Cro. E. 448. pl. 18. and 472. (bis) pl. 36. S.C. but S. P. does not appear.—Ow. 106. S. C. but S. P. does not appear.

28. *A ſtatute-merchant* was *by mittimus removed out of the Chancery into C. B.* and *execution awarded there ſuper tenorem recordi.* Reſolved that error lies in B. R. although the original be in the Chancery, and the judgment of execution given in C. B. Mo. 570. pl. 778. Trin. 41 Eliz. B. R. Worſley v. Charnock.

29. In

29. In *Durham*, if an erroneous *judgment* be *given either in Canc.* there according to the common law, *or before the juſtices of the biſhop*, a writ of error is to be brought before the *biſhop* himſelf; and if he *gives an erroneous judgment*, a writ of error ſhall be ſued returnable in the King's Bench. 4 Inſt. 218. cap. 38.

30. When *judgment* is given *in B. R. upon writ of error, no writ of error* thereupon lies in the Exchequer-chamber; per Coke Ch. J. Roll. Rep. 65. pl. 10. Mich. 12 Jac. B. R. S. P. by Coke Ch. J. 2 Bulſt. 162. Whether the judgment ſo given in B. R. be in affirmance or diſaffirmance of the judgment before given. But in treſpaſs, detinue, ejectione firmæ, where the judgment is originally here upon a ſuit here begun, a writ of error lies in the Exchequer chamber, but not otherwiſe.

31. *Bail upon a judgment in ſcire facias* cannot have error in the Exchequer chamber; for it is out of the ſtatute of 27 Eliz. Held per Cur. Cro. J. 384. pl. 14. Mich. 13 Jac. in Cam. Scacc. in caſe of Sandelow v. Deverton.

32. Error cannot be brought *in one inferior court on a judgment in another;* per Cur. Keb. 318. pl. 42. Trin. 14 Car. 2. B. R. Marchant v. Short.

33. Error lies *in B. R. of a judgment in attainder before the Ld. High Steward;* but the plaintiff in error ought to aſſign the errors in perſon; per Twiſden and Windham, and not denied. Lev. 149. Mich. 16 Car. 2. B. R. in Cornhill's caſe. S. P. by Twiſden. Sid. 208. pl. 2. in S. C.

34. Writ of error *on a judgment in indictment of perjury in B. R. was brought in parliament.* Arg. cites the caſe of READ v. DAWSON, as about two years before, and per Cur. this proves that it may be brought in parliament, but not that it muſt; and they affirmed their juriſdiction that *error may be brought in B. R. in criminal caſes upon judgments given in this ſame court;* but *not in civil caſes, unleſs* it be *of errors in fact* triable by jury; but in caſes criminal, as well of errors in law as in fact. Lev. 149. Mich. 16 Car. 2. B. R. If the *indictment* had been *of treaſon*, &c. and the defendant had been erroneouſly outlawed, and ſo returned, a writ of error may be brought in B. R. for the reverſal thereof. 3 Inſt. 214. cap. 101.

35. A writ of error *out of an inferior court lies as properly in C. B. as in B. R. but* generally writs of errors for many years have not been brought in C. B. the reaſon is matter of conveniency, becauſe *if you bring a writ of error in C. B. and the judgment is affirmed, yet it may be brought into B. R. and be there reverſed;* though indeed if a writ be brought in C. B. we muſt proceed upon it; but no man will adviſe his client to bring it in C. B. but rather into B. R. where it is final; per Vaughan Ch. J. Cart. 222. Paſch. 23 Car. 2. C. B. Anon. [486]

36. Upon a *judgment in the King's Bench error may be* brought either *in the Exchequer chamber or parliament*, at the election of the party, *but* upon a judgment *in the Exchequer chamber*, the writ of *error muſt firſt be brought before the Ld. Chancellor, and cannot come per ſaltem into parliament.* Parl. Caſes, 56, 57. in caſe of Philips v. Bury. 2 Keb. 91. Mich. 18 Car. 2. B. R. the Court conceived that no writ of error lay in parliament on a judgment in B. R. affirmed in Cam. Scacc. And per Windham, the ſtat. 27 Eliz. cap. 8. was made to prevent delays in parliament.

37. In the court of Exchequer chamber for reverſing a judgment given in the court of Exchequer, according to the ſtatute 31 Ed. 3. cap. 12. the Lord Keeper Somers did then declare, that the queſtion had been put to all the judges in England, *whether the judgment of that court ought to purſue the opinion of the majority of judges?* And he ſaid the judges had delivered to him their opinions in writing. Holt Ch. J. Powell and Eyre Juſtices were of opinion, *that the majority of judges ſhould govern this judgment.* But the Ch. J. Treby, Ch. B. Ward, Nevell, Rokeby, Turton, Letchmere, and Powis, were of a contrary opinion; and therefore the Ld. K. pronounced a reverſal of the judgment in the court of Exchequer, merely upon his own opinion, and of Treby Ch. J. and Baron Letchmere, againſt the opinion of all the reſt of the judges. Carth. 388. Mich. 8 W. 3. B. R. The King v. Hornely and Williams.

38. *Mayor and commonalty of London ſued in the ſheriff's court for a fine for refuſing the office of ſheriff*, according to a by-law; *error brought into the Huſtings, which is a court held before the mayor, or ſix aldermen in his abſence;* it was objected that the writ of error did not lie, becauſe the mayor was both judge and party; but not allowed, becauſe the court might be held without the mayor; adjudged in B. R. Holt diſſentiente, and judgment affirmed. MS. Tab. March 18, 1707. Mayor of London v. Markwith.

(I) Lies where.

In the *ſame Court* where the Judgment was.

But in the ſame term they may reverſe their own error without ſuing to the parliament. Br. Error, pl. 68. cites S. C.——Fitzh. Error, pl. 16. cites S. C.

[1. A Writ of error does *not* lie in Banco Regis *for an error in a judgment* given in the ſame court. 7 H. 8. 6. 29. agreed.]

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Br. Error, pl. 68. S.P. cites 7 H. 6. 28. S. C. —— Fitzh. Error, pl. 16. cites S. C.

[2. *But* if the errror be not in the judgment, but *in the proceſs*, there the writ of error lies in the ſame court de Banco Regis, where the judgment was, and they may reverſe it. 7 H. 6. 30.]

Br. Error, pl. 68. S.P. cites 7 H. 6. 28. S. C. —— Fitzh. Error, pl. 16. cites S. C.

[3. *As* they may reverſe their own judgment *for falſe Latin*, becauſe this is not the default of the Court but the clerks. 7 H. 6. 30.]

[4. *So* upon a judgment *in a real action*, if they award an *habere facias ſeiſinam of* two meſſuages and *lands in one town, where the demand is in two towns*, this erroneous execution may be there reverſed upon a writ of error brought in another term than that in which

which the execution is awarded. Hil. 38 El. B. R. between HANMER AND THOMAS, adjudged.]

[5. If a man *comes in B. R. the ſame term the exigent is returned, and* notwithſtanding this the Court gives *judgment againſt him*, this may be reverſed by writ of error in the ſame court, becauſe this is not the *act of* the court, but of *the ſheriff or coroner.* 7 H. 6. 28.] Br. Error, pl. 68. cites S. C.

[6. If the Court de *B. R. awards exigent where they ought to award a pluries capias*, and thereupon the party is *outlawed* in the country, this may be reverſed in the ſame court, becauſe it *is the judgment of the coroner.* 7 H. 6. 28.] Br. Error, pl. 68. cites S. C.

[7. If a *diſtringas* and *octo tales be returnable* in B. R. where the *award is made de octo tal'*, and after judgment is given, this may be reverſed by writ of error in the ſame court, becauſe the error is *in the proceſs*, and made *by the ſheriff.* 7 H. 6. 28.] Br. Error, pl. 68. cites S. C. and that it was in the ſame court in the ſame term, and that the error aſſigned was, that he had a diſtringas juratores after iſſue joined, and the ſheriff returned the diſtringas & octo tales where no tales was awarded by the roll. But Cheyney Ch. J. ſaid, that the ſame term that judgment is given, the record is in the breaſt of the juſtices, and not in the roll; for the roll the ſame term is not the record, but the remembrance of the juſtices, and by this amendment we ſhall not force the party from any action, for though the roll be vicious, the record is in us juſtices, therefore we will amend the roll, and not the record, for the record is in our breaſts all this term, and I myſelf well remember that octo tales was awarded, and I think that where good judgment is given in C. B. which is entered in the roll erroneouſly, and writ of error comes the ſame term, the juſtices ought to amend the roll according to their remembrance and the truth, and then to ſign the record; but contra in another term; for then the record is in the roll, by which he commanded the clerk to amend the roll; quod nota. ——— Br. Amendment, pl. 32. cites 7 H. 6. 29. S. C. ——— Br. Record, pl. 20. cites 7 H. 6. 30. S. C. ——— Fitzh. Error, pl. 16. cites S. C. ——— If a judgment is pronounced in B. R. and is not entered, the judges may alter it the next term. Per Jones J. which was not denied. Poph. 181.

[8. If *a partition* be made *in Chancery*, this may be reverſed by writ of error in the ſame court, without going to parliament. 42 Aſſ. 22. adjudged.] Br. Error, pl. 131. cites S. C.

[9. If *after a judgment* a *capias ad ſatisfaciendum be awarded in B. R. where no capias lies in the original*, and thereupon the *party is outlawed*, he may have a writ of error in another term, and reverſe it in the ſame court, for the *error in proceſs in promulgatione utlagariæ*, becauſe this *was the judgment of the coroners*, and not of the Court. Dyer, 3 El. 195. 37. adjudged.]

[10. If in an action upon the *caſe in B. R.* an *award is made upon non ſum informatus quod querens damna recuperare debeat, ſed quia neſcitur quæ damna, &c. a writ of inquiry* of damages *is awarded, but* it is *never returned, nor any final judgment given, and yet* afterwards a writ of *capias ad ſatisfaciendum is awarded for the* 8*l. damages, and upon this an exigent, and the party is outlawed*, no writ of error lies in Banco Regis in another term for this error in the judgment, becauſe they cannot correct their own error, but the party has his *remedy in parliament only.* Dyer, 3 El. 195. 37. adjudged.] [488]

[11. If a man brings a writ of error *in B. R. upon a recovery in an aſſiſe of darrein preſentment in Banco, and is nonſuit therein, upon which a writ to the biſhop is awarded* for the recoveror, yet afterwards the *recoveree may have a new writ* of error *in the ſame court*, though they ought to reverſe by conſequence their own Br. Error, pl. 121. cites S. C.

award of the writ to the biſhop, if they reverſe the firſt judgment. 23 Aſſ. 8. adjudged.]

[12. If *judgment* be given in an action *in Banco Regis, and there alſo execution is awarded*, a writ of error *quod coram vobis reſidet does not lie in B. R. in adjudicatione executionis*, becauſe they cannot reverſe their (*) own error. M. 12 Jac. B. R. between CHESTON plaintiff, AGAINST BUNN AND SERLE, adjudged.]

* Fol. 747. Roll. Rep. 64, 65. pl. 10. S.C. per tot Cur.

[13. If the *defendant* in an action, being an *infant, appears in B. R. by attorney, and judgment* is there given *againſt him*, a writ of error to reverſe this judgment lies in the ſame court for this error. M. 25, 26 El. Rot. 98. B. R. adjudged between † SAER AND GURNEY. Mich. 5 Ja. B. R. between ‡ WATKIN AND GRIFFIN, adjudged. Rot. 386. Tr. 1650. between § DAWKES AND PEYTON, adjudged, and the judgment reverſed accordingly between DAWKES AND PEYTON, where the caſe was, that PEYTON, being a clerk of the petit bag of Chancery, declared there by force of his privilege, but not by attorney or guardian, and yet was within age, and after he came of full age, and after they pleaded to iſſue, and after it was tranſmitted in B. R. and there was a verdict and judgment given for the plaintiff, the action being a treſpaſs of battery, and ſo the caſe was more ſtrong than the other caſes, becauſe the error in this caſe was committed in Chancery before the record came in B. R.]

† Cro. E. 106. in pl. 19. cites Gourney's caſe. S. C. adjudged accordingly.

‡ S.C. cited Sty. 218. per Roll Ch. J. as adjudged.

§ Sty. 216. S.C. argued, but adjornatur.—Ibid. 218. 212. S C. accordingly.

[14. If *two bring* a writ of *error in B. R.* upon a judgment in an aſſiſe, and *pending the writ one* of the plaintiffs *dies*, and after the *Court, not knowing of the death of one* of them, *reverſes the judgment*, and after *he, againſt whom the judgment was reverſed, brings a writ of error in the ſame court de B. R. and aſſigns the death* of one of the plaintiffs in the firſt writ of error, *which was the act of God, not the error of the Court*, it ſeems the writ well lies. Vide 2 R. 3. 1. a. b. and 20. where this is reported uncertainly, but Vaviſor in the end ſaid, that he would ſhew them precedents.]

In an aſſumpſit againſt two mean between the verdict and the judgment, one of them dies, and notwithſtanding judgment was given, and upon this it was demurred, if error lies here; for it was ſaid, that this Court cannot reverſe their own judgment, except it be for error in proceſs, and not for error en fait; but it was adjudged that the writ of error was well brought here; for the death, &c. was by the act of God, and a thing that did not lie in their cognizance; and it was clearly agreed, that the death of one of the parties did abate the writ, and the judgment was reverſed. Cro. E. 105, 106. pl. 19. Trin. 30 Eliz. B. R. Megot v. Broughton. ——— 2 Le. 54. pl. 77. S. C. but no reſolution. ——— 4 Le. 60. pl. 151. Megot v. Davis. S. C. in totidem verbis, & adjornatur.

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15. *Error in B. R. in the proceſs where it is the default of the clerks* ſhall be reverſed in the ſame court *by a writ of error* ſued by the party before the ſame juſtices, but not without ſuing of a writ of error, although it be the ſame term. F. N. B. 21. (I).

Jones upon F.N.B. 21. (I) took this *difference*, true it is that B. R. cannot reverſe a judgment, although it be in the ſame term, without a writ of error, but this is *where*

16. *But in C. B.* after judgment given in the ſame term, the juſtices may reverſe their own judgment upon error in the proceſs, or for * default of the clerks, *without any writ of error* ſued forth; but in another term the party ought to ſue forth a writ of error thereupon returnable into B. R. F. N. B. 21. (I).

17. But of an *error in law* which is the default of the juſtices, the ſame court cannot reverſe the judgment by a writ of error, nor

nor with a writ of error; but this error ought to be redreſſed in another court before other juſtices by a writ of error. F. N. B. 21. (I).

error lies in the ſame cauſe in the ſame court, as upon outlawry; *but if no error lies in this court for the ſame cauſe, but in parliament*, then B. R. may reverſe the judgment without writ of error being the ſame term. Poph. 181. Trin. 2 Car. B. R.

18. The court of *B. R. cannot reverſe errors in law* before themſelves, though it be in the ſame term; *but* error *in fact or in proceſs* they may; per Cur. Mo. 186. pl. 332. Mich. 26 Eliz. B. R. Anon.

Yelv. 157. Trin. 7 Jac. B. R. Williams J. ſeemed that B. R. cannot reform error in proceſs unleſs in the ſame term.

19. If A. B. be *indicted of treaſon or felony in B. R. or* if he be indicted *before commiſſioners of oyer and terminer, or any other*, and *the indictment* of treaſon or felony *is removed into B. R.* and *by proceſs out of B. R. he is erroneouſly outlawed*, and ſo returned, a writ of error may be brought in B. R. for reverſal thereof. 3 Inſt. 214.

20. A writ of error was brought of a judgment *in B. R. upon an indictment in B. R.* and held good, and that there are more precedents of writs of error in ſuch caſes brought there than in parliament, and cannot be elſewhere than here, being matter in fact, and non conſtat till error aſſigned if it be for error in fact or not. Sid. 208. pl. 2. Trin. 16 Car. 2. B. R. The King v. Cornwall and Ux.

(I. 2) In Exchequer Chamber.

1. A Writ of error is *not maintainable* in the Exchequer chamber by the ſtatute of 27 Eliz. upon a judgment in B. R. *upon a reſcous*, becauſe it is not within the words of the ſtatute, although it be a treſpaſs; but *it is more than a treſpaſs*, and the party that brings reſcous could not have had treſpaſs, becauſe the cattle reſcued were the defendant's own cattle; per all the juſtices clearly. Mo. 694. pl. 963. Trin. 37 Eliz. Ody v. Yate.

Cro. J. 171. in pl. 12. Mann the ſecondary ſhewed to the Court a precedent of ſuch writ of error brought, but reſolved not allowable, it not being an action mentioned in the ſaid ſtatute.

2. By the ſtatute 27 Eliz. the Exchequer chamber hath power to examine errors of judgments in B. R. and after ſuch judgments are affirmed or reverſed, then to ſend back *the record* into B. R. ſo that by the words of this ſtatute, it is *not to be ſent back unleſs the judgment be affirmed or reverſed*; but yet by the equity of that ſtatute, if the *plaintiff* in the writ of error is *nonſuit, or if the ſuit is diſcontinued*, the record ſhall be ſent back into B. R. and the court of Exchequer ſhall give coſts and damages to the plaintiff in the original action for his delay and vexation upon the ſtatute 3 H. 7. cap. 10. but if the plaintiff in error was plaintiff in the original action, then no coſts ſhall be given. 2 And. 122. pl. 68. 40 Eliz. Anon.

3. Error

3. Error in the Exchequer chamber, upon a judgment in B. R. for that *one of the parties died before judgment*; it was objected they had * no authority to examine ſuch errors; but it was held by all the judges and barons that they had authority, though they had none to bail the defendant, becauſe their power was only to examine errors. Cro. Eliz. 731. pl. 70. Mich. 41 & 42 Eliz. in Cam. Scacc. Price's caſe.

It was afterwards moved in B. R. that they had proceeded in the Exchequer chamber without warrant of the ſtatute to try error in fait; for the ſtatute does impower them only to examine errors

4. Error in the Exchequer chamber of a *judgment in B. R. in an ejectione firmæ*, the *error aſſigned was, that the plaintiff was an infant and ſued by attorney, where he could not make attorney*, but ought to have ſued by guardian; it was reſolved by all, except Anderſon, that although this was an error in fact, yet it might be well aſſigned in that court of Exchequer chamber for error, although it was urged, that their authority given them by the ſtatute, was not to examine matters in fact, but only errors in law, which appeared in the record, and to reverſe or affirm the judgment; whereupon the defendant ſaid, that the plaintiff at the time of his action brought was of full age; upon which, iſſue being joined, the court of Exchequer chamber awarded niſi prius. Cro. J. 5. pl. 5. Paſch. 1 Jac. Rew v. Long.

in the record; and of that opinion were all the juſtices; wherefore for this cauſe they would not regrant reſtitution upon this judgment to the defendant, who was put out by the firſt judgment. Ibid. ——Cro. C. 514. at the end of pl. 11. cite S. C. that error in the Exchequer chamber in fait was aſſigned and tried by niſi prius and found, and for that cauſe reverſed.

5. Error was brought by the bail in the Exchequer chamber upon the ſtatute of 27 Eliz. *of a judgment in a ſci. fa. againſt him*; it was the opinion of all the juſtices, that it was not an action mentioned in the ſtatute, whereof a writ of error did lie in that court, nor is he party that can have error of the firſt judgment. Cro. J. 171. pl. 12. Trin. 5 Jac. in Cam. Scacc. Vaughan v. Williams.

Per Cur. no writ of error lies in the Exchequer chamber, becauſe *ſci. fac. is a judicial writ*, and judgment is given therein, and it is *not expreſsly named in the ſtatute* 27 *Eliz.* which gives error

6. In *ſci. fac. againſt the bail* who upon the ſecond ſci. fac. was condemned for not having the body of the principal, and *judgment was given that the plaintiff recover ſuper recuperationem prædictam*, where it ſhould be ſuper *recognitionem prædictam*; per Cur. no writ of error lies into the Exchequer chamber; nor does it lie into B. R. as upon error in proceſs; for *this is no error in the proceſs*; for that is where the proceſs is miſtaken, viz. one proceſs for another, which it is not here; but *the error is only in point of judgment*, viz. *recuperationem inſtead of recognitionem*, which is clearly another matter, and *no remedy*, as it ſeems, *but in parliament*. Yelv. 157. Trin. 7 Jac. B. R. Prowſe v. Turner.

in the Exchequer chamber. Yelv. 157. Trin. 7 Jac. B. R. Prouſe v. Turner. —— In ſci. fac. againſt bail, or *on a recognizance*, a writ of error was never allowed in the Exchequer chamber; agreed by all. 2 Keb. 833. pl. 58. Mich. 23 Car. 2. B. R.

7. *Judgment* in debt was given *in C. B.* which *was affirmed* upon a writ of error brought *in B. R.* Afterwards the defendant died, and then a *ſcire facias was brought againſt the ſon and the tertenants, and judgment againſt them*; and upon a motion for a writ of error in the Exchequer chamber, upon the judgment in the ſcire facias,

ſacias, it was denied, becauſe the record came into B. R. by writ of error, and not originally by bill, as by the ſtatute 27 Eliz. cap. 8. is required. Roll. Rep. 264. pl. 35. Mich. 13 Jac. B. R. Harvey v. Williams.

8. Writ of error does not lie in the Exchequer chamber on a *judgment* given *in a writ of raviſhment of ward*, by the ſtatute 27 Eliz. Sic dictum fuit, and not denied. 2 Roll. Rep. 134. Mich. 17 Jac. B. R. in caſe of Barnefield v. Hutchins.

9. It was agreed that error upon a *judgment* in B. R. *in replevin* does *not lie* in the Exchequer chamber, *but in parliament* only, becauſe replevin is out of the ſtatute. 2 Roll. Rep. 434. Trin. 21 Jac. B. R. Farnell's caſe. [491]

10. No writ of error lies in the Exchequer chamber by force of the ſtatute 27 Eliz. on a *judgment in B. R. in an action de ſcandalis*, for it is not included within the words of the ſtatute, for though the ſtatute ſays, ſuch writ ſhall lie upon judgments in actions of the caſe, yet it does not extend to that action, although it be in an action on the caſe, becauſe it is an action of a far higher degree, being founded ſpecially upon a ſtatute. 2 Ld. Raym. Rep. 954. Trin. 2 Ann. in caſe of Aſhby v. White, by Holt Ch. J. cites Cro. C. 142. pl. 19. [Mich. 4 Car. B. R. Say (Ld. Viſcount) v. Stephens.] Cro. C. 142. S. C. held accordingly by three juſtices, but Crooke J. doubted.—Jo. 194. pl. 5. S. C. held accordingly.—Ley, 82. S. C. reſolved.—Palm. 565. S. C. but S. P. does not appear.—S. C. cited by Jones J. Jo. 423.—S. C. cited and S. P. reſolved accordingly per tot. Curiam. Sid. 143. pl. 20. Paſch. 15 Car. 2. B. R. Stamford (Earl) v. Nedham.—S. C. cited Sid. 240. in pl. 13. Hill. 16 & 17 Car. 2. B. R.—S. P. cited as adjudged accordingly. 5 Mod. 230.

11. Error of a *judgment in B. R.* lies in B. R. *in criminal caſes* upon judgments in the ſame court, as well of errors of law as errors of fact; *but not in civil caſes, unleſs of errors in fact triable by jury*. Lev. 149. Mich. 16 Car. 2. B. R. Cornhill's caſe. Sid. 208. pl. 2. The King v. Cornwall, S.C. & S.P. and it cannot be brought elſewhere than here for matter in fact, & non conſtat till error aſſigned whether it be for matter in fact or not.

12. In *debt upon the ſtatute of uſury*, the plaintiff had judgment in B. R. and the defendant brought a writ of error in the Exchequer chamber. It was moved that it ſhould not be allowed, becauſe it is not within the ſtatute 27 Eliz. which gives a writ of error there; for no action which *concerns the king* is within it, and therefore an action upon the ſtatute of ſcandalum magnatum is not within the ſtatute, and cited Ld. Say's caſe. But on the other ſide it was ſaid that it hath been adjudged to lie *on a judgment in an action on the ſtatute for tithes*; ideo quære. Sid. 240. pl. 13. Hill. 16 & 17 Car. 2. B. R. Whitton v. Preſton. Keb. 823. pl. 5. S. C. per Cur. the writ of error muſt be ſuperſeded, and the king being here to have a part, he may be ſaid a party; but Hyde and Twiſden abſentibus, adjornatur.—5 Mod. 230. Arg. cites S. C. that *the writ of error was diſallowed.*

13. *Mandamus to reſtore* Dr. Patrick *to the maſterſhip of Queen's College in Cambridge*, to which there was a long return of charters and local ſtatutes; and upon the arguing it ſeveral times the Court was divided, whether it might be adjourned into the Exchequer chamber, for difficulty it being amongſt the pleas of the crown Raym. 101 to 113. Hill. 16 & 17 Car. 2. Patrick's caſe, S.C. argued, but Curia

advisare vult. But in the Marg it is said that this case was solemnly argued by four judges, and that Norton [Moreton] and Keeling were for the plaintiff, and Twisden and Windham contra. crown as well as civil pleas might, was the doubt, but *the Court seemed* that it might, and *that pleas of the crown, as well as other pleas, might be adjourned thither*, and that 4 Inst. 68, 69. seems to warrant it, and that it extends to all pleas, except to those of the ecclesiastical courts. Sid. 346. pl. 12. Mich. 19 Car. 2. B. R. The King v. Dr. Patrick.

Lev. 65. Queen's College case alias Dr. Patrick's case, the Court being so divided it was considered if it being a cause of the crown side, it might be adjourned into the Exchequer chamber, and it seemed to some that it might, but it was not.

14. In *trespass upon the statute* 8 *H.* 6. the plaintiff had judgment. It was moved whether a writ of error would lie of this in the Exchequer chamber; for though a trespass is one of the seven cases mentioned in the statute which gives this writ of error, yet it may be intended common trespasses only, and not those which are founded on a statute; Curia advisare vult. Vent. 34. Trin. 21 Car. 2. B. R. Skirr v. Skies.

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But where judgment was given in B. R. in debt on the

15. Writ of error in the Exchequer chamber doth not lie *to reverse a judgment given in an action of qui tam*, &c. *because the king is party*. Vent. 49. Mich. 21 Car. 2. B. R. Anon.

stat. 1 Eliz. cap. 3. and 23 Eliz. cap. 1. for *absenting from church for eleven months*, resolved that error well lies in the Exchequer, because *the king is not properly a party*, though he is to have part of the penalty. Raym. 275. Pasch. 31 Car. 2. in Scacc. Scot v. Knapton.

16. *Scire facias issued against the bail*, and *upon two nichils returned, there was a judgment against them*. Resolved, that no writ of error can be brought into the Exchequer chamber upon that judgment, but in parliament only; and that after such a return of two nichils, it cannot be assigned for error, that there was no capias against the principal; but in that case *the bail is relievable only by an audita querela*. Vent. 38. Trin. 21 Car. 2. B. R. Wingate v. Stanton.

S. P. in a nota. Sid. 424. Mich. 21 Car. 2. B. R. at the end of the case of Redman v. Edolph.

17. Where an *action commences by original writ out of Chancery*, a writ of *error does not lie* in the Exchequer chamber by the stat. 27 Eliz. cap. 8. *but only in parliament*. Saund. 346. Mich. 21 Car. 2. at the end of the case of Mellor v. Spateman.

2 Keb. 849, 850. pl. 99. S. C. held accordingly; for by the judgment which recites the affirmance in the Exchequer chamber, and execution here, all the rest is determined, and the

18. *Judgment in B. R. in an action on the case, and a scire facias quare executionem*, &c. and there was a *judgment upon that*; upon which a writ of *error was brought in the Exchequer chamber*, and the *judgment in the sci. fa. was affirmed*; then the *defendant died*, and a *sci. fa. (reciting the judgment and affirmance of it in the Exchequer chamber) was brought against an administrator, and judgment had upon that*, and the *administrator brought a writ of error upon the judgment in the last sci. fa.* The Court held that it did not lie in the Exchequer chamber, because it was brought upon a judgment affirmed in the Exchequer chamber, which is therefore privileged from any other writ of error to be brought upon it there, so that *this writ can be brought only upon the judgment given in the sci. fa.*

and

and therefore lies not into the exchequer chamber. Vent. 168, 169. Mich. 23 Car. 2. B. R. Skinner v. Webb.

ſuperſedeas was ſet aſide and execution granted. —— Per Twiſden J. clearly no writ of error lies in the Exchequer chamber on judgment in ſci. fa. &c. 2 Keb. 842. pl. 79. Mich. 23 Car. 2. B. R. in caſe of Jones v. Anderſon.

19. Note, it was ſaid by the Court, that if there be a *conviction of forcible entry upon the view of the juſtices of the peace*, no writ of error lies upon it; but it may be examined upon a certiorari. Vent. 171. Mich. 23 Car. 2. B. R. Anon.

20. Error was brought of a judgment in this court into the Exchequer chamber, and *error in fact* was then aſſigned; and the Court being there of opinion, that error in fact could not be aſſigned there, they affirmed the judgment; upon which the record with the affirmation was remitted hither, and a writ of error was brought here coram vobis reſident' (as is uſual for error in fact). Vent. 207. Paſch. 24 Car. 2. B. R. Prior v. .....

2 Lev. 38. Hopkins and Prior v. Weigglefworth, S.C. the error aſſigned was the death of one of the plaintiffs, and judgment was affirmed; upon which the plaintiff brought writ of error coram vobis reſident' in B. R. and aſſigned the ſame error and entered it on the ſame roll; and now Hale Ch. J. ſaid this writ does not lie here; for this ought to be brought upon and recite all the proceedings in the Exchequer chamber.

21. No writ of error lies in the Exchequer chamber *on a ſci. fa. againſt bail.* 12 Mod. 112. Hill. 8 W. 3. Coniers v. Manucaptors of Rawlins.

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22. *Judgment in caſe* upon a bill of exchange *was affirmed upon* a writ of *error in Cam. Scacc. and remitted into B. R.* and then a *ſci. fa. iſſued, and judgment thereupon was, that the plaintiff ſhould have execution.* Then the *defendant brought error in Cam. Scacc. tam in redditione judicii quam in adjudicatione executionis*, and the writ was allowed, *yet the plaintiff was taken in execution*, whereof complaint was made to the Court, but without relief; for per tot. Cur. no writ of error lies in Cam. Scacc. in ſuch caſe, and therefore the execution is well taken out. Comb. 393. Mich. 8 W. 3. B. R. Hartop v. Holt.

12 Mod. 105. S. C. ruled accordingly. —— 5 Mod. 229. S. C. adjudged that the writ of error does not lie and is no ſuperſedeas. —— 1 Salk. 263. pl. 4. S. C. adjudged accordingly. —— Ld. Raym. Rep. 97. S. C. adjudged accordingly, that the intent of the ſtatute of 27 Eliz. was only to relieve the party grieved upon the merits of the cauſe as it was at the time of the firſt judgment, and not upon any matter ſubſequent which ariſes afterwards; when therefore the firſt judgment was affirmed, the merits of the cauſe were allowed, and the Exchequer Chamber, who ought only to affirm or reverſe the firſt judgment, have executed their full power. It is true that if a ſci. fa. be brought to revive a dormant judgment in B. R. error will lie in the Exchequer Chamber tam quam, becauſe it is only in execution of the firſt judgment, and is quaſi an original action; but if a judgment in B. R. be once affirmed in the Exchequer Chamber, and then a ſci. fa. is brought upon it, it is privileged from any other writ of error, otherwiſe the law would be infinite and without end. And the ſci. fa. is not in nature of debt at common law; for the one is brought to obtain another judgment, and the other to obtain execution.

(K) *What Perſons* ſhall have a Writ of Error.

[And in what Caſes *jointly*.]

[1. THE writ of error ſhall be brought by him *who ſhould have the thing for which* the judgment is erroneouſly given, if the judgment had not been given. Dyer, 1 Ma. *9. 5.]

* This ſhould be D. 90. a. pl. 5. Mich. 1 Mar. in caſe of Reynolds and Verney & al' v. Dignam & al'.

[2. *As the iſſue female* ſhall have it *if entailed to her.* 3 H. 4. Dyer, 1 Ma. †9. 5.]

† D. 90. a. pl. 5. cites 3 H. 4.

S. P. and Hill. 10 E. 3.——Br. Error, pl. 35. cites 3 H. 4. 16. S. P. and alſo 9 H. 7. 24. Contra, and that the heir at common law ſhall have the action, and that after the judgment reverſed, the heir in tail may enter.——S. P. per Cur. Le. 261. pl. 346. 18 Eliz. B. R.

[3. *None* ſhall have a writ of error *unleſs* he be *party or privy* to the judgment. 22 E. 4. 31.]

Godb. 377. Arg. cites S. C. and 9 E. 4. 13. 9 H. 6. 46. b.——Privies in record may join in a writ of error; per Roll Ch. J. Sty. 170. Hill. 1649.——There is a difference if one be party to the writ, although not party to the judgment; a quære impedit was brought by the king againſt the patron and the incumbent, and judgment was had againſt the patron only, and the incumbent parſon brought a writ of error; but if he had not been party to the writ, he could not have maintained error. Arg. Godb. 378. pl. 465. Paſch. 3 Car. B. R. in Brooker's caſe, cites Error, 72.——S. had judgment againſt W. and afterwards acknowledged a ſtatute to B. then S. ſued execution, and B. brought error on the judgment, but adjudged that it would not lie, 1ſt, Becauſe he was a ſtranger; and, ſecondly, Becauſe he came in under and after the title of error. Arg. Godb. 378. cites 43 Eliz. C. B. Sherrington v. Worſeley.

[4. *But all* that were *parties to the fine, though they ſhall have nothing if reverſed*, yet ſhall join with him that ſhall have the thing *for conformity*. Dyer, 1 Ma. 89. 2.]

D. 89. b. pl. 2. Raynolds and Verney v. Dignam.

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[5. Writ of error may be brought by him that is *made party by the law, though* he was *not originally party*; as every of the *vouchees* ſhall have a writ of error. ‡ 22 E. 4. 31. 8 H. 4. 3. b.]

‡ Br. Error, pl. 187. cites S. C.

——Br Error, pl. 39. cites S. C.——Fitzh. Error, pl. 61. cites S. C.

[6. The *tenant* ſhall have a writ of error alſo *of an error between him and the demandant*. 8 H. 4. 3.]

Br. Error, pl. 39. cites S. C.——

Fitzh. Error, pl. 61. cites S. C.——See (R), pl. 1. and the notes there.

[7. *But* the tenant ſhall *not* have a writ of error *of an error between the demandant and the vouchee*. 22 E. 4. 32. Contra 8 H. 4. 5.]

Fitzh. Error, pl. 61. cites S. C.——Jenk. 69. pl. 31. S. P. accordingly, cites 8 H. 4. 4. and 9 H. 4. 1.——See (R), pl. 2.

[8. [*But*] the tenant ſhall have a writ of error of an erroneous judgment *given againſt the tenant by reſceit*. 22 E. 4. 32.]

Br. Error, pl. 187. cites 22 E. 4. 30, 31. S. P.——In a quod ei deforceat in Wales, in nature of a writ of right, judgment was given upon the default of the tenant by reſceipt, and this was aſſigned for error, for that the judgment ought always to be againſt the tenant to the action; and this was held a manifeſt error, and judgment was reverſed. Cro. C. 262, 263. pl. 9. Trin. 8 Car. B. R. Killin v. Vaughan.

[9. *But*

[9. *But upon default of the tenant*, if the *demandant ſays*, that the *reverſion is to J. and prays that he be reſceived*, there the tenant ſhall not have a writ of error. Quære, 22 E. 4. 32.]

[10. If a judgment be given againſt B. and the money of C. is attached by force of a *foreign attachment in London*, C. ſhall not have a writ of error, becauſe he *comes in by garniſhment* by the cuſtom, and is not party nor privy. 22 E. 4. 31.] Br. Error, 187. cites S. C. but it is held by ſome the garniſhee upon foreign attachment, &c. may have a writ of error, and that the *plaintiff in attachment of debt* in another's hands in London by the cuſtom may; for the judgment is not only againſt the garniſhee but againſt the defendant alſo, that the other ſhall be diſcharged againſt him, which is extinguiſhment of the debt of the defendant againſt the garniſhee.

[11. If he in the *remainder* be made *privy* to the record by aid-*prayer* * he ſhall have a writ of error during the life of the leſſee. Co. 3. Marqueſs of Wincheſter, 4.] * Fol. 748.

[12. *So if* he be *reſceived* he ſhall have a writ of error. Co. 3. Marqueſs of Wincheſter's caſe, 4. † 8 H. 4. 5.] † Fitzh. Error, pl. 61. cites S. C. —— Br. Error, pl. 39. cites S. C.

[13. *So if* he in the reverſion or remainder be made privy *by voucher*. Co. 3, 4.]

[14. *So if* a *recovery be againſt leſſee for life*, he in the reverſion ſhall have writ of error after his death. 18 E. 3. 25. b. 17 Aſſ. 24.] Same caſes cited 3 Rep. 4. a.

[15. So if the *feme* be *reſceived by the default of the baron*, and loſes the land by judgment, the baron and feme ſhall have a writ of error thereupon. 49 E. 3. 21. b.]

[16. If the *baron and feme levies a fine*, they may by error reverſe the fine for *nonage of the feme* during the life of the baron. Co. 2. Beckwith, 57. b. ‡ Worſly, 77. b. Contra, 50 E. 3. 6.] ‡ Cro. E 129. pl. 1. Charnock v. Worſley. S. C. adjudged. —— Le. 114. pl. 157. S. C. adjudged. —— F. N. B. (D) S. P. —— Br. Error, pl. 28. cites S. C. But *caſſet executio during the life of the baron*; for he has authority to give it during his life. —— Fitzh. Error, pl. 67. cites Hill. 50 E. 3. 5. S. C.

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[17. If the *conuſor of a ſtatute aliens* the land, and *execution is ſued againſt the alienee*, he may have a writ of error upon the execution. § 18 E. 3. 25. adjudged. Quære, for he is not privy thereto; for the execution goes of the land of the conuſor. Dyer, 4 H. 8. 1. 5. ‖ 17 Aſſ. 24. the ſame caſe, becauſe he is ouſted by the execution.] § Fitzh. Error, pl. 71. cites S. C. —— S. C. cited D. 1. b. pl. 5. ‖ Fitzh. Error, pl. 71. cites S. C. —— Godb. 377. Arg. cites S. C. and 18 E. 3. 25. and ſays that the feoffee is privy to that which charges him, the land being extended in his hands, and if the feoffee in ſuch caſe ſhould not have error, the law ſhould give him no manner of remedy; for the conuſor himſelf cannot have error, becauſe the lands are not extended in his hands.

[18. If an *action* be brought *againſt A. as a feme ſole, where ſhe is* a feme *covert*, and ſhe pleads to iſſue as a feme ſole, and after a judgment is given againſt her, *and ſhe is took in execution, ſhe and her huſband may bring a writ of error*; for otherwiſe the huſband ſhall be prejudiced in the conſortſhip of his wife, and of her care concerning his buſineſs and family, and he has no other means to help himſelf; but in the caſe of a fine the huſband may enter and avoid it. Tr. 1651. between ¶ HAYWARD AND WILLIAMS adjudged ¶ Sty. 254. S. C. adjornatur. —— Ibid. 280. S. C. and after it was moved ſeveral times, and the Court adviſed, they at

last ſaid, that a ſtranger to a record may not bring a writ of error to

judged in a writ of error. Intratur Hill. 1649. Rot. 824. * 18 E. 4. 4. per Curiam. M. 15 Car. B. R. per Curiam, between EDWARDS AND SIMPSON, in a writ of error upon a judgment in the Marſhalſea.]

reverſe it, but that is only where he may have another remedy to avoid the prejudice he may receive by it; but in this caſe the baron has no other remedy; for his wife is taken in execution, and by this means he ſhall loſe her ſociety; and therefore revertetur, niſi ante, &c.

* Br. Error, pl. 173. cites S. C. but that is of an action brought againſt a feme covert who appeared, becauſe ſhe did not know whether her baron (who was beyond ſea) was dead or not, and ſhe was condemned upon plea, but the baron came back, and they brought a writ of error, and all the juſtices held that it well lay; and if ſhe is outlawed they ſhall join in error, otherwiſe it cannot be reverſed. ——— Br. Joinder en Action, pl. 88. cites S. C. as to outlawry; for feme covert cannot ſue without her baron. ——— S. C. cited 2 Roll. Rep. 53. Mich. 16 Jac. B. R. in the caſe of Haydon v. Miller, but in that caſe, becauſe it did not ſufficiently appear to the Court that ſhe was covert at the time of the original proceſs ſued out, and which ought to be expreſsly averred in the aſſignment of the error, the firſt judgment was affirmed. ——— Same caſes cited 2 Ld. Raym. Rep. 1526, 1527. Trin. 2 Geo. 2. in caſe of King v. Jones, but the Court took a difference between the defendant's being a feme covert at the time of ſuing the writ, and her being then and after a feme ſole, and cited the caſe of Haydon v. Miller, and judgment in the principal caſe affirmed accordingly.

Sty. 254. & 280. S. C. but S. P. does not appear.

[19. *So* in the ſaid caſe if the action be brought *againſt A. and others, they all with the huſband may join* in a writ of error in the ſaid caſe of HAYWARD AND WILLIAMS; adjudged per Curiam, and the judgment reverſed accordingly.]

S. P. for the feoffee has no other remedy in this caſe, becauſe he

[20. If *pending a real action* the *tenant aliens in fee*, and after a *recovery is had againſt him*, he *himſelf* may have a writ of error, though he hath nothing in the land, *becauſe he is privy* to the judgment after his alienation *and tenant in law.*]

cannot have writ of right, nor other remedy; quod nota. Br. Error, pl. 111. cites 12 Aſſ. 41. ——— Ibid. pl. 118. S. P. cites 20 Aſſ. 2. ——— In ſuch caſe the feoffor ſhall have error, and when he is reſtored the feoffee ſhall enter upon him; per Richardſon J. Palm. 247. Mich. 10 Jac. B. R. cites 6 H. 8. Brook's caſe, and 12 Aſſ. 4. 20 Aſſ. 2. 21 E. 3. Error, 41. ——— The feoffor in ſuch caſe ſhall have error, and yet there is no right nor privity in him. Ibid. 254. per Doderidge J. cites 12 Aſſ. 41. 17 Aſſ. 24. 20 Aſſ. 2. 21 E. 3. 54. 38 E. 3. 10. and 11. 1 Rep. 111. [Albany's caſe.] ——— See (A. c) pl. 8. S. P.

See (A. a) pl. 6. S. P.

[21. *So if* he had aliened in fee pending the writ, *and re-purchaſed it for life*, and after judgment had paſſed againſt him, he ſhould have had a writ of error.]

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[22. *So his heir* after his death ſhall have a writ of error, though he ſhall have nothing in the land, for the privacy which he has to the judgment. Contra, 50 Aſſ. 3.]

Br. Error, pl. 112. cites 15 Aſſ. 8. S. P. obiter. ——— Ibid.

[23. *But* if the tenant aliens pending the writ, and after judgment paſſes againſt him, the *alienee cannot* have a writ of error upon this judgment *for want of privity.*]

pl. 132. cites 50 Aſſ. 3. and ſays that ſo it ſeems to him. ——— Jenk. 161. in pl. 6. S. P.

Br. Error, pl. 132. cites S. C.

[24. *So if* the tenant aliens, pending the writ, and *re-purchaſes* it *for life*, and after judgment paſſes againſt him, and after he dies, it ſeems he in *reverſion ſhall have a writ*; for though he had nothing in the land at the time of the writ purchaſed, yet he had a reverſion at the time of the judgment, and ſo *privy* thereto. Dubitatur, 50 Aſſ. 3.]

[25. In

[25. In an action againſt J. S. if certain perſons become bail for him, and after judgment is given againſt J. S. the *bail cannot* have a writ of error *upon the firſt judgment, if* judgment be *not alſo* given *againſt the bail in ſcire facias*. H. 11 Ja. B. R. per Curiam. Hill. 11 Car. B. R. between HARDY AND BROWN, per Curiam, adjudged in a writ of error upon a judgment in Rippon. Intratur Tr. 10 Car. Rot. 979. But the judgment upon the ſcire facias (*) reverſed upon this writ for error in the judgment upon the ſcire facias. But Mich. 13 Car. B. R. between † SOUTH AND GRIFFITH, ſuch writ brought by the bail upon the firſt judgment againſt the principal, and upon a judgment in a ſcire facias againſt the bail was abated, and he put to a new writ. Intratur, Hill. 12 Car. Rot. 559. Mich. 15 Car. B. R. between ‡ WILLIAMS AND WORRAL, ſuch writ abated, being brought upon ſuch judgments in the Marſhalſea. Intratur, Tr. 15 Car. Rot. 1200. Mich. 24 Car. B. R. between JEFFREYS AND SCOT, adjudged the writ ſhall abate. Intratur, M. 23 Car. Rot. 218.]

† Jo. 396. pl. 4. S. C. the bail cannot join in a writ of error to reverſe the judgment againſt the principal, and another judgment againſt the bail; but the bail ſhall have error alone to reverſe the judgment againſt them, and the principal ſhall have another writ to reverſe the firſt judgment, and a writ brought by the bail to reverſe the firſt and ſecond judgment was held ill.——Cro. C. 481. pl. 4. S. C. held accordingly by Berkley and Crooke, contra Jones (abſente Brampſton) that the writ ſhould abate in toto, becauſe it was grounded on the firſt judgment, and alſo upon the judgment in the ſcire facias, and ſo coupling them together all is void; but if the bail in their writ of error had recited the firſt judgment, (as of neceſſity they muſt mention it,) and the ſecond judgment in the ſcire facias, and alleged error in that judgment, and in the execution thereof, &c. it had been well enough.

* Fol. 749.

It has been a queſtion heretofore, whether a writ of error brought upon the principal judgment, and alſo upon the judgment given againſt the bail together, be good in part, and ill for other part; but of later times it has been ruled that it ought to abate for all; therefore let the party ſhew cauſe why the writ ſhall not be abated here. Sty. 174. Mich. 1649. Shaler v. Bigg.——S. P. by Glyn Ch. J. Sty. 471. Mich. 1655. in caſe of Buſfield v. Norden, but the principal judgment ought to be reverſed by the principal, and not by the bail, and therefore the writ of error is not well brought by the bail, therefore let it abate.

The bail cannot have a writ of error of the principal judgment, which was agreed by the Court, but then the queſtion was, the record being removed, whether he may have a writ of error, quod coram vobis reſidet? And thereof the Court doubted and would adviſe. Cro. C. 561. pl. 5. Mich. 15 Car. B. R. Anon.

[26. In *a writ of annuity againſt an heir, upon an annuity granted by his anceſtor in fee*, upon *non eſt factum pleaded*, if a verdict be *found for the plaintiff*, and thereupon *judgment is given that the plaintiff ſhall recover his coſts, damages and arrears of the lands deſcended from the ſame anceſtor*, and thereupon a writ of *execution is awarded* to levy it of the lands deſcended, *but no return* thereof *appears upon the record*, and after the *heir dies inteſtate*, his *adminiſtrator cannot have a writ of error* upon this judgment, inaſmuch as he loſes nothing thereby, for if it be levied it is of the lands deſcended, the which, nor the profits thereof, he cannot have, nor be reſtored to it if he reverſed the judgment. Hill. 11 Car. B. R. between FRANKE AND STUKELY, per Curiam, in a writ of error upon a judgment in Banco. Intratur, Hill. 10 Car. Rot. 990.] [497]

[27. If a *judgment* be given *againſt the principal, and after* a judgment *againſt the bail in a ſcire facias* againſt them, the *principal ſhall not have* a writ of *error* upon the firſt judgment and the judgment againſt the bail. Mich. 13 Car. B. R. between GRIFFITH AND SOUTH. Dubitatur, Hill. 15 Car. in Camera Scaccarii, in a writ

Cro. C. 481. pl. 4. S. C. but S. P. does not appear.——Jo. 396. pl. 4.

S. C. but S. P. does not appear

of error between COKE AND upon a judgment in Banco Regis ſuch writ of error was abated per Curiam.]

——— if the ſureties be amerced where they ought not to be amerced by the law, yet the defendant ſhall not have a writ of error thereupon, for he is not the party grieved by the amercement; and upon that reaſon it is, if in a ſcire facias againſt the bail erroneous judgment be given, the defendant in the action ſhall not have a writ of error; Arg. 2 Le. 4. pl. 4. Mich. 31 & 32 Eliz. B. R. in Savacre's caſe. ——— Keb. 256. pl. 30. Paſch. 14 Car. 2. B. R. Spencer v. Monke, S. P. held accordingly.

28. Where one *recovers in aſſiſe againſt the tenant*, and the *diſſeiſors named* in the aſſiſe *were acquitted* of the diſſeiſin, yet the *tenants who loſt, and thoſe diſſeiſors, may join* in writ of error. Thel. Dig. 32. lib. 2. cap. 13. ſ. 1. cites Hill. 2 E. 3. 31. and that ſo it is agreed in falſe judgment Paſch. 3 E. 3. 80. and Trin. 19 E. 3. Joinder en Action, 30. and 19 Aſſ. 7. if the diſſeiſors are convicted of the diſſeiſin; and ſays ſee ſuch like matter Paſch. 3 H. 4. 16.

29. If the *tenant in præcipe quod reddat aliens pending the writ*, and the *demandant recovers* by judgment, the *tenant may well bring writ of error*. Br. Entre Cong. pl. 51. cites 12 Aſſ. 41.

30. It was adjudged where *two brothers parceners in gavelkind* were *forejudged in writ of meſne*, that *the ſurvivor* of them, *and the ſons of the other*, ſhould be received to join in writ of error, inaſmuch as one of the brothers was dead before the judgment. Thel. Dig. 32. lib. 2. cap. 13. ſ. 3. cites 19 Aſſ. 8.

31. A *ſtranger to a recognizance of ſtatute merchant* may ſue writ of error to reverſe execution awarded of this recognizance, *if he be tenant of the land at the time of the execution ſued*. Thel. Dig. 33. lib. 2. cap. 42. ſ. 1. cites Trin. 18 E. 3. 25. 17 Aſſ. 24.

32. And it was held, where writ of *error is brought by two tenants*, and the *one dies*, the *ſurvivor and the heir of the other ſhall have a* ſcire facias in common ad audiendum errores. Thel. Dig. 32. lib. 2. cap. 13. ſ. 2. cites 19 E. 3. Joinder en Action, 30. and 19 Aſſ. 7.

The king ſhall take advantage of this ſtatute notwithſtanding

33. 9 *R.* 2. *cap.* 3. *ſ.* 1. *If tenant for life in dower, by the curteſy, or in tail after poſſibility, be impleaded, and loſe by verdict or otherwiſe, he* in reverſion *ſhall have an attaint or writ of error upon a falſe verdict found, or an erroneous judgment given againſt the* particular tenant.

that he is not named in it. Pl. C. 343. b. Trin. 10 Eliz. Brett v. Rigden. ——— It was reſolved, that though the ſtatute ſpeaks only of reverſions, yet it ſhall be taken to *extend to remainders*. 3 Rep. 4. a. Trin. 25 Eliz. The Marq. of Winchester's caſe.

It extends *not to a reverſion or remainder* expectant *upon an eſtate tail*, for by enumerating the four particular eſtates for life, it appears to be the intention of the legiſlature to exclude eſtates expectant upon an eſtate tail; and it would be unreaſonable to give a writ of error to ſuch reverſioner or remainder-man during the life of the tenant whoſe eſtate is an eſtate of inheritance, and by poſſibility may continue for ever. Reſolved, 3 Rep. 4. a. b. Marq. of Winchester's caſe. ——— 3 Rep. 61. a. Mich. 37 & 38 Eliz. C. B. Lincoln College caſe. ——— 10 Rep. 44. b. in Jennings's caſe.

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It may be collected from hence, that the parliament ad-

34. *And if the oath be found falſe, or the judgment erroneous, and the tenants ſtill in life, he ſhall be reſtored to his poſſeſſion and* iſſues, *and the reverſioner to the* arrearages; *but if he be dead, or be found of* covin *with the demandant, the reverſioner ſhall have all, yet the tenant*

may

may traverſe the covin by ſcire facias *out of the judgment or writ of attaint if he pleaſe.* judged ſuch recovery by covin and conſent to be a *forfeiture*, otherwiſe it would be hard to reſtore him not only to the poſſeſſion, but likewiſe to the meine profits; per Coke. 3 Rep. 4. b. Trin. 25 Eliz. in the Marquis of Winchester's caſe.

35. In *aſſiſe againſt an infant and two others*, there *each took the tenancy ſeverally and pleaded in bar*, and the *plaintiff elected the infant for tenant and made title, and were at iſſue*, and *demurred upon the others*, and *it was found that the infant was tenant, and the title for the plaintiff, and that the two diſſeiſed the plaintiff to the uſe of the infant, he being a year and half old*, and the plaintiff recovered, and the two brought writ of error, inaſmuch as they ought to adjudge the plaintiff to be barred for miſelecting of his tenant. Hornby ſaid they ſevered in pleas in aſſiſe, therefore they cannot now join in this action; but Tirwhit contra, and Markham doubted, therefore quære his intent of the tenancy, inaſmuch as *an infant of that age cannot agree to the entry*. Br. Joinder in Action, pl. 107. cites 3 H. 4. 16.

36. *Several outlaws in appeal* may join or ſever in writ of error at their election, by the clear opinion of Gaſcoign. Thel. Dig. 32. lib. 2. cap. 13. ſ. 4. cited Paſch. 7 H. 4. 39 and 40.

37. Where the *tenant vouches in præcipe quod reddat*, or damages are to be recovered, and the *vouchee enters into the warranty and loſes*, the damages ſhall be recovered againſt the vouchee, therefore he ſhall have writ of error; per Horton. Br. Damages, pl. 45. cites 8 H. 4. 5.

38. *Succeſſor of a parſon* ſhall have error or attaint of a recovery adjudged againſt his predeceſſor. Br. Error, pl. 198. cites 8 H. 6. 25.

39. *Treſpaſs againſt two* who are condemned by erroneous judgment, they may join or ſever in writ of error at their election; per Cur. Br. Joinder in Action, pl. 77. cites 14 H. 6. 9.

40. In *recovery in writ of treſpaſs againſt the anceſtor, the heir* ſhall not have writ of error nor attaint; for this does not deſcend to him there; but yet *if franktenement come in debate*, the heir of it ſhall take advantage *by way of eſtoppel*. Br. Diſcent, pl. 4. cites 33 H. 6. 18, 19.

41. If *treſpaſs* be brought againſt J. N. who dies, his *heir* ſhall not have error nor attaint; for it was upon a perſonal action, which ſhall not deſcend to the heir. Br. Error, pl. 14. cites 33 H. 6. 19. 51, 52. Br. Eſtoppel, pl. 15. cites S. C. per Aſhton.

42. Treſpaſs *againſt four* in B. R. by one, and *one died* meſne *between the niſi prius and the day in Bank*, and therefore the plaintiff prayed judgment againſt the others; but Markham ſaid, that he might have *judgment againſt all*; for none can have error but the executors of the deceaſed, and not the other defendants. Br. Brief, pl. 357. cites 5 E. 4. 6, 7.

43. Where a *feme covert was ſued as a feme ſole*, and condemned *and put in execution*, and afterwards *her baron returned from beyond ſea*, it was held that *he and his feme ſhould have* a writ of *error* to

reverſe this judgment. Thel. Dig. 32. lib. 2. cap. 13. ſ. 5. cites Paſch. 18 E. 4. 4.

44. In *debt upon eſcape after recovery of debt, or damages, or other ſuch action founded upon record, againſt a ſtranger to the record*, the defendant ſhall not falſify by error in the firſt record. Br. Error, pl. 196. cites 21 E. 4. 27.

[499] 45. If erroneous judgment be given *againſt tenant by the curteſy*, and after *he dies without iſſue*, if *his heir reverſes the judgment by error*, the heir of the part of the feme may enter. Br. Error, pl. 154. cites 9 H. 7. 24.

46. *And* by all the juſtices, if *a man ſeiſed of land has iſſue two ſons, and the eldeſt enters into religion* and the *father dies*, and the *youngeſt* ſon *loſes by erroneous judgment* and the *eldeſt is deraigned*, he has no remedy. Ibid.

47. *But if the youngeſt reverſes the judgment* by error, *the eldeſt may enter;* quod nota; and this though the youngeſt enters after the reverſal or not; and ſo in the other caſe above, as appears there. Ibid.

48. *Tenant in tail ſuffered a recovery, and releaſed all errors;* now, though this releaſe ſhall bar him to bring a writ of error, yet it ſeemed to divers juſtices that *it ſhall not hinder the iſſue in tail*, but then the queſtion was, whether, if there are no ſuch, *he in remainder in tail ſhall have error* by the ſtatute Rich. 2. or by the common law, he not being privy in blood to him who loſt the land erroneouſly? And it ſeemed by the opinion in Paſch. 4 H. 8. fol. 1. that he may. D. 188. pl. 8. Mich 2 & 3 Eliz. Sir Ralph Rowlet's caſe.

Ow. 68. S.C. & S.P. —*No man* ſhall have error or attaint *but he who may be reſtored to the thing loſt* by the verdict or judgment. Mar. 210. pl. 247.

49. Error and attaint always deſcend to *ſuch perſon to whom the land would deſcend*, if ſuch recovery or falſe oath had not been. Le. 261. pl. 346. 18 Eliz. B. R. in caſe of Heningham v. Windham.

50. *So* if a man *has lands of the part of his mother*, and loſes it by erroneous judgment, and dies, the heir of the party of the mother ſhall have the writ of error. Le. 261. pl. 346. 18 Eliz. B. R. in caſe of Henningham v. Windham.

Paſch. 18 Car. per Mallet J. and ſaid that you ſhall never find it otherwiſe in all our books.

51. If *tenant in tail male has iſſue a ſon and a daughter by one venter, and a ſon by another, and dies*, and the *eldeſt ſon makes a feoffment*, and a *common recovery is had againſt the feoffee, in which the eldeſt is vouched, and he vouches over the common vouchee*, and after the *eldeſt dies*, the *youngeſt ſon may have writ of error;* for though the eldeſt ſhould have rendered a fee ſimple to the feoffee according to his loſs, yet he ſhould have recovered but an eſtate tail, viz. ſuch an eſtate as he had when the warranty was made, which would have deſcended to the youngeſt, and conſequently the writ of error ſhall be brought by him. Le. 261. pl. 346. 18 Eliz. Henningham v. Windham.

52. He

52. He who is *ſpecial heir* by the cuſtom, *as of Borough-Engliſh* land, ſhall have the writ of error, and not the heir at the common law; adjudged. 4 Le. 5. pl. 19. 18 Eliz. Henningham's caſe.

53. *In a common recovery four huſbands and their wives were vouched*, and the *plaintiff brought a writ of error as heir to one of the huſbands*, exception was taken becauſe he *did not make himſelf heir to the ſurvivor of the four huſbands*. But a difference was taken between a real and a perſonal covenant, for if two are bound to warranty and one dies, the ſurvivor and the heir of the other ſhall be charged, and ſaid, that each of the four and their heirs are charged, and then the heir of each being chargeable the heir of any of them may have writ of error. And the writ of error was adjudged good. But upon ſuggeſtion that the writ of error was not well brought, for the voucher being of four huſbands and their wives, it ſhall be intended in right of their wives according to 20 H. 7. 1. b. 46 E. 3. 28. 29 E. 3. 49. So the [500] plaintiff here ſhould intitle himſelf as heir to the wife; wherefore the plaintiff relinquiſhed his writ, and *brought a new writ and intitled himſelf as heir to the wife*. Le. 291. pl. 718. Mich. 26 & 27 Eliz. B. R. Gravenor v. Maſſey.

54. The plaintiff had a *verdict in* an action on the *caſe for words and* 1000 *l. damages*, and afterwards he *took out execution by elegit on the lands of the defendant, who died*, and his *adminiſtrator brought* a writ of *error* in the Exchequer-chamber; the defendant in error pleaded in abatement this execution, by which he intended, that the adminiſtrator not having any loſs but the heir only, therefore a writ of error would not lie by the adminiſtrator; but upon a demurrer to this plea, it was *adjudged for the adminiſtrator; for upon eviction of the lands the plaintiff might reſort to the goods*. Mo. 686. pl. 949. Trin. 29 Eliz. Lord Mordant v. Bridges.

Cro. E. 67. pl. 17. S. C. Mich. 29 Eliz. but S. P. does not appear. — Ibid. 294. pl. 10. Scroggs v. Ld. Mordant. Hill. 35 Eliz. in Cam Scacc. S. C. & S. P. reſolved that the writ of error did lie, and that the adminiſtrator is privy to the record, and may have loſs by it in futuro.

55 *Leſſee for life and infant in remainder join in a fine*, the infant alone may bring error. D. 89. b. pl. 2. Marg. cites Hill. 30 Eliz. C. B. Pigot's caſe.

56. In a *quare impedit* againſt the biſhop and S. brought by the queen, in which the *biſhop pleaded that he claimed nothing but as ordinary*; after judgment for the queen *error was brought by the biſhop and S.* It was objected that the biſhop ought not to join in the writ, becauſe he had no loſs; but it was adjudged that the writ was well brought, for Wray ſaid, the *biſhop has loſs*; for the writ ſhall be to the archbiſhop for admiſſion and inſtitution, and ſo he has loſs. Cro. E. 65. pl. 11. Mich. 29 & 30 Eliz. B. R. The Biſhop of Glouceſter v. Savacre.

3 Le. 176. pl. 228. The Queen v. the Biſhop of Glouceſter, S. C. Per Wray, the biſhop *ſhall join for conformity of law and for privity of record*; and the plea of the biſhop is not ſo ſtrong as a diſclaimer; and afterwards the writ was awarded good. — And. 200. pl. 236. S. C. but S. P. does not appear. — 3 Mod. 134. S. P. obiter per Cur. ſays they muſt join in error unleſs where the biſhop claims only as ordinary.

Cro. E. 115. pl. 15. Pigot v. Ruſſel, S. C. and the writ held well brought, it being for an error in fait, viz. his non-age, and of that no other can take advantage. And if two infants bring error they muſt aſſign the errors ſeverally, and therefore if one be within age he muſt bring the writ alone.

57. *Huſband and wife tenants for life, remainder to an infant in fee, all three levied a fine*, and the *infant alone brought writ of error to reverſe it for non-age*. It was objected, that ſince all joined in the fine they ſhould likewiſe join in the writ of error; and that the huſband and wife ſhould be ſummoned and ſevered, and then the infant might proceed alone to aſſign errors; but adjudged that the writ of error is well brought by the infant alone, becauſe the error aſſigned is not in the record, but without it, viz. in the perſon of the infant, and that is the cauſe of the action by him, and for no other. Leon. 317. pl. 445. Mich. 30 & 31 Eliz. B. R. Pigott v. Harrington.

58. A *conuſor of a fine cannot aſſign error in the grant and render* by which he takes eſtate, any more than the conuſee ſhall do in the conuſance; for this would be to defeat the eſtate which by the fine is given to himſelf; *ſo a recoverer ſhall not bring* a writ of *error to defeat a record by which he himſelf recovered*, for the judgment in the writ of error is to reſtore the party to all which he loſt by the fine or judgment, and not to avoid or loſe that which he had gained by the fine or judgment. 5 Rep. 39. b. Trin. 34 Eliz. B. R. in Tey's caſe.

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Ow. 147. S. C. argued. —— Le. 325. pl. 359. S. C. Wray Ch. J. held clearly that the executor might have and purſue this writ of error, and afterwards the outlawry was reverſed accordingly. —— S. C. cited as reſolved accordingly. 5 Rep. 111. a. —— Godb. 380. Jones J. cited 5 Rep. 111. but ſaid that Marſh's caſe never was adjudged. —— Cro. E. 358. S. P. cited by Popham and Gawdy as ruled accordingly in B. R. in Nicholſon's caſe.

59. A man was *outlawed of felony*, and died, his *executor brought a writ of error* to reverſe the outlawry, and the queſtion was, whether it lay? the ſame was argued, ſed adjornatur. Cro. E. 225. pl. 10. Paſch. 33 Eliz. B. R. and Ibid. 273. pl. 2. Paſch. 34 Eliz. B. R. Marſh's caſe.

60. The plaintiff had a *judgment in debt*, and afterwards the *defendant made a feoffment to J. S. of his lands*, then the plaintiff ſued an *elegit* upon the judgment; before it was executed J. S. brought a writ of error, and aſſigned error in the judgment; adjudged, that a writ *of error would not lie for J. S. unleſs* it be *for error in ſuing out execution*, which was not done in this caſe, for before execution he is not a party grieved, which is the true reaſon why *he in reverſion* or remainder *ſhall not have* a writ of *error in the life-time of the tenant for life* upon a judgment given againſt ſuch tenant for life, becauſe neither of them can be a *party grieved* in his time. Cro. E. 289. pl. 6. Mich. 34 & 35 Eliz. B. R. Charnock v. Sherrington.

Mo. 687. pl. 949. Trin. 29 Eliz. B. R. the S. C. ruled that the writ well lay for the adminiſtrator, becauſe it might be that the land might be evicted, and then the plaintiff

61. If *execution* upon a judgment *is ſued by elegit, and lands only extended*, and no goods taken in execution, and after the *defendant dies*, his *adminiſtrator may have a writ of error*, for he is privy to the record, and may in futuro have loſs by it. Cro. E. 294. pl. 10. in Cam. Scacc. Hill. 35 Eliz. Scroggs v. Ld. Mordant.

plaintiff might reſort to the goods.——And at the end of the caſe in Cro. E. is a nota added to the ſame purpoſe.

62. In many caſes *he that has no loſs nor can have loſs* may maintain a writ of error; *as the tenant which makes a feoffment pending the writ againſt him; ſo in treſpaſs againſt two, and execution of the damages is had againſt one only*, and the plaintiff is ſatisfied, and *he, againſt whom the execution was, died*, yet the *ſurvivor may ſue a writ of error*; per Cur. Cro. E. 294, 295. pl. 10. Hill. 35 Eliz. B. R. in caſe of Scroggs v. Ld. Mordant; and as to the laſt point cites 20 E. 3.

63. *Judgment in quare impedit* was given *againſt the incumbent and biſhop defendants*. The *biſhop pleaded that he claimed nothing but as ordinary. Error was brought in the name of the incumbent and biſhop*, but the *incumbent only aſſigned the errors* (without ſummons and ſeverance). *Afterwards the incumbent and the biſhop aſſigned the ſame errors*, and the defendant pleaded in nullo eſt erratum. All the Court held, the *aſſignment by one only was ill*, and all the plea diſcontinued, and not aided by the ſecond aſſignment after. And afterwards a new writ of error was brought. Cro. J. 92. pl. 20. Mich. 3 Jac. B. R. Lancaſter v. Low.

But Mod. 134. Trin. 3 Jac. 2. B. R. in the caſe of Hacket v. Herne it is ſaid obiter, that if a quare impedit be brought againſt a biſhop and others, and judgment be againſt them all, they muſt likewiſe all join in a writ of error, unleſs it be where the biſhop claims only as ordinary.

64. An *aſſiſe* was brought *againſt five* for 100 acres of land, *three of the defendants were found not tenants, and acquitted* of the diſſeiſin; *two other were found guilty*, quoad three acres, and for the reſidue not guilty; but the verdict was entered for 100 acres, and judgment given accordingly. A writ of error was brought, in which all of them joined; adjudged, that it ought to have been brought *only by thoſe two who were found guilty*, and the three who were acquitted had not any loſs, and therefore ought not to have joined. Cro. J. 138. pl. 15. Mich. 4 Jac. B. R. Vaughan v. Lorriman.

Noy, 116. Vaughan's caſe. S. C. adjudged to be error.

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65. *Treſpaſs againſt ſeveral*, they *all appear by attorney, and plead ſeveral pleas; three not guilty, two of which are found guilty*; the *others juſtify by force of a ſtatute made* 12 *Car.* 2. *that three of them being officers purſuant to the direction of the governor*, &c. and *according to the ſtatute took the goods, and that the other defendants, as their ſervants, and by their command, aſſiſted them in it*. Upon a writ of error brought, the *error aſſigned* is, *that A. who was ſervant, was an infant*, and under age. It was moved the infant's appearance by attorney is erroneous for all; for it is a joint judgment, and joint damages are given, and cited the caſe of Oate v. Aylett. The other ſide agreed, that in all caſes where an infant ought not to appear by attorney, if he doth, it is error. But whether it is error here, he only acting as a ſervant, I muſt ſubmit. The reaſon why an infant cannot appear by attorney is, becauſe he is thought not to be able to make known his caſe; now he being a ſervant muſt plead as the others, and ſtand or fall by that. Per Holt Ch. J. the caſe is the ſame whether he is maſter or ſervant, for the ſervant is equally liable to damages with the

maſter. Powell J. it is a joint judgment, and entire damages which cannot be divided. Per Cur. the judgment was reverſed. Holt's Rep. 360. pl. 5. Trin. 8 Ann. Greek v. Mew.

Hob. 70. pl. 81. Hill. 11 Jac. in Cam. Scacc. Parker v. Lawrence.—If in *treſpaſs againſt three*, *judgment was againſt the plaintiff as to one, and as to the other two for the plaintiff*, the two only without the third may have a writ of error, for he for whom the judgment was given cannot ſay that the judgment was to his damage. Per Cur. præter Twiſden, who held that the writ ought to be brought by all. 1 Lev. 210. Paſch. 19 Car. 2. B. R. Cannon v. Abbot.

66. In *treſpaſs againſt three one pleads to iſſue*; the *plaintiff has a verdict againſt him and judgment*; the *other two demur*; a *nolle proſequi is entered as to them*; *the three defendants cannot join* in a writ of error; for the two againſt whom the nolle proſequi is entered are not damnified. Jenk. 309. pl. 87.

67. The *ſon and heir was outlawed upon an indictment for felony in the life-time of his father, who was ſeiſed in fee, and upon his death the ſon entered and deviſed it to C. in fee*, who conveyed it to B. who brought a writ of error to reverſe the outlawry; Doderidge and Jones J. ſeemed to incline that it did not lie for B. For that none can reſtore the blood, but he who is privy in blood; ſed adjornatur. Godb. 376. pl. 465. Paſch. 3 Car. B. R. Brooker's caſe.

Jo. 360. pl. 1. Follex v. Buſhell, S. P. adjudged, and ſeems to be S. C.—S. P. adjudged Hob. 72. pl. 85. Foreſt v. Sandland.—Cro. J. 384. pl. 14. Mich. 13 Jac. B. R. Sandelow v. Deverton in Cam. Scacc. S. P. held accordingly.——Roll. Rep. 294. pl. 9. Verten v. Sandelow. S. C. & S. P. accordingly.——Cro. C. 300. pl. 2. Lancaſter v. Keyleigh. Paſch. 9 Car. B. R. held accordingly.——S. C. & S. P. reſolved Jo. 325. pl. 3.——Godb. 440. pl. 507. S. C. held accordingly.——Cro. C. 574, 575. pl. 17. Hill. 15 Car. B. R. Smith v. James, S. P. held accordingly.——Bulſt. 125. Paſch. 9 Jac. Hooker v. Robinſon, S. P. agreed.——Lev. 137. Trin. 16 Car. 2. B. R. Atherton v. Hole. S. P. and the writ was quaſhed.——Writ of error by principal and bail was held ill, and that they cannot join, and cites Foreſt v. Sandland, Hob. 72. Show. 8. Paſch. 1 W. & M. Evans v. Pettifer.——Comb. 108. S. C. held accordingly.

68. The *principal and bail* ought not to *join* in a writ of error to avoid the principal judgment, nor the judgment againſt the bail. Cro. C. 408. pl. 1. Trin. 11 Car. B. R. Buſhell v. Yaller.

69. *Nor* can *thoſe returned in one writ take advantage* of any error in the proceedings on the other writ, becauſe the actions are ſeveral. Carth. 201. cites Cro. C. 517. [pl. 19. Mich. 14 Car. B. R.] Angel v. Cooper.

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70. If *J. S. binds himſelf and his heirs in a bond*, and thereupon *judgment is obtained againſt J. S.* and *J. S. makes his* will, and his *heir at law executor, and dies, leaving lands which deſcend* to his heir, yet he *ſhall not have a writ of error as heir*, for he is not privy to the judgment, and when an extent is made upon him it is as tertenant, but after the lands are taken in execution he may have a writ of error; per Roll J. ſed adjornatur. Sty. 38, 39. Trin. 23 Car. White v. Thomas.

S. P. by Roll Ch. J. Judgment reverſed. Sty. 400. Boking v. Symons.

71. By Roll Ch. J. if an *action* be brought *againſt three, and one of them is an infant*, and they *all appear by attorney*, and an *intire judgment is given againſt them all*, and they all join in writ of error to reverſe this judgment, this writ is well brought; for the judgment was erroneous, becauſe it is an entire judgment, for as to the infant it cannot be good, and ſo it is naught to the reſt, and he cited one BYRE's CASE, 9 Jac. in the point. Sty. 406. Hill. 1654. Anon.

72. Judgment

72. Judgment was had in *debt upon a bond againſt father and ſon*, and afterwards the *father alone brought a writ of error*, and the *error aſſigned was, that his ſon was under age*; but becauſe the *ſon did not join in the error*, the Court ordered the writ to be abated. 3 Mod. 134. Trin. 3 Jac. 2. Hacket v. Herne.

73. There is a *difference where* a writ of *error is brought by the plaintiffs in the original action, and when by the defendants*, for *if two plaintiffs are barred by an erroneous judgment, and* afterwards *bring* a writ of *error*, the *releaſe of one ſhall bar the other*, becauſe they are both actors in a perſonal thing to charge another, and it ſhall be preſumed a folly in him to join with another, who might releaſe all; *but where the defendants bring a* writ of *error it is otherwiſe*, for it being brought to diſcharge themſelves of a judgment, the releaſe of one cannot bar the other, becauſe they have not a joint intereſt, but a joint burthen, and by law are compelled to join in errors. 3 Mod. 135. Trin. 3 Jac. 2. B. R. in caſe of Hacket v. Herne.

Ibid. Marg. cites 5 Rep. 55. a. Ruddock's caſe [but it ſhould be 6 Rep. 25. a. b.] where the ſame diverſity is taken per Curiam.

74. Where *ſeveral writs of ſci. fa. iſſue into ſeveral counties*, againſt ſeveral tertenants, upon one and the ſame judgment, in ſuch caſe they cannot all join in one writ of error, for the actions are ſeveral. Carth. 200. Mich. 3 W. & M. in B. R. in caſe of Blake v. Gell.

75. *But* where a ſcire facias iſſued againſt the tertenants *in the ſame county*, and upon a ſcire feci returned againſt ſeveral, they pleaded that J. S. is another tertenant and not ſummoned, and then a ſecond *ſcire facias iſſued againſt the ſaid J. S.* who was returned an infant, &c. and the *parol demurred for infancy*, and after his full age a *reſummons* iſſued againſt all the tertenants; but one of the tertenants who was returned ſummoned was dead before the day of the return, and this was aſſigned for error, and the *ſurviving tertenants and the heir of him who was dead joined in the writ* of error, and held good, for the laſt ſcire facias is only *ſupplemental* to the firſt, and then both make but one action. Carth. 200. Mich. 3 W. & M. in B. R. Blake v. Gell.

76. Judgment was had againſt the principal, and afterwards upon a ſcire facias, *execution was awarded againſt the bail*, and one of the *bail* for the defendant in the original action brought a writ of error *tam in redditione judicii quam in adjudicatione executionis againſt the bail*, &c. But the writ was *quaſhed quoad all that related to the judgment in the original action, and no more*, and was ruled to ſtand good quoad the judgment againſt the bail upon the ſcire facias and the bail (plaintiff in error) proceeded therein accordingly. Carth. 447. Paſch. 10 W. 3. B. R. Burr v. Atwood.

1 Salk. 89. pl. 11. Atwood v. Burr. S. C. but S. P. does not appear.—Ibid. 402. pl. 10. S. C. but not S. P. —3 Salk. 369. pl. 6. S. C. and

adjudged naught, and that it ſhould have been in adjudicatione executionis recognitionis prædicta, becauſe a recognizance is not ſuch a judgment as might or would be intended on the face of the * writ of error. —— 7 Mod. 3. S. C. and ſame exception taken by Raymond at the end of the caſe, fol. 8. and the Court were of opinion to quaſh the writ of error for this exception. —— Ld. Raym. Rep. 553. S. C. and the writ of error was quaſhed for the ſame reaſon. —— Ibid. 328. S. C. ſtated as in Carth. and ruled accordingly.

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77. Error upon a judgment in C. B. in an *action againſt two*, and *one of the defendants was outlawed*; and exception was taken to *the writ*

writ of error, becauſe it *mentioned the writ to be brought againſt one only*; but it was held good, becauſe the writ as to the other was determined by the outlawry; ex relatione m'ri Jacob. Ld. Raym. Rep. 691. Trin. 13 W. 3. Oliver v. Hunning.

78. If an *appeal of murder* be brought *againſt three* perſons, they may all join in a writ of error, for *it is ad damnum ipſorum reſpective*, and yet the attaint of one is not the attaint of the other two; per Holt Ch. J. Holt, 277. pl. 22. Hill. 4 Ann. in caſe of Bradell v. Sawbridge.

Ibid. ſays that the like judgment was given in Hill. term, 6 Geo. B. R. in the caſe of Brewer v. Turner.

79. The plaintiff obtained *judgment againſt two defendants in* an action of *debt*, and *one of them brought a writ of error*, when it ſhould be brought by both, *and then he who would not proſecute ought to be ſummoned and ſevered*, which not being done, this was held to be a fault not amendable, and thereupon the writ of error was quaſhed. 8 Mod. 305. Mich. 11 Geo. Cowper v. Ginger.

(L) *Againſt whom* it lies.

Br. Error, pl. 9. cites S. C.—— Or his heir, be he tertenant or not.

[1. IT does *not* lie againſt *any but* againſt him who is *party or privy to the firſt judgment*. 9 H. 6. 46. b. Curia.]

[2. It does not lie againſt any who is not party or privy, *though* he be *tenant of the land*. 9 H. 6. 46. b. Curia.]

For nontenure is no plea in writ of error. Br. Error, pl. 131. cites 42 Aſſ. 22. Per Fulthorp. —— It is agreed that writ of error does not lie *but againſt parties or privies*, viz. the party or his heir, be he tertenant or not, and if another be tertenant ſcire facias ſhall iſſue againſt him, for otherwiſe aſſiſe lies for him if he be ouſted. Br. Error, pl. 9. cites 9 H. 6. 46.

Br. Error, pl. 9. cites S. C.—— Br. Error, pl. 131. cites 42 Aſſ. 22. Per Fulthorp.

[3. The writ lies againſt him who is party or privy to the judgment, though he hath nothing in the land. 9 H. 6. 46. b. Curia.]

Br. Error, pl. 9. cites S. C. and ſays, quære, what remedy in ſuch caſe?

[4. If a man *recovers and dies without heir*, quære againſt whom the writ of error ſhall be brought. 9 H. 6. 49. b. Quære.]

5. Writ of error lies well *againſt him who was tenant at the time of the judgment given*, notwithſtanding that he is not his tenant at the time of the writ of error acquired; contra of attaint; for this ſhall be againſt the tenant of the franktenement, &c. Br. Error, pl. 109. cites 6 Aſſ. 6.

Br. Nontenure, pl. 8. cites S. C.

6. *H. recovered*, and had *iſſue Iſabel and died*, and *ſhe took baron and had iſſue T. and died*, and writ of error was *brought againſt the tenant by the curteſy and the heir*, and admitted, and yet per Candiſh, the uſage has been to bring the writ of error againſt the party to the record or his heir, and when the judgment is reverſed to bring ſcire facias againſt the tertenant, if he can ſay any thing why the plaintiff ſhould not have execution, quod nota. Br. Error, pl. 27. cites 47 E. 3. 7.

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7. Where *error* is ſued *in parliament of a judgment given in B. R.* or if error be ſued in B. R. upon a fine levied in C. B. the tranſcript ſhall go, and ſhall be certified, and not the record itſelf. Br. Record, pl. 48. cites 2 H. 7. 19. Br. Error, pl. 137. cites 1 H. 7. 19, 20. S. C.

8. If an erroneous *judgment is given for the queen in a writ of intruſion*, the party ſhall have a writ of error againſt the queen without any petition; per Coke, Arg. 2 Le. 194. Hill. 29 Eliz. in Hurlſton's caſe.

9. Many *outlawries* have been *reverſed* for error *without any petition, and yet* in ſuch caſe *the queen has an immediate intereſt*; per Wray. 2 Le. 194. Hill. 29 Eliz.

10. Error does not lie againſt *the queen* upon a petition, *where ſhe is immediate party to the recovery*; but otherwiſe where ſhe is party only as for conformity, as in an action upon the ſtatute, or in a popular action; per Curiam. Noy, 56. Anon. 2 Le. 194. pl. 244. Hill. 29 Eliz. B. R. Hurlſton's caſe. Same caſes cited, and ſeems to be S. C. of GLAZIER v. HUDLESTON, and the caſe was, that judgment was given for the queen in a ſci. fa. to reverſe the patent of the conſtableſhip of the caſtle of Cheſter. But Clench ſaid, that there needs no petition, becauſe both patentees claim from the queen, and whether there be error or not the queen is not prejudiced.

11. Adjudged, that a writ of error lies *againſt the king without petition*, though anciently the courſe was by petition, and was a decency, but ſince the year 1640, writs of error have been ex officio. 1 Salk. 264. pl. 7. Paſch. 11 W. 3. B. R. Anon.

(M) At what *Time* it may be brought.

[Before Writ of Enquiry. Pl. 2, 3. 9, 10, 11. 14.]

[1. A WRIT of error *bearing date before the judgment given* is not good, for it lies not before the judgment given, for the writ is, ſi judicium redditum ſit, &c. 22 H. 6. 7. contra * 1 R. 3. 4.] Br. Error, pl. 76. cites 22 H. 6. 5. 7. S. P. but ſays, that aliter dicitur in B. R. 5 E. 6. ——Mo. 461. pl. 647. Hill. 39 Eliz. is a nota that a writ of error was delivered inſtanter when the judgment was given, but held not good, becauſe it was procured before the judgment given. ——Mar. 140. pl. 112. Mich. 17 Car. in caſe of DALE v. WORTHYE, the Court agreed that a writ of error bearing teſte before judgment is good, as is the book of 1 E. 5. 4. becauſe there the foundation ſtands good, and it is the uſual courſe of practice for preventing and ſuperſeding execution. ——Vent. 255. Hill. 25 & 26 Car. 2. B. R. the Court held that a writ of error bearing teſte before the judgment given is good to remove the record, ſo as judgment be given before the return of it. ——Mod. 112. pl. 9. S. P. by Hale Ch. J. and ſeems to be S. C.

* Noy, 54. cites S. C. but there it was ſaid by the Court, in the caſe of JENNINGS v. BRAGGE, that a writ of error bearing teſte before the judgment is entered of record is void, although the judges have pronounced the judgments, quod intretur judicium.

Writ of niſi prius was returnable octab. Hillarii, at which day it was returned, and at the firſt day thereof the plaintiff had judgment to recover, the defendant brought writ of error, *bearing date the third day of the ſaid return, and before the fourth* day, viz. meſne *between the firſt day and the fourth day*, and becauſe judgment was given the firſt day, and ſo it is after judgment as it ought to be, therefore well; per Cur. Br. Error, pl. 17. cites 34 H. 6. 27. ——Br. Jours, pl. 10. cites S. C.

[2. In an aſſiſe of *darrein preſentment* if the *parties demur upon the title*, and it is *adjudged for the plaintiff, and that he ſhall have a writ to the biſhop*, a writ of *error lies* upon this judgment *before the damages* [506]

mages inquired of, becauſe there were no damages at the common law, and then the writ would be preſently, and the addition of damages given by the ſtatute to be inquired of to the ſheriff, ſhall not ſtay the writ of error, and if it be affirmed, it may be inquired of the damages where it is affirmed. 17 E. 3. 5. 19. 21. adjudged 33.]

[3. *So* if a man *recovers by default in* a writ of *couſinage or aiel*, a writ of error lies upon this before the damages are inquired of, becauſe the damages are but an addition to the common law given by the ſtatute (*), and ſo the judgment for the principal continues as it was at common law. 17 E. 3. 21. 33.]

* Fol. 750.

Br. Error, pl. 58. cites S. C.—— Per Stouf; and Brook adds, that in account there are 2 judgments, and writ of error is *quod ſi judicium reddituum ſit tunc*, &c. for writ of error does not lie before judgment. —— Cro. E. 636. in pl. 32. cites S. C. & S. P. For the plaintiff might be nonſuited before the ſecond judgment, as 1 H. 7. 2. is; and that ſo it was adjudged in 11 Eliz. HARDING v. VINE. And ſo 7 R. 2. in formedon where the tenant was ouſted of aid, error lies not till the judgment of the principal.——Le. 184. in pl. 277. cites 21 E. 3. 9.

[4. *No writ* of error *lies upon a judgment to account before the laſt judgment*, becauſe the plea is not ended till he hath accounted. 21 E. 3. 9. adjudged. Co. 11. † Metcalfe, 38. adjudged. Vide Noy's Reports, 68. two executors have judgment againſt B. quod computet the writ ſhall not abate by the death of one of the executors.]

† Cro. J. 356. pl. 14. METCALF v. WOOD. S. C. reſolved. —— D. 291. b. Marg. pl. 68. cites 40 Eliz. B. R. Bill v. Matthews. S. P.

Award quod computet is but barely as an award, as award that aſſiſe ſhall be taken, award in waſte, writ to inquire of waſte, of treſpaſs, &c. Writ of inquiry of damages in partitione faciendâ, award quod partitio fiat, in writ of admeaſurement, award quod admenſuratio fiat, award that one ſhall be ouſted of aid, and ſuch like, are only awards of the court, and are but interlocutory, and not definitive, whereof no writ of error lies till the laſt judgment is given. Per Cur. 11 Rep. 40. a. Mich. 12 Jac. in Metcalf's caſe. —— In accompt no error lies before the ſecond judgment. Palm. 2. cites 21 E. 3. 9. Award.

[5. *So* no writ of error lies *upon an award before the original* be *determined*. 17 E. 3. 21.]

[6. *As* it does not lie *upon an award of a capias, ſummons, or reſummons* before the original determined. 17 E. 3. 21.]

‡ Cro. E. 635. pl. 32. and 643. pl. 46. the COUNTESS OF WARWICK v. LD. BARKLEY, S. C. held per tot. Cur. that till the ſecond judgment given, quod partitio ſtabilis ſit the record is not full, nor the judgment perfect, and therefore the record ſhould not be removed. —— Mo. 643. pl. 888. S. C. but no judgment. —— Noy, 71. S. C. held accordingly; and this is not like other real actions, where error lies before the habere facias ſeiſinam be returned; for that is a final judgment, and no other to be given; beſides, there needs no return of an habere facias ſeiſinam; for the party that recovers may execute his judgment by his entry, and cites D. 67. a. —— Roll. Rep. 85. Mich. 12 Jac. B. R. Coke Ch. J. ſaid, that in the Counteſs of Warwick's caſe of partition there was not any reſolution, but

[7. In a writ of partition, if the *judgment* be given *quod partitio fiat*, and thereupon a writ is directed to the ſheriff to make a partition before it is executed and returned, *no writ of error lies* upon the firſt judgment for that *before the laſt judgment*, which ought to be quod partitio præd' foret firma, and ſtabilis in perpetuum the plaintiff may be nonſuit, or he may, upon the return of the ſheriff, ſuggeſt to the Court that the partition is not equal, and ſo have a new partition, and alſo he may releaſe before the laſt judgment. Mich. 40, 41 El. B. R. between the ‡ LORD BARKLY AND THE COUNTESS OF WARWICK adjudged. M. 10 Ja. B. 20. between ‖ BALLAD AND RAWLINS, per Curiam, P. 13 Car. B. R. between WILLIAMS AND WATKINS adjudged, and ſuch writ abated, being brought upon the firſt judgment given in Cardigan.]

But that it ſeems in ſuch caſe before the ſecond judgment no writ of error lies, quod fuit conceſſum, per Doderidge, but Crooke and Haughton doubted of it. ——S. C. cited by Doderidge, as ruled to be brought too ſoon before the ſecond judgment. 2 Bulſt. 104.——S. C. cited 2 Roll. Rep. 125. as held accordingly.

* ‖ Cro J. 324. pl. 4. Rawlins v. Barrat, S. C. & S. P. reſolved.—2 Bulſt. 104. S. C. & S. P. agreed.——2 Bulſt. 19 Arg. S. P.

[8. A writ of error *lies in Camera Scaccarii after an award of the court of the King's-bench for judgment, and the roll ſigned for judgment by the clerk before any judgment entered;* for otherwiſe the plaintiff in the writ of error ſhould be at great prejudice, for the uſe of the Court is not to enter the judgment till the vacation after, but to award execution preſently after the ſigning the roll for judgment, and before entry thereof; and ſo if the writ of error ſhall not be allowed after ſigning, and before the entry, the plaintiff in the writ of error ſhould not have any benefit of the ſuperſedeas of the execution, which is incident in the writ of error. Mich. 15 Jac. B. R. between SMITH AND BOWLES, by all the clerks, that this is the common courſe, and per Curiam adjudged.]

See tit. Execution, (M. a) pl. 1, S. C. —— See ſupra the caſe of Jennings v. Bragg, in the notes, pl. 1.

[9. If a woman *recovers in a writ of dower*, a writ of *error lies before the writ of inquiry of damages awarded, and before the third part aſſigned by metes and bounds;* for the judgment is perfect as to the realty, and the damages given by the ſtatute by way of addition. P. 17 Car. B. between STEWARD AND STEWARD, per Curiam adjudged, and the inquiry of the damages, after the writ of error brought, quaſhed.]

Mar. 88. pl. 142. S. C. reſolved that the error was well brought. —Brownl. 127. Hill. 13 Jac. Glefold v. Carr, S. P. per tot. Cur. held that it would not lie; for the judgment is not perfect till the value be inquired of.

[10. In an *ejectione firmæ*, if the *plaintiff recovers per nihil dicit*, in which *judgment is given that the plaintiff ſhall recover his term*, and a *writ awarded to inquire of the damages*, a writ of *error lies* upon this judgment *before the return of the writ of damages, and judgment thereupon*, for the judgment is perfect as to the recovery of the term before by the firſt judgment, and the plaintiff may preſently have execution for the poſſeſſion, and perhaps he will never have judgment for the damages, and ſo the defendant ſhould be ouſted of the poſſeſſion without remedy. Tr. 3 Car. B. R. between NEWTON AND TERRY. Intratur Mich. 2 Car. Rot. 110. per Curiam, in a writ of error judgment reverſed. Nota, Mr. Hoddeſdon the ſecondary de B. R. ſaid to me, that this is now agreed by both Courts, ſcilicet, the Common-pleas and King's-bench.]

Noy, 95. Terry v. Newton, S. C. reſolved. —— Lat. 212. Terry v. Newton, S. C. accordingly.

[11. *So* if a man *recovers in a quare impedit upon a demurrer*, the defendant may have a writ of error before the writ of inquiry of damages (*) returned, for ſuch writ may be awarded out of the King's-bench if the judgment be affirmed there. Note, this was the LORD ARUNDEL'S CASE AGAINST EDMONDS, about 15 Car. admitted, and ſo is the conſtant practice of the Court, for no damages were given at the common law, but given by the ſtatute. Contra Noy's Reports, 66. the BISHOP OF GLOUCESTER AND VELE.]

S. P. by Bankes Ch. * Fol. 751. J. Mar. 89. in pl. 142. Paſch. 17 Car.

[12. If

Fitzh. Error, pl. 71. cites S. C. —D. 1. b. pl. 5. cites S. C.—— See (K) pl. 17. S. C.

[12. If an *execution upon a ſtatute-merchant be awarded* where a *ſtranger is ſeiſed of the land by feoffment of the conuſor*, yet *he ſhall not have a writ of error* of the execution *before he is ouſted* by the execution, 18 E. 25. becauſe he is *not privy* to the record before this, nor before the return of execution, and after the ouſter of him by force of the writ by the ſheriff. Dubitatur, 18 E. 3. 25.]

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[13. If a man *recovers in a præcipe quod reddat* againſt me, I may have a writ of error *before execution* is ſued. 18 E. 3. 26. 17 Aſſ. 24.]

* Noy, 35. Terry v. Newton, S. C. reſolved.—— Lat. 212. Terry v. Newton, S. C. accordingly. —Where an aſſiſe or an ejectment is brought where the land is the principal, if judgment be given for it, although damages are to be recovered, yet before a writ of inquiry for them error lies; becauſe the damages are but acceſſory; Arg. Cro. E. 636. in pl. 32.——For the judgment is, quod querens recuperet terminum, and upon this judgment the plaintiff may have an habere facias poſſeſſionem, and if error would not lie on this judgment, the plaintiff after he had got poſſeſſion upon an erroneous judgment would never ſue a writ of inquiry, and ſo the defendant would be without remedy. Lat. 212. Paſch. 3 Car. Smith v. Amys.——S. P by Roll. Ch. J. Sty. 283. Trin. 1651, in caſe of Giles v. Timberley.——S. P. adjudged, there bring no return of damages, nor a capiatur, the commonwealth may by this means be cozened of the fine, and the defendant barred from bringing a writ of error. Sty. 346. Mich. 1652, Acton v. Ayres.——If error be brought in ejectment before the laſt judgment on the writ of inquiry, and no capiatur entered, it is error; per Twiſden, and ſo he ſaid it had been often ruled. Keb. 327. pl. 59. Trin. 14 Car. 2. B. R. Oliver v. Hardwick.

[14. If a man recovers *in* an *ejectione firmæ by confeſſion, nihil dicit, non ſum informatus, or demurrer*, a *writ of error lies before the damages taxed by writ of inquiry*. I had the precedents of Maſter Hoddeſdon, ſecondary de B. R. Paſch. 13 El. B. R. Rot. 52. between TAVERNER AND FAWCET. Error brought upon a judgment in Banco, and a writ of inquiry awarded in B. R. The like between BACH AND ERRINGTON, P. 13 El. B. R. Rot. 51. Tr. 35 El. B. R. Rot. 696. WIMARK'S CASE; and ſame caſe Co. 5. WIMARK'S CASE, 74. where judgment upon demurrer in B. R. and before the return of the writ of inquiry error was brought in Camera Scaccarii, and there affirmed and remanded, P. 44 El. Rot. 438. B. R. between HOWSE AND LAYTON. Error brought in Camera Scaccarii before damages aſſeſſed, and this affirmed, Mich. 25, 26 El. B. R. Error brought after judgment, and before damages aſſeſſed, and this reverſed for error in fact, Tr. 3 Car. between * NEWTON AND TERRYE, per Curiam, in a writ of error. New Entries, 191. between DUN AND LAWE. But vide, this is there but an award. Hill. 1649. between BROAD AND BARNET adjudged in a writ of error upon a judgment by nihil dicit in Banco. Intratur, Tr. 1649. Rot. 1535.]

[15. *But* in an ejectione firmæ, *if judgment be* given, *ideo conſideratum eſt quod querens poſſeſſionem ſuam termini adhuc venturi de tenemento præd' recuperare debeat*, no writ of error lies before damages taxed, becauſe there is but an award; but otherwiſe it had been if it had been recuperet. M. 5 Ja. B. R. Rot. 269. between LANE AND ALEXANDER, per Curiam, in a writ of error in Camera Scaccarii upon a judgment in B. R. and the record remanded in B. R. accordingly for the cauſe aforeſaid.]

A writ of error was delivered to the ſame court before a writ to the biſhop was awarded

[16. If a man *recovers in* a *quare impedit, and* after *brings a writ of quare non admiſit* againſt the biſhop, *a writ of error may be* after brought *upon the judgment in the quare impedit*, and the record ſhall be removed, *though the* other writ of *quare non admiſit be not yet diſcuſſed*. Dubitatur, 26 E. 3. 75.]

to admit the clerk; per tot. Cur. the writ of error ought to be allowed. Godb. 439. pl. 505. Trin. 5 Car. B. R. The Earl of Pembroke v. Boſtock.

[17. If

[17. If a man *recovers damages*, and *after a year ſues a ſcire facias of the damages*, a *writ of error lies after of the judgment*, and the record ſhall be removed. 26 E. 3. 75.]

[18. If an *infant ſuffers a common recovery by guardian, in which he is tenant to the præcipe*, at *full age* he may have a writ of error as well as within, and aſſign for error that he was within age at the time of the recovery ſuffered; for if he had brought * this writ within age, it ſhould not have been tried by inſpection. P. 9 Car. B. R. between THE EARL OF NEWPORT AND THE DUKE OF BUCKINGHAM, per Curiam reſolved, and not ſuffered to be argued at the bar, where the queſtion in law was, whether he could avoid the recovery by writ of (†) error which was ſuffered by guardians when he was within age? and it was adjudged quod non.]

*[509] Cro. C. 307. pl. 8. The Earl of Newport v. Mildmay, S. C. but S. P. does not appear.——Jo. 318. pl. 4. S. C. but † Fol. 752. S. P. does not appear.——2 Saund. 94. Paſch. 22 Car. 2. Heſketh v. Lee, S. P. in error to reverſe a judgment in a common recovery in the county palatine of Lancaſter, notwithſtanding exceptions taken to the admittance and appearance of him by guardian, the ſame were over-ruled, and the judgment affirmed by the whole Court.——Mod. 48. pl. 104. S. C. adjornatur.——If infant comes in and ſuffers a common recovery, this ſhall not be reverſed for error, per Cur. Sid. 321. Hill. 18 & 19 Car. 2. B. R. cites Ld. Newport's caſe.——And in the principal caſe there of RABY v. ROBINSON, the Court on conference with the other judges held, that where an infant comes in as vouchee in perſon, and ſuffers a common recovery, a writ of error does not lie after full age; but if he appears by attorney and ſuffers a common recovery, this may be reverſed for error after his full age, becauſe it ſhall be tried per pais, whether the warrant of attorney was made when he was an infant, &c. and this is the reaſon that judgments ſo obtained againſt infants may be reverſed after their full age, viz. becauſe the trial is not by inſpection but per pais, and cites Cro. E. 569. Mo. 460. Co. Litt. 380. b. and F. N. B. 104. (K).——Lev. 142. REBY v. ROBINSON, S. C. the parties agreed before judgment given, but the opinion of the judges was ſaid to be, that error lay not after his full age. See tit Trial (C), per totum.

19. In account, writ of error came *after judgment given that the defendant ſhould account, and after capias ad computandum was awarded, and before that he had accounted in fact*, and therefore per Cur. this ſhall not be ſent till he has accounted; for the plea is not ended before he has accounted in fact. Br. Accompt, pl. 39. cites 21 E. 3. 9.

Writ of error cannot arreſt execution, becauſe judgment was given before when he was adjudged to account, and all times after he ſhall be adjudged in ward, and he who is in ward cannot be taken out by writ of error. Br. Accompt. pl. 45. cites 21 H. 6. 26.

20. 9 *R.* 2. *cap.* 3. *ſ.* 1. *If tenant for term of life, tenant in dower, tenant by the curteſy, or tenant in tail after poſſibility be impleaded, and plead to inqueſt, and loſe by the oath of twelve, or loſe by default, or in other manner, he to whom the reverſion pertains at the time of ſuch judgment given, his heirs and ſucceſſors ſhall have an attaint, and alſo a writ of error, as well in the life of ſuch tenants as after their death.*

21. If a *quare impedit* is brought *againſt two*, and *one pleads to iſſue*, and the *other confeſſes the action*, upon which judgment is given, *he ſhall not have a writ of error till the matter is determined as to the other*, for the writ of error muſt rehearſe all that are parties to the original, and then the writ ſays, ſi judicium inde redditum ſit tunc recordum illum habeatis, and as to one judgment is not given, and if the record ſhould be removed before the intire matter is determined, there would be a failure of right; per Curiam, 11 Rep.

Fitzh. Error, pl. 35. cites S. C. and Priſot cited it as lately adjudged in Ld. Cornwall's caſe, where treſpaſs was brought a-

gainſt two, and one appeared and pleaded, and was attainted, and judgment given againſt the other, that he could not have writ of error till the matter was determined againſt the other, &c.——Br. Error, pl. 15. cites S. C. and Priſot cited it as lately adjudged in Ld. Cromwell's caſe.

11 Rep. 39. a. b. in Metcalf's caſe, cites 34 H. 6. 41. a. in Humfrey Bohun's caſe.

22. Writ of error was *diſcontinued*, and the *plaintiff after the record moved into B. R. brought another writ of error* there, quod *coram vobis* reſidet; quod nota. Br. Error, pl. 140. cites 2 H. 7. 12.

23. *Information* was made in the Exchequer *againſt the merchants of the Still-yard for divers merchandiſes ſhipped not cuſtomed*, and judgment given againſt them, upon which they ſued *writ of error*, which was *diſcontinued for the not coming of the Chancellor and Treaſurer*, to whom it was directed ſecundum formam ſtatuti, by which they ſued to have *another writ of error*, which was *diſcontinued in the ſame manner*, and *they ſued the third*, and then the King's Attorney prayed execution, and could not have it; for the writ of error is a ſuperſedeas in itſelf, and the *party cannot compel the judges to come*, and a man who is nonſuited in writ of error may have another writ of error, but not with ſuperſedeas as the firſt writ was; for this is his own default; contra here by the not coming of the juſtices. Br. Error, pl. 147. cites 6 H. 7. 15, 16.

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24. *So* of demiſe of the king, or death of the party, or *by adjournment of the county*, in thoſe caſes the party ſhall have ſuperſedeas upon the ſecond writ of error. Ibid.

25. An *exigent* being *awarded in an appeal*, a writ of *error was brought immediately*; for he by the exigent awarded, in caſe of felony, forfeited all his goods immediately; wherefore for as much as he *was at preſent loſs* and prejudice he might have a writ of error preſently; cited by Coke, Cro. J. 357. in caſe of Metcalf v. Wood, as a caſe he had ſeen a precedent of 8 H. 8.

26. If *in a formedon* the *tenant has judgment for part*, no writ of error lies until the intire matter in demand is determined; for the judgment is, ſi judicium inde redditum ſit, which word inde goes to the intire demand. 11 Rep. 39. b. per Curiam, cites Dyer, 291. b. [D. 290. a. pl. 62. and 291. b. pl. 67. Trin. 12 Eliz. Fitzwilliams v. Copley.]

27. *Error in proceſs* cannot be alleged *after in nullo eſt erratum pleaded*; for if it had been alleged the other party might allege diminution. Cro. E. 83. Hill. 30 Eliz. in caſe of Robſert v. Andrews.

28. J. S. had a judgment againſt W. *in debt*, and afterwards *W. made a feoffment to C.* the plaintiff *of his land*; then J. S. ſued an *elegit* upon the judgment, but before it was executed C. brought a writ of error, and would aſſign error in the judgment. The Court thought that a writ of error *would not lie for C. the feoffee unleſs* it be *for error in ſuing out execution*. Secondly, till execution ſued he is not a party grieved, which is the true reaſon why *he in reverſion* or remainder *ſhall not have error in the life-time of the tenant for life* upon a judgment given againſt ſuch tenant for life, becauſe he

he was not then a *party grieved*. Cro. Eliz. 289. pl. 6. Mich. 34 & 35 Eliz. B. R. Charnock v. Sherrington.

29. Error *to reverſe an amerciament in a court leet*, becauſe it was unreaſonable; it was inſiſted that after an amerciament is once affeered, the writ of moderata miſericordia doth not lie; and per tot. Cur. clearly this is no error now to be aſſigned, and the ſame was affirmed. Bulſt. 125. Paſch. 9 Jac. Stubbs v. Flower.

30. In *action of account* it was inſiſted, that a writ of error does not lie on the firſt judgmeut, and Man ſecondary informed the Court, upon a general writ of error, upon a judgment given in an account, the firſt judgment that he ſhall accompt, and the ſecond judgment alſo, ſhall be reverſed, if error be therein. Doderidge J. ſaid, by this it appears that *the general writ of error goes to both the judgments*, as well to the one as to the other; the whole Court agree with him herein. 2 Bulſt. 120. Trin. 11 Jac. Porter v. Agar.

Cro. J. 324. pl. 4. S. P. reſolved by the whole Court in S. C. and likewiſe in the caſe of Rawlins v. Barret.

31. In *debt againſt divers by ſeveral præcipes*, if there be error in the *judgment againſt one*, he may have error before determination of the matter as to the others, for in thoſe originals in which are *ſeveral counts*, and error is againſt one, he ſhall have writ of error, and the record of his count and the pleading ſhall be ſevered from the original, and removed in B. R. and yet the original remains in C. B. as well becauſe the court of C. B. is in poſſeſſion of it as becauſe otherwiſe the court of C. B. could not proceed to determine the reſidue without the original. 11 Rep. 41. a. Mich. 12 Jac. cites 36 H. 6. tit. Fieri Fac. 3. and in ſuch caſe Coke ſays it ſeems to him, that if there be error in the original upon a certiorari, the Ch. J. ſhall only certify the tenor of it. *But where the original is one and one count, he cannot have writ* of error *till all is determined*; for the record cannot be in B. R. and C. B. at the ſame time.

S. P. Arg. 2 Roll. Rep. 125. cites S. C. and 12 E. 4. 1.

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32. *Where ſeveral judgments are to be given, the one dependent on the other*, there the writ of error does not lie till the laſt judgment is given of the thing of which the judgment is given before; per Doderidge J. 2 Roll. Rep. 126. Mich. 17 Jac. B. R.

All the books ſtand upon theſe *differences*, viz. *If judgment be had after judgment*, he ſhall *not have error till the laſt judgment*, as in *account, admeaſurement*, and ſuch like. 2dly, When the *things are ſeveral*, then he ſhall not tarry till the laſt judgment. 3dly, *Though* they are *ſeveral things in their nature, yet if the damages are intire*, there the error ſhall not be before judgment be of the whole and final. Per Doderidge. And per Haughton, in *debt, detinue, dower*, &c. *if defendant confeſſes part, and has judgment, for this error lies, becauſe it is ſeveral*, but *otherwiſe in treſpaſs, becauſe the damages are entire*. Litt. Rep. 6. Mich. 17 Jac. B. R.

33. Where a *ſuit is of ſeveral things*, yet *if the damages are intire*, the writ of error does not lie till all is determined, as in treſpaſs againſt ſeveral, &c. Per Doderidge J. 2 Roll. Rep. 126. Mich. 17 Jac. B. R.

34. In *debt, detinue, and dower, by ſeveral præcipes*, writ of error does not lie till all is determined; but otherwiſe in *treſpaſs*; per Haughton J. 2 Roll. Rep. 126. Mich. 17 Jac. B. R.

35. If in a *quo warranto judgment be given as to part of the liberties claimed*, that they ſhall be ſeiſed, and that the defendant's capiantur pro fine, *and as to the other part, curia adviſare vult*, a writ of error lies before any judgment given for the other part. Paſch.

2 Roll. 113. The King v. Cuſack, S. C. adjornatur.

* This is misprinted, and ſhould be 17 Jac.

17 * Car. 2. adjudged upon a writ of error upon a judgment in a quo warranto againſt the corporation of Dublin. 3 Danv. 22. pl. 26. cites Palm. 1, 2, &c. 17 Jac. B. R. and ſays ſee a long argument and the judgment accordingly.

36. In *treſpaſs* when the *recovery is had by default* no writ of error will lie before the writ of *inquiry of damages is returned*; for the defendant is not grieved until judgment is given upon the return of the writ of inquiry. Jenk. 25. in pl. 48.

37. Error lies *after a confeſſion or retraxit*, but not after a *diſclaimer*. Jenk. 283. pl. 12. cites 8 Rep. 58. 6 Jac. Beecher's caſe.

38. Writ of *error bore teſte before the plaint there entered*, the Court, viz. Mallet, Heath, and Brampſton were clear of opinion, without any ſolemn debate, that *the record was not removed by that writ* of error, becauſe if there be not any plaint entered at the teſte of the writ, how can the proceſſus according to the writ be removed, when there is no proceſſus entered? and that failing, all fails; and beſides it is merely for delay of juſtice. Mar. 140. pl. 212. Mich. 17 Car. Dale v. Worthy.

A writ of error that bears teſte before the judgment given, is good to remove the record, ſo as judgment be given before the return of it; per Cur. Vent. 255. Hill. 25 & 26 Car. 2. B. R. Baker v. Bulſtrode.

39. A writ of error *bearing teſte before judgment* is good, as is the book of 1 E. 5. 4. becauſe in that caſe the foundation of the writ ſtands good, and it is the uſual courſe of practice for the preventing and ſuperſeding of execution; agreed per Curiam. Mar. 140. pl. 212. Mich. 17 Car. Dale v. Worthy.

Judgment, whenever it is entered, *has relation to the day in Bank*, viz. the firſt day of the term; ſo that a writ of error returnable after will remove the record, whenever the judgment is entered. Per Hale Ch. J. Mod. 112. pl. 9. Paſch. 26 Car. 2. B. R. Anon.

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40. A writ of error may be brought *before the writ of inquiry is returned in an ejectment*; for in that action the judgment is complete at the common law before it is returned; for the judgment is only to gain poſſeſſion. And *ſo* it is in a writ of *dower*; *but in treſpaſs, where damages only are to be recovered*, the judgment is not complete till the writ of inquiry is returned, nor can be made up before, as in this caſe it may; but here being no complete judgment entered, there being no capias which ought to be in all actions quare vi & armis, that the king may have his fine, which he cannot otherwiſe have if the party does not proceed in his writ of inquiry, the writ of error is brought too ſoon, and plaintiff may proceed to execution in C. B. becauſe the complete record is not here; per Roll Ch. J. and bid them adviſe what to do in C. B. for it is miſchievous either way. Sty. 109. Trin. 24 Car. B. R. Glide v. Dudeney.

41. Error *returnable the ſame term* in which judgment was given, is good when the record is removed; per Twiſden J. Sid. 104. Hill. 14 & 15 Car. 2. B. R.

42. Defendants in *indictment* in B. R. were found guilty, and after view judgment there, brought writ of error there, but upon ſearch of the roll there was only *judgment entered quod capiatur*, and therefore the Court directed that the writ of error ſhall *not* be

be *allowed till the defendants come in proper perſon*, and in the interim proceſs ſhall be made againſt them to come in to hear their judgments. Sid. 208. pl. 2. Trin. 16 Car. 2. B. R. The King v. Cornwall & Ux.

43. Hale ſaid, that about three years ſince at Norfolk aſſizes, the *defendant in an indictment of barretry brought a writ of error teſte before the aſſizes*, and it was diſallowed, becauſe if ſuch practice ſhould obtain it would diſappoint all the proceedings at the aſſizes. Vent. 255. Hill. 25 & 26 Car. 2. B. R. in caſe of Baker v. Bulſtrode.

19. A writ of error will lie on a *judgment in ejectment quod recuperet*, &c. *before a writ of inquiry executed*, for that is only as to the damages; per Holt Ch. J. Carth. 205. Hill. 3 W. & M. in B. R.

44. 10 *W.* 3. *cap.* 14. *ſ.* 1. *No fine or common recovery, nor any judgment in any real or perſonal action, ſhall be reverſed or avoided for error, unleſs the writ of error, or ſuit for the reverſing ſuch fine, recovery, or judgment, be brought and proſecuted with effect within* 20 *years after ſuch fine levied, or ſuch recovery ſuffered, or judgment ſigned or entered of record.*

45. Error of a judgment in debt *upon a bond* in C. B. and the error aſſigned was, that it was a bond *for appearance taken by the plaintiff colore officii*, and it was no where ſaid that the plaintiff was a ſheriff, but only that he took the bond, *per nomen vicecom'*. Holt ſaid, then you ſhould have pleaded the ſtatute and that matter, and now you are too late, and judgment was affirmed. 12 Mod. 634. Hill. 13 W. 3. Jones v. Sweetapple.

(N) *How* the Writ ſhall be *brought.*

[1. IF a writ of error be brought in this manner, videlicet, this is *directed to Sir Edward Littleton*, (he being *then chief juſtice* de Banco,) *to certify a judgment in querela, quæ fuit coram vobis et ſociis veſtris* where *it was before Sir John Finch*, then chief juſtice, *the predeceſſor* of Sir Edward Littleton is, this writ ſhall abate. Tr. 16 Car. B. R. between LOWES AND WEBBLE, adjudged per Curiam.]

[2. *So* if a writ of error be *directed to Oliver St. John*, he being *chief juſtice* de Banco, *to certify* a judgment in querelâ, quæ fuit coram vobis et ſociis veſtris, *where it was before Edmund Reeves and ſociis ſuis*, there *not being then any chief juſtice*; this is not good, but the writ ſhall abate. Hill. 1649. Several writs abated for this cauſe.] [513]

[3. *But* if a writ of error be *directed to Peter Pheaſant, to certify* a judgment in loquela quæ fuit coram vobis & ſociis veſtris, *where* it appears by the record that *it was held coram Edmundo Reeves et Petro Pheaſant*, this is a good writ; for though in the return Edmund Reeves is firſt named, yet this is well enough, inaſmuch as Peter Pheaſant is alſo named, and it does not appear

which of them was the eldeſt. Hill. 1649. between CLARKE AND SPRIGG adjudged. Intratur P. 1649. Rot. 458.]

Sty. 183. S. C. adjornatur.—Ibid. 203, 204. S. C. and the writ was abated.

[4. If a writ of error be *directed to the mayor, aldermen, and recorder of Lanceſton* in Cornubia, and the *record is certified by the mayor, aldermen, and deputy-recorder*, the *court being held by letters patents*, this is not well certified, inaſmuch that this ought to be certified in the name of the judges of the Court; and it does *not appear that the recorder had power to make a deputy* by the ſaid letters patents. Hill. 1649. between SPRYE AND MILL, adjudged, and the writ abated accordingly. Intratur P. 1649. Rot. 208.]

In ſuch caſe he need not ſhew in what action it was; per Coke Ch. J. Roll. Rep. 22. cites S. C.

5. In a writ of error to *reverſe an outlawry*, it is *not mentioned at whoſe ſuit* he was outlawed, *nor in what action*, and yet held good, becauſe of the many precedents. 4 Rep. 93. b. cites. 4 E. 4. 44. Paſton's caſe.

2 Bulſt. 212. Patch. 12 Jac. Oſborn v. Makeburne S. P. exactly, and the whole Court were clear of opinion that it ought always to be ſhewn in what action the judgment was given, and for ſuch omiſſion the writ of error was quaſhed.

6. But in the principal caſe where the writ of error was brought to remove a judgment in quadam loquela by writ of certain land and paſture, and ſhews not in what action this plea was, the Court for that reaſon adjudged, that the writ ſhould abate. Roll. Rep. 22. pl. 27. Paſch. 12 Jac. B. R. Watſon v. Bernard.

7. A writ of error *directed to the Chief Juſtice de Banco* upon a judgment given in a *quare impedit by judges of aſſize*, and held good; and the plaintiff in error had a ſuperſedeas, viz. non moleſtandum to the metropolitan to ſurceaſe execution until the error was diſcuſſed, and this iſſued out of the Common Pleas, and the defendants ſued a ſcire facias quare executio non, &c. againſt the biſhop and incumbent; at the return whereof the plaintiff came and aſſigned his errors. Dyer, 76. b. 77. a. Mich. 6 E. 6. Henſloe v. Keble.

8. A writ of error was brought *directed to Sir A. Brown Ch. J. of C. B.* but *before the return of the writ Sir A. was removed, and Sir J. Dyer made Ch. J.* there, this was held ill, and the plaintiff was forced to bring a new writ of error de recordo quod coram vobis reſidet. D. 173. b. pl. 16. Mich. 1 & 2 Eliz. Kirk v. Parrott.

9. When a writ of error is brought to reverſe a fine, there *muſt be one writ ſent to the Ch. Juſtice de Banco*, another *to the cuſtos brevium* to certify tranſcriptum pedis finis cum omnibus eundem finem tangen'; and another *to the chirographer* to certify tranſcriptum notæ finis. 5 Rep. 39. a. b. Trin. 34 Eliz. B. R. Tey's caſe.

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Cro. E. 891. pl. 8. Andrews v. Ld. Cromwell. S. C. & S. P. reſolved that

10. If an *aſſiſe* be *ſummoned before the juſtices of aſſiſe*, and *they are after removed, and the chief juſtice of B. and another juſtice, are made juſtices of aſſiſe in the ſame county, and the aſſiſe is taken before them, and propter difficultatem adjourned into B.* and judgment there given for the plaintiff, and a writ of *error is directed to the ſame Ch. J.*

Ch. J. before whom the aſſiſe paſſed, reciting the aſſiſe ſummoned before the juſtices of aſſiſe by name; & poſtmodum capt' before the Ch. J. &c. but does not recite how the aſſiſe came in B. viz. by adjournment or otherwiſe, this writ of error is not good, for as it took notice of the change of the juſtices, a fortiori it *ought to take notice of the adjournment*, for by that both the judges and court were changed. Yelv. 3. Paſch. 44 Eliz. Ld. Cromwell v. Andrews. Adjudged per totam Curiam againſt the opinion of all the curſitors; but Yelv. 6. in the ſame caſe it was adjudged that *the record was removed by this bad writ, and* that *the party might have a new writ de recordo quod coram nobis reſidet.*

the writ was not good for that reaſon, and that it ſhould abate; but Fenner e contra. And though in 5 E. 6. D. [76. b. 77. a. pl. 34, &c. Mich. 6 E. 6. Henſlow and Stanby v. Keble.] where a judgment was in quære impedit before the juſtices of niſi prius, by the ſtatute of Weſtm. 2. and error thereof being brought, exception was taken, becauſe he does not ſhew in the writ where the judgment was, and yet held to be good; for there the record began, and remained in the Common Bench, and where the judgment was, was not material; but in this caſe, the record was not at firſt in the Common Bench, and therefore he ought to ſhew how it came thither. And Gawdy ſaid, when the record begins in one place, and is finiſhed in another, there of neceſſity in a writ of error, the proceedings in both places ought to be mentioned.

And Yelv. 3. a diverſity was taken between the caſe of an aſſiſe, and a quare impedit; for the aſſiſe ought to be commenced originally before the juſtices of aſſiſe, and ſo by preſumption and intendment, judgment given alſo before them, and not in C. B. unleſs upon adjournment; and therefore if judgment be given in C. B. it ought to be apprized certainly how the record of aſſiſe came into C. B. But in error to remove a record of a quare impedit the writ is not of ſuch preciſe form, becauſe the action originally commenced before the juſtices of C. B. and by intendment judgment given there, though by the ſtatute to avoid a lapſe judgment may be given before the juſtices of aſſiſe.

11. In the 5 E. 6. where *judgment in a quære impedit* by the ſtatute of Weſtm. 2. was given *by juſtices of niſi prius*, and a *writ of error thereof brought without ſhewing where the judgment was given*, it was held good; for the record beginning and remaining in C. B. it was held not material where the judgment was given, per Curiam; and Gawdy ſaid, when the record begins in one place, and is finiſhed in another, there of neceſſity in a writ of error the proceedings in both places ought to be mentioned. Cro. E. 891, 892. pl. 8. Paſch. 44 Eliz. in Ld. Cromwell's caſe.

12. Error brought *as coſen and heir of C. earl of Devon to reverſe a fine levied by the ſaid earl*, and errors were aſſigned, and a ſcire facias ad audiend. errores, but he does *not ſhew either in the writ of error or in the ſci fa. how he is his couſin.* Reſolved it was good enough without ſhewing the ſame in any of the ſaid writs, for the one is but a commiſſion to hear the errors, and needs not ſuch certainty; and the other is but a writ founded thereupon, and therefore *how couſin, need not be ſhewed in them.* Cro. J. 160. pl. 15. Paſch. 5 Jac. B. R. Champernoon v. Godolphin.

13. *Nor is it requiſite that the title be ſhewed therein, unleſs* it be *in a ſpecial caſe* varying from the common courſe; *as where an eſpecial heir in tail brings a writ of error, or he in the remainder*, becauſe he is to entitle himſelf, he *ought to ſhew ſpecially how couſin, or how he has the remainder*, but otherwiſe not. And although in ſome writs it is ſhewn how couſin, as in VENNER'S CASE, and is good enough, yet it is not of neceſſity; and the omitting thereof is no cauſe of abating the writ. Cro. J. 161. Paſch. 5 Jac. B. R. in caſe of Champernoon v. Godolphin.

God. 248. pl. 345. Heydon's caſe. S. C. & S. P. and Crook agreed with Doderidge, but Haughton and Coke Ch. J. e contra.

14. If a writ of error be brought *upon a judgment in an aſſiſe capt' coram J. Fleming nuper capital' juſticiar' ad placita*, & J. Doderidge * uno juſticiar' ad placita coram nobis tenend' aſſignat' juſticiar' noſtris ad aſſiſas, this writ is naught, for there was no ſuch record before Fleming juſticiar' ad placita, the words coram nobis tenend' aſſignat' being omitted, and thoſe after Doderidge cannot refer to the firſt; adjudged per Curiam præter Doderidge. Cro. J. 341. pl. 7. Paſch. 12 Jac. Sir Chriſtopher Heyden v. Godſalve.

15. A writ of error was brought *in recordo & proceſſu aſſiſæ, &c. inter A. and B. ſummonit'*, exception was taken becauſe he did *not ſhew which was plaintiff* and which defendant in the writ of error, nor in the aſſiſe; ſed non allocatur, becauſe the precedents are both ways. Cro. J. 341. Paſch. 12 Jac. Heyden v. Godſalve.

16. A writ of error was brought *to remove a record in curiæ manerii de Cuttinby*, where *the record was in curia cuſtodum libertatis Angliæ authoritate parliamenti de Cuttingby*. It was moved that here was a *variance* between the writ and the record; but per Roll there is no direct oppoſition between them, for they both may ſtand together, and though de facto it is the court of the lord of the manor, yet virtually and in dignity it is the court of the king. Sty. 344. Mich. 1652. Reckwith v. Moyle.

Vent. 109. Guy v. Adams, S. C. but S. P. does not appear.—S. C. cited as held accordingly. 2 Ld. Raym. Rep. 1100.

17. Writ of error *to certify the record of a plaint held before the mayor and aldermen, and the mayor and conſtables of the ſtaple of Briſtol, and alſo before the ſheriffs and bailiffs*, mayor and commonalty of the ſaid city, &c. and this was *directed to them & eorum cuilibet*, and *the record certified was only by the ſheriffs and bailiffs*; but adjudged to be well, for that it ſhall be taken diſtributively, viz. that the record of a judgment, upon a plaint held before the ſaid officers or either or any of them, ſhould be certified; and judgment was affirmed. 2 Sand. 291. Hill. 22 & 23 Car. 2. Gay v. Adams.

(O) *What* ſhall be *a Removal of a Record.*

[1. IF a writ of error be brought in Banco Regis *to remove a recovery of the manor of M. in M. cum pertinentiis*, where *the record* of the recovery *is of the manor of M. cum pertinentiis*, yet the record is well removed. Co. 3. Marquis of Wincheſter, 2. adjudged per Curiam, for upon ſuch writ the recovery is reverſed.]

2. *Debt* was brought *by F. againſt E. feme and executrix of J. N.* and he recovered, and ſhe brought *writ of error* and removed the record, and the writ *made mention of record between the feme and J. N. the teſtator*, and *not between the feme and F. who recovered*, and it was doubted where the record remains, and the opinion was that it is in B. R. becauſe the roll in C. B. makes mention that it is removed; quære; for per Babb. it may be amended; quære inde. Br. Error, pl. 5. cites 9 H. 6. 4.

3. In

3. In *partition* the *judgment was, quod fiat partitio,* but *before the final judgment was given a writ of error was brought,* and it was held that the record was not removed for that cauſe, whereupon the writ of error was quaſhed. 3 Salk. 145. pl. 2. Mich. 12 W. 3. B. R. Finch v. Renew. Ld. Raym. Rep. 610. Finch v. Ranow. S. C. ruled accordingly.

4. A judgment in C. B. given after the return of a writ of error is not removed, and nul tiel record may be pleaded to a ſcire fac. quare executio non brought upon it to compel the plaintiff to aſſign errors. 2 Ld. Raym. Rep. 1179. Trin. 4 Ann. B. R. Wilſon v. Ingoldſby.

5. *One of the defendants brings a writ of error without the other,* though the writ ſhall be quaſhed, the record is removed. 2 Ld. Raym. Rep. 1403. Trin. 11 Geo. Ginger v. Cowper. [516]

(P) *Record removed.*

What Thing ſhall be *removed thereby.*

[1. IF a writ of *error upon any judgment but a fine* be *brought in B. R.* the *record itſelf ſhall be removed there,* and not the copy only. 22 E. 3. 6. per Thorpe. * 40 Aſſ. 29.] * Br. Record, pl. 46. cites S. C.

[2. In a writ of error *upon a fine* levied in Banco the *tranſcript only* ſhall be removed in Banco Regis, becauſe if the record itſelf ſhould be removed, there is no chirographer in Banco Regis to engroſs it, and then no quid juris clamat could be brought if it ſhould be affirmed there, for this lies only in Banco and does not lie there, and this ſhall not be removed out of the King's Bench after it comes there. † 21 E. 3. 24. ‡ 22 E. 3. 6. adjudged.] † Fitzh. Error, pl. 76. cites S. C. ——Br. Protection, pl. 62. cites S. C. more fully. ‡ Fitzh. Record, pl. 11. cites S. C.——S. P. by Coke Ch. J. Godb. 248. Paſch. 12 Jac. B. R.

[3. *But if* in B. R. they conceive the fine is *to be reverſed,* they may ‖ ſend for the note itſelf and reverſe it. 21 E. 3. 24. D. 1. Ma. 89. 4.] ‖ Fol. 753. Fitzh. Error, pl. 76. cites S. C.——Fitzh. Protection, pl. 62. cites S. C.

[4. Where they may ſend a writ to the treaſurer and chamberlains to *draw the fine off the file.* 22 E. 3. 6. adjudged.] Fitzh. Record, pl. 11. cites S. C. and ſays vide 40 Aſſ. and 16 E. 3.

[5. If a writ of error be brought in B. R. upon a *fine levied in* the huſtings of *Oxford,* the record itſelf ſhall be removed. 50 Aſſ. 9.] Br. Parol ou Ple, &c. pl. 6. cites S. C.—— Br. Conuſance, pl. 61. cites S. C.

[6. If a writ of error be brought in Banco Regis *to reverſe a judgment* given *in Banco,* the *original* ſhall not be removed if it be not When a writ of error is

brought, the Court ſaid that not by ſpecial matter, as if error be aſſigned in the original. 24 E. 3. 24. b.]

there is no occaſion to bring it into B. R. but only the record, and the original writ, and the warant of attorney, and not the eſſoin roll, unleſs diminution be alleged. Br. Error, pl. 138. cites 1 H. 7. 21. ——— Fitzh. Error, pl. 10. cites S. C.

[7. If a writ of error be *brought in B. R. upon a judgment in an inferior court againſt the plaintiff, there* the Court may reverſe the judgment, though the original be not removed, no error being aſſigned in the original, for this is removed but to ſue here upon the ſame original. 37 Aſſ. 5. adjudged.]

Br. Error, pl. 27. cites S. C. —— [8. If a writ of error be *brought in B. R. upon a judgment in Ireland*, the original ſhall not be removed. 37 Aſſ. 5.]

S. C. cited 2 Bulſt. 163. ——— It is only a tranſcript which is ſent hither, becauſe it muſt come * over the ſea, and ſo in danger of being loſt; Arg. Quod fuit conceſſum, per Coke and Doderidge. Roll. Rep. 17. Paſch. 12 Jac. B. R. ——— Cro. J. 535. S. P. per Cur. Paſch. 17 Jac. pl. 19. in the Biſhop of Oſary's caſe.

* [517]

[9. Upon a writ of error in *parliament upon a judgment in B. R.* the *roll in which the record is* ſhall be brought into parliament by the chief juſtice himſelf. 22 E. 3. 3.]

Same caſes cited Godb. 249. but it was anſwered, that it is at the pleaſure of the parliament to have either the one or the other. —— S. C. cited Cro. J. 341. pl. 7. —— 2 Bulſt. 166. S. P. —— [10. When a writ of error is brought in parliament upon a judgment given in B. R. the chief juſtice de B. R. ſhall carry with him in parliament *the whole roll, in which is contained the plea and proceſs in which the error is ſuppoſed, and* there ſhall *leave a tranſcript* of the record in which the error is aſſigned, *and* ſhall *carry in B. R. the roll itſelf*, becauſe the roll concerns other matters, &c. and for that if the judgment be affirmed the court of B. R. may proceed upon the record there to grant execution, and therefore if the record itſelf ſhould be removed, and judgment there affirmed, and the parliament be diſſolved, there could not be any proceedings thereupon to have execution. 1 H. 7. 19. D. 23 El. 375. 19.]

Ibid. 173. ſame caſes cited, and 10 H. 6. ——— 4 Inſt. 21. cap. 1. S. P. and that after the tranſcript is examined, the Ch. J. carries back the record itſelf into B. R.

11. A writ of error *in all caſes (except* the caſe *of a fine)* removes the record; for it takes it out of the inferior court to the ſuperior. In the caſe of a fine, tranſcript only is removed upon the writ of error. Jenk. 31. pl. 61. cites 26 Aſſ. 24.

S. C. cited Arg. 2 Bulſt. 163. 12. The *Common Bench upon a writ of error* does not ſend but the tranſcript of the writ and record, and not the original itſelf; per Knivet. Br. Error, pl. 127. cites 34 Aſſ. 7.

13. *But ancient demeſne, franchiſe*, and *juſtices of aſſiſe*, upon writ of error, ſend the original writ and record itſelf, and not the tranſcript; per Knivet. Br. Ibid.

14. *But* by 37 Aſſ. 5. *Ireland* does not ſend the original itſelf, but the tranſcript; per Finch. there. Br. Ibid.

15. Upon a writ of error the record itſelf ſhall be removed, and not a tranſcript of the record, for *upon the tranſcript error cannot be aſſigned, unleſs* it be in a writ of error ſued *upon the tranſcript of a fine*, that errors may be aſſigned upon the tranſcript of

of the note of the fine; and if the juſtices think that this is error then they ſhall ſend for the note of the fine and reverſe it. F. N. B. 20. (F).

16. By the writ of error *all is certified which is with the Ch. J.* of C. B. *which is only the body of the record;* but the original and judicial *writs remain with the cuſtos brevium, and other officers*, which are never certified but where error is aſſigned for want of them. Cro. E. 84. Hill. 30 Eliz. B. R. in caſe of Robſert v. Andrews.

17. In caſe of error *upon indictments* to reverſe them *the body of the record itſelf is to be removed*, and a tranſcript of it is not ſufficient; per Williams J.; and per Fleming Ch. J. if the error be *aſſigned in the outlawry*, only diminution may be alleged, there being only a tranſcript of the record, but if the errors be *aſſigned upon the outlawry, and alſo upon the body of the indictment*, here in this caſe the body of the record ought to be removed, and to be in court, and a tranſcript is not ſufficient, and ſo it was in this caſe, and therefore by the rule of the Court, a certiorari was granted to remove the record itſelf, and that afterwards diminution may be alleged. Bulſt. 181. Paſch. 10 Jac. B. R. Baker v. Baker.

18. A writ of error *lies in parliament upon the tranſcript of the record*, without bringing the record into parliament, for the parliament is holden at the king's pleaſure, and may be diſſolved before the errors are diſcuſſed, and ſo the record itſelf cannot be brought here again, becauſe the parliament, which is a higher court, was once poſſeſſed of it; agreed per tot. Cur. Godb. 247. pl. 345. Paſch. 12 Jac. B. R. and cites 8 H. 5. Error, 88. [518]

19. The *uſual form* of all writs of error *is to certify recordum & proceſſum*, and *yet they do only certify the declaration and the pleas* omitting the writs. And the record ſhall be intended the principal record, and not the writ and proceſs. Bridgm. 57. Hill. 12 Jac. cites 11 Rep. Metcalf's caſe, and the words of the writ of error, "ſi judicium inde redditum ſit" ſhall be taken to be the principal judgment.

20. There is no *difference between a writ of error upon a fine, and* upon *another judgment;* for where it is brought *to reverſe a fine the tranſcript of record is only removed;* for none can have the record of the fine but C. B. But otherwiſe it is where the writ of error is to reverſe another record there; and yet in both caſes the record or roll in C. B. is not ſent out of C. B. for it remains there, but the difference is in the entering of them; for when the writ of error is brought to remove the record out of C. B. into B. R. the entry is "mittitur tranſcriptum recordi." Per Ley Ch. J. 2 Roll. Rep. 253. [233.] Trin. 19 Jac. B. R.

21. A writ of error was brought *upon two judgments* given *in an inferior court*, and *they returned two records between the ſame parties, but* it ſeems *not thoſe which the plaintiff intended*, and this was complained of to the Court; and it appeared that *thoſe, which the plaintiff brought his writ of error upon, were not determined; for writs of inquiry of damages were returned, but no judgments entered.* Per Curiam,

Sid. 466. pl. 1. Bridier v. Thomas, S. C. ſays that there were four cauſes between the ſame parties,

and the plain iff prayed the ſteward to certify the two laſt cauſes, but he certified the two firſt, and

Curiam, if there be divers records between the ſame parties, the inferior court may remove which they pleaſe, they being warranted by the writ ſo to do; and here was an omiſſion in the plaintiff, that he did not ſee that judgment was entered; for after a writ of inquiry of damages returned, the Court is to give judgment at the prayer of either party, and not without. Vent. 96. Mich. 22 Car. 2. B. R. Prydyerd v. Thomas.

omitted entering judgments in the laſt till the return of the writ of error was paſt. And per Twiſden J. in ſuch caſe the ſteward may certify which he pleaſes without any contempt; but in caſe no judgment was given before the return he may return the ſpecial matter, viz. that the writ of error was returnable ſuch a day, before which no judgment was. ——Raym. 189. Rinch's caſe, S. C. reſolved accordingly, and that the ſteward could not certify the two laſt, becauſe no judgment was given upon them, and the writ of error commands to certify ſi judicium redditum ſit, and the defendant might have helped this by moving the court below, after coſts taxed, to have judgment entered in the two laſt actions as well as the plaintiff; for judgment ought to have been given at the requeſt of either party, and ſo the contempt was diſcharged.

22. In an action of *waſte brought in the huſtings* in London, there *was a verdict for the plaintiff*, which being after *quaſhed for the inſufficiency, and a new venire awarded*, whereupon a *verdict was given for the defendant*, and judgment for him, and a writ of error being thereupon brought before ſpecial commiſſioners, it was reſolved that *the firſt verdict ſhould be certified in the record, becauſe it was not ſet aſide, for that the jurors had found againſt evidence, or for any undue practice or miſfeaſance of the parties*, but only for the inſufficiency thereof in point of law, which the Court had adjudged upon the verdict appearing before them upon record. 2 Saund. 254. Mich. 22 Car. 2. Green v. Cole.

[519] 23. If the *record varies from the writ of error*, yet the inferior court ought to remove it. Vent. 97. in a nota Mich. 22 Car. 2. B. R.

24. In *debt upon a record in an inferior court*, if the defendant *pleads nul tiel record*, they ſhall certify only tenorem recordi, and grant execution afterwards. Vent. 212. Paſch. 24 Car. 2. B. R. Anon.

* Yelv. 118. S. P. —— S. P. and it is no objection that it ſhould be the tranſcript for fear of the

25. It is the true record which *comes here out of Ireland*, and not the tranſcript, but * *when it comes here* it is the true record, and not before, and *that* which is in Ireland *ceaſes to be a record*; and *ſo* it is of *a record of C. B.* that comes hither by writ of error; per Holt Ch. J. 12 Mod. 255. Mich. 10 W. 3. B. R. Coot v. Linch.

peril of the ſea, for one might object in the ſame manner, that upon error in C. B. the tranſcript only is removed hither for fear it ſhould be burnt or loſt before it comes into B. R. But in fact, when the record in both caſes arrives here, then it is the true record, and not before; and that which is in Ireland or C. B. ceaſes to be the record; per Holt Ch. J. Ld. Raym. Rep. 427. Hill. 10 W. 3. Coot v. Linch.

(Q) *Quod coram vobis reſidet.*

When a Writ of *Error* ſhall *abate.*

In what Caſes the Record is ſo removed, that this Writ lies.

[1. IF a *record* be *removed by writ of error out of one court into another*, if the writ of error be abated the plaintiff may have a ſpecial writ of error quod coram vobis reſidet, &c. 3 H. 6. 3. 26.]

Br. Error, pl. 4. cites S. C. —— Fitzh. Record, pl. 16. cites S. C.

[2. If the *writ* of error be *diſagreeable to the record of the judgment or otherwiſe bad*, yet *if the record be removed by it*, another writ quod coram vobis reſidet lies. M. 3 Ja. B. R. per Curiam.]

[3. If the *writ* of error *mentions the judgment to be in loquela inter A. and two others*, where it *was between A. and the two* perſons, *and another* perſon alſo *not named*, the writ ſhall abate, and the record is not removed to have a writ of error, quod coram vobis reſidet, but he ought to have a new writ. P. 1649. adjudged in a writ of error. Intratur M. 23 Car. B. R. Rot. 242. between WORGON AND KEDWIN, and the like judgment given the ſame term between HACKER AND WHATTEN, where the *writ* of error *mentions five*, and *the loquela was between ſeven*, ſo two of them were not named.]

[4. If the *addition of the myſtery of one of the parties* be *miſtaken in the writ of error*, by which it abates, the record is not removed ſo as to have a writ of error quod coram vobis reſidet; as if the plaintiff in the firſt action be named A. B. de London, citizen and *ſadler*, and the writ of error is to * remove a record in loquela inter A. B. de London, citizen and *ſalter*, &c. the record is not removed by this, but ſhall abate, and a new writ of error ſhall be awarded de novo. D. 1 El. 173. 16.]

* Fol. 754.

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[5. If the writ of error *abates for miſtake of the name of either party*, there no writ of error quod coram, &c. lies, for that the record is not removed thereby. 9 H. 6. 4.]

Br. Error, pl. 5. cites S. C. —— Fitzh. Error, pl. 21. cites S. C.

[6. *As* if *F. recovers in debt againſt the executor of B.* and the *executor brings* a writ of *error of a record between the executor and B. the teſtator*, where it ſhould be between the executor and F. by which it abates, no writ quod coram, &c. lies, for that the record is not removed. 9 H. 6. 4.]

Br. Error, pl. 5. cites S. C. —— Fitzh. Error, pl. 21. cites S. C.

[7. If a *man* 3 *Jac. ſues a writ* of error *to reverſe a judgment given in the time of queen Eliz.* and the *writ is judicium redditum in cur' noſtra*, by which is intended in the time of king James, (in whoſe time the writ of error is brought), for which the writ is abated,

abated, it ſeems that he cannot have a writ quod coram vobis reſidet, but ought to have a new writ of error, for the record is not removed, for there is not any ſuch court mentioned. M. 3 Ja. B. R. Dubitatur.]

11 Rep. 41. b. Metcalf's caſe, S. C. & S. P. unanimouſly reſolved. —— Roll. Rep. 33, 34. pl. 33. S. C. & S. P.

[8. If *judgment* be given *in an account quod computet, and before the ſecond judgment a writ of error is brought in B. R.* where the writ is abated, becauſe it does not lie before the ſecond judgment, the record is not removed by this; for the writ commanded them to ſend the record, ſi judicium inde redditum ſit, but no judgment was given here, upon which the writ of error lies thereupon. M. 12 Ja. B. R. between WOOD AND METCALF, per Coke,]

* Br. Error, pl. 4. cites S. C. —— Fitzh. Record. pl. 16. cites S. C.

[9. This writ *may be awarded by the Court, in which the record is returned.* 3 H. 6. 3. * 26.]

Cro. J. 384. pl. 14. Sandelow v. Deverton, S. C. in the Exchequer-chamber, and S. P. held accordingly. —— Roll. Rep. 294. pl. 9. S. C. and S. P. held accordingly by Coke and Haughton. —— Hob. 72. pl. 85. Foreſt v. Sandland, S. C. adjudged.

[10. If *judgment* be given *againſt J. S. in B. R.* and *he and his bail bring* a writ of *error in Camera Scaccarii*, which is of a record between J. S. and the bail, &c. this does not remove the record, becauſe the *bail are not parties to the record.* H. 13 Ja. B. R. between VERTEN AND SIR JAMES SANDELOE.]

Cro. C. 561. pl. 5. the Court doubted, and would adviſe, whether the bail might have a writ of error, quod coram vobis reſidet. Mich. 15 Car. B. R. Anon. —— Lev. 137. Trin. 16 Car. B. R. Atherton v. Hole, S. P. adjornatur; but Twiſden J. cited Hill. 21 Car. B. R. Rot. 217. that by writ of error brought by the bail the judgment againſt him only may be removed; but ſaid, that in the principal caſe, there being no judgment againſt the bail, nothing is removed, becauſe judgment againſt him is not yet given.

[11. If the *bail bring a writ of error as well upon the principal judgment as in the judgment againſt them upon a judgment* in Banco, or in an inferior court, and the writ abates, becauſe it does not lie upon the principal judgment, it ſeems the principal judgment is not removed by this, but it ſeems that the judgment againſt the bail is removed, ſo that the bail may have a writ of error quod coram vobis reſidet. M. 15 Car. B. R. between WILLIAMS AND WORRAL; a doubt among the juſtices.]

Error in Boſton to reverſe a judgment given there upon a ſcire facias grounded upon a recognizance entered into by the defendant, as bail for one Townſend at the ſuit of the plaintiff; the Court of Boſton do certify not only the judgment upon the ſcire facias, but alſo the principal judgment, and all proceedings therein, and reſolved good enough, becauſe if they ſhould certify only the judgment in the ſcire facias it could not well be underſtood by this Court, becauſe in inferior juriſdictions there are not ſeveral rolls to enter the judgment for the principal, and another for the ſcire † facias, and another for the bail, but all proceedings, as well againſt defendants as againſt the bail, are entered (for the moſt part) in a book, and never entered at large, unleſs when a writ of error is brought, and then they make up an intire record, and not otherwiſe; and judgment was affirmed. Raym. 431. Paſch. 33 Car. 2. B. R. Johnſon v. Taylor.

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[12. If a writ of error be *brought in B. R. to reverſe a judgment given in Banco*, and in the writ *the ſum of the damages in the firſt action is miſtaken*, though a *mittitur* be *entered upon the record upon the receipt of the writ* of error, yet the record is not removed by it. H. 7 Ja. B. between STOCKER AND KEMISH, per Curiam.]

Roll. Rep. 220. pl. 2. Trin. 13 Jac. B. R.

[13. If the *judgment* be given in Banco *tempore of one king*, and the writ of *error brought tempore of another king*, and the writ of error be to remove a record *in loquela quæ fuit in curia noſtra; et*

coram juſticiariis noſtris, et per breve noſtrum, between the parties, and thereupon the record is certified in B. R. yet it is not removed de Banco, ſo that no writ of error lies in B. R. quod coram vobis reſidet. D. 1, 2. Ma. 106. 16.]

Loyd v. Bethel, S. P. agreed per Curiam, that it is not good. —— Bridgm. 56. S. C. & S. P.

[14. If the *writ* of error *mentions the judgment to be coram the conſtable and bailiffs*, and the *record* is, that it was *coram the deputy conſtable and ſuitors*, and not the bailiffs, the record is not removed, but it ought to be abated, and a new writ of error to remove it. P. 1649. between WORGAN AND KEDGWIN adjudged. Intratur M. 23 Car. B. R. Rot. 241.]

See Sty. 131. Mich. 24 Car. Exception taken on the like point, in the caſe of Tomkins v. Jourden, Curia adviſare vult.

[15. If a writ of error be *brought in B. R. in Hibernia, upon a judgment* * given *in Banco there*, and upon this the *firſt judgment is reverſed*, upon which a writ of *error is brought in B. R. in England upon the judgment given in Hibernia, and* in this the *judgment given there reverſed*, and that the judgment given in Banco in Hibernia ſhall ſtand in its force; if there be error in the judgment given in Banco in Hibernia, writ of error may be brought in B. R. in Hibernia [Anglia] in recordo quod coram vobis reſidet, though the record itſelf is not removed, but only the tranſcript, for the danger of the miſcarriage over the ſea. Tr. 5 Ja. B. R. between COMYN AND ST. JOHN, agreed.]

* Fol. 755.

Yelv. 117. Seint-John v. Comyn, S. C. the Court after much debate granted that they ſhould have a new writ quod coram vobis reſidet, de bene eſſe.

[16. If a writ of error *brought in Camera Scaccarii upon a judgment* given *in B. R.* by the ſtatute of 27 El. *be abated by death or otherwiſe*, it ſeems that no writ lies there quod coram vobis reſidet, for upon this writ of error the record itſelf was not removed, but only the tranſcript, and therefore he ought to have a new writ of error. Dubitatur H. 13 Jac. B. R. between VERTON AND SIR JAMES SANDELOE. Mich. 19 Jac. in Scaccario, adjudged per Curiam.]

Cro. J. 384. pl. 14. Sandelow v. Deverton, S. C. in the Exchequer-chamber reſolved accordingly. Roll. Rep. 294. S. C. & S. P. per Coke and Haughton. —— Hob. 72. pl. 81. Foreſt v. Sandland, S. C. adjudged. —— Error coram vobis lies on affirmance of a fine in B. R. 1 Salk. 337. Winchurch v. Belwood.

18. If *record* be *removed out of* this court of *C. B. into B. R. by writ of error, and ſcire facias is brought againſt the party, and after the plaintiff in the ſcire facias is nonſuited, and the other brings ſcire facias to have execution, and the other ſhews writ of error, quod penes illos reſidet and aſſigns errors*, yet the other ought to have execution without anſwering to the errors. Br. Faux Judgment, pl. 9. cites 21 H. 6. 34. [522]

19. *But* if he will *firſt ſue writ of error* and pray ſcire facias againſt the party, and after be nonſuited, there if the other ſues ſcire facias to have execution, the party who was nonſuited ſhall have writ of error quod coram vobis reſidet, and aſſign his error,

ror, *contra in the ſcire facias.* Br. Faux Judgment, pl. 9. cites 21 H. 6. 34.

20. *And* ſo there ſeems *a diverſity where he ſues ſcire facias and is nonſuited,* and where he *prays ſcire facias and does not ſue it out.* Br. Faux Judgment, pl. 9. cites 21 H. 6. 34.

21. A writ of error is *brought* of a judgment *in the Exchequer before the Chancellor, Ld. Treaſurer, and two Chief Juſtices,* and *afterwards another is brought, but not quod coram vobis reſidet, becauſe the record is not removed out of the cuſtody of him who had it before,* but the record remains in the ſame cuſtody after the writ of error purchaſed as it was before. 3 Rep. 11. b. 15. b. Mich. 26 & 27 Eliz. in Scacc. Sir William Herbert's caſe.

Yelv. 211. S. P. adjudged, and that the record being brought in B. R. was well removed and remained there.

22. If a writ of error be brought *to remove a record before the biſhop of Durham and eight others,* and thereupon *a record before the biſhop and nine others is removed,* the record cannot be examined upon this writ, but there *ought to be a new writ* de recordo quod coram vobis reſidet. Cro J. 224. pl. 14. Mich. 7 Jac. Odel v. Morton.

——2 Ld. Raym. Rep. 1200. cites S. C. that the record was held to be well removed; for if the parties are rightly named, any other variance will not hurt.

Yelv. 212. S.C. & S.P. per Cur. for that the anſwer was not ſo full as the command of the writ awarded,

23. But upon view of the record it appeared the *writ was directed to the biſhop and eight others, and eight of them only certified, and not the ninth, and it appeared not that he was dead or removed,* and therefore alſo the writ was held to be ill, &c. per Curiam. Cro. J. 254. pl. 14. Mich. 7 Jac. Odell v. Morton.

writ, and therefore ill, and the anſwer ought to be by all, unleſs ſome are dead after the writ, and if ſo, then it ought to appear by the anſwer of thoſe that are alive.

24. *A. brought* a writ of *error againſt B. upon a fine,* upon which *the tranſcript of the fine and proclamations are removed* in Banco, and afterwards A. is nonſuited; now another who has cauſe may have a writ of error quod coram vobis reſidet. 3 Le. 107. pl. 157. Trin. 26 Eliz. B. R. in caſe of Ragg v. Bowley.

Cro. J. 620. pl. 6. Cave v. Polewheel, S. C. adjudged notwithſtanding ſeveral precedents were cited to the contrary, which the Court ſaid had paſſed without debate.

25. The *plaintiff recovered in B. R.* and the defendant brought a writ of *error in the Exchequer-chamber,* and after the record was certified, the *writ was diſcontinued,* and *then the defendant brought a writ* of *error coram vobis reſidet, in the Exchequer-chamber;* and reſolved by all that it did not lie, becauſe the writ of error is given by the ſtatute 27 Eliz. in a ſpecial manner, viz. either to affirm or reverſe the judgment, and the execution thereof is referred to B. R. and therefore no coram vobis reſidet lies; but upon a diſcontinuance or miſcontinuance, the tranſcript of the record is remanded to B. R. Jo. 14. pl. 16. Mich. 18 Jac. Polhill v. Cate.

26. *If a writ* of error *does abate upon the plea to the writ, and the record be well removed,* the *party may have a new writ* of error *coram vobis reſidet,* &c. But if the record be not well removed, then the party ſhall not have a new writ of error here; per Doderidge.

Godb.

Godb. 375. pl. 463. Trin. 3 Car. B. R. Carliſle Dean and Chapter's caſe.

* 27. Error was brought in the Exchequer-chamber of a *judgment in a ſci. fa. by an executor to have execution of a debt recovered by teſtator.* The Court doubted whether this ſci. fa. being grounded on a *judgment* in an action of debt, be not within the equity of the ſtatute; adviſare vult. Cro. C. 286. pl. 32. Mich. 8 Car. B. R. Nevil v. South and Delabarre.

28. Where the writ of error *recites truly the names of the parties* to the action, *the action itſelf*, and the *thing in demand*, though the writ of error abates for other defects, a new writ of error de recordo quod coram vobis reſidet well lies. Jenk. 306. pl. 81.

Yelv. 6. Trin. 44 Eliz. B. R. Cromwell v. Andrews, S. P. but if there is any miſtaking in the ſaid matters, it is otherwiſe.

29. Error to reverſe a judgment in C. B. in an action on the caſe; exception was taken that the record was not removed, the *judgment in C. B.* being *given coram Petro Pheſant*, and the *writ of error was to certify a record quod coram vobis reſidet;* and the Court abated the writ of error for this exception. Sty. 183. Mich. 1649. Gilbert v. Marden.

30. *A writ* of error *quod coram vobis reſidet is*, when a writ of error is brought to reverſe a judgment given in C. B. or other court, where the record was formerly removed into the court of B. R. and by reaſon of the death of the party, or for ſome other cauſes, reſts undetermined, by reaſon of the abatement of the former writ of error. Sty. 470. Mich. 1655. Anon.

31. Where a writ of *error abates, or is diſcontinued in Cam. Scacc.* the judgment is not again in B. R. till a *remittitur* is entered; for without ſuch remittitur it cannot appeal to the court of B. R. but that the writ of error is ſtill pending in the Exchequer-chamber. 1 Salk. 261. pl. 1. Trin. 4 W. & M. in B. R. Howard v. Pitt.

Show. 402. S.C. accordingly. Carth. 236. S. C. and per Curiam, unleſs a remittitur is entered the plaintiff muſt ſue a ſcire facias.

32. A writ of error coram vobis was brought, *reciting the former writ to be returnable coram nobis, where it was in the time of the late queen as well as of the king*, and therefore was quaſhed. *But* Holt Ch. J. ſaid, *if* the writ of error had been *granted in the time of the king and queen, and then the queen had died*, and then the record had been brought into B. R. this had been ſuch a record as the coram nobis reſidet deſcribes. Ld. Raym. Rep. 151, 152. Hill. 8 & 9 W. 3. Walker v. Stokoe.

Carth. 367. S. C. the Court held that this writ was no warrant for the Court to proceed upon, and quaſhed it.

33. And Holt took the diſtinction in Yelv. 211. that *where the ſuit is to defeat a record*, then the variance is fatal, *but where the ſuit goes to another collateral matter*, and not to defeat the record, there it is otherwiſe. Ld. Raym. Rep. 152. in S. C.

Carth. 370. S.P. in S.C.

34. It lies *on a judgment in B. R. for any error in the record, as want of an original*, &c. or concerning *matters of fact, as nonage, death of the party:* for error in fact is not the fault of the Court, therefore it may be determined by the judges when the record is

before them. 8 Mod. 317. Mich. 11 Geo. in a note there at the bottom of the page.

35. Where a writ of error in this court *abates by the death of the parties*, another writ of error will lie quod coram vobis reſidet, but in no other caſe. 2 Barnard. Rep. 253. Paſch. 6 Geo. 2. B. R. Herne v. Buſhel.

[524] (R) *Who may aſſign* Error in the Thing.

The *Vouchee*.

Br. Error, pl. 39. cites S. C.—— Fitzh. Error, pl. 61. cites S. C.

[1. IN a writ of error by the vouchee he may aſſign *error which was between the demandant and tenant*. 8 H. 4. 3. b. becauſe the whole is upon one original.]

——Jenk. 69. pl. 31. S. P. and cites S. C. and 9 H. 4. 1.

Jenk. 69. pl. 31. cites 8 H. 4. 4. and 9 H. 4. 1. that the tenant cannot. The vouchee may have prejudice by this error, but the tenant cannot, becauſe he has recovered in value; if the tenant reverſes the judgment, the vouchee ſhall have a ſci. fac. to reſtore the value; if the vouchee prevails by means of the writ of error brought by the vouchee, the tenant ſhall be reſtored.

[2. *So* the *tenant may* aſſign error between the demandant and the vouchee. Contra, 22 E. 4. 32.]

See (K) pl. 7. ſupra.

Br. Error, pl. 39. cites S. C.—— Fitzh. Error, pl. 61. cites S. C.

3. *So* the *ſecond vouchee* may aſſign error between the tenant and the firſt vouchee. Contra, 8 H. 4. 5.]

Fitzh. Error, pl. 61. cites S. C.

[4. If the *heir of the huſband brings* a writ of *error upon a judgment* given *againſt him, being vouchee in a writ of dower, he may aſſign error in the whole proceſs*. 8 H. 4. 5.]

[5. The vouchee may aſſign error *in the judgment of the value* againſt himſelf. 18 E. 3. 38. b.]

Cro. E. 739. pl. 13. Hill. 42 Eliz. B. R. Holland v. Dauntzey, S. P. held accordingly per tot. Cur.

[6. If *tenant in tail within age*, being *vouched in a common recovery, appears by attorney* where he ought to appear by guardian, he in *remainder may aſſign it for error*, becauſe he is *privy* to the record *in* regard of his *intereſt*, and the appearance of the infant by attorney was void. H. 13 Ja. B. R. between HOLLAND AND LEE.]

——Palm. 123 and 224. to 258. S. C. argued by counſel and the Court, and judgment accordingly. ——Bridgm. 69. Holland v. Jackſon & al' S. C. argued, but the writ abated by death of one of the plaintiffs in error.—— Roll. Rep. 301 to 309. S. C. Arg. ſed adjornatur, and afterwards the writ abated by the death of one of the plaintiffs.——Mo. 622. pl. 850. S. C. but S. P. does not appear.—— All. 75. S. C. cited by Hale, and that the intire judgment was reverſed.——See tit. Attorney (C), pl. 4. and the notes there.

[7. If A. *recovers againſt three in* a *dum fuit infra ætatem*, and *two of the tenants are within age*, yet *all may* bring a writ of error, and *aſſign the nonage for error*. Dyer, 1, 2. Ma. 104. 10. adjudged.]

[8. If

[8. If *A. recovers againſt B. debt and damages*, and after *B. dies*, and upon the return of the death of B. *upon a teſtatum a ſcire facias is awarded to the ſheriff of Kent, and* another ſcire facias to *the ſheriff of Surry*, againſt the tertenants, and the *ſheriff of Kent returns C. tertenant* of the land there, which was the land of B. at the time of the judgment; *and* the *ſheriff of Surry returns D. tertenant* of the land there; and upon this *C. and D. appear*, and *C. pleads that J. S. a ſtranger is tertenant of the land*, * which was the land of B. at the time of the judgment; to which A. the plaintiff ſays, that J. S. is not tertenant of any land, &c. upon which ſeveral pleas ſeveral iſſues are joined, and ſeveral venire facias's, and ſeveral trials, one in Kent and the other in Surry; and the *iſſue is found againſt C.* ſcilicet, that J. S. was not tertenant; *and the other iſſue is found for D.* ſcilicet, that he is not tertenant; upon which ſeveral verdicts judgment is given accordingly for the plaintiff A. If *C. brings a writ of error only* upon this judgment, (†) *he cannot aſſign* for error *that D. died before the verdict was given for him*, for he is a mere ſtranger to the proceedings between A. and D. for if A. had relinquiſhed his writ againſt D., C. could not prevent it; for he hath not pleaded that D. was alſo tertenant, but hath put himſelf upon another plea, and this being found againſt him he ſhall not have any advantage of any proceeding between D. and A. Mich. 14 Car. B. R. between ANGELL AND COWPER, adjudged per Curiam in a writ of error upon a judgment in B. and the firſt judgment affirmed accordingly, notwithſtanding this error. Intratur.]

Cro.C. 517. pl. 19. S.C. and for the defendant in error it was infiſted that for as much as there be two ſeveral ſcire facias's in ſeveral counties, they be as ſeveral ſuits, the one not depending upon the other, and the proceedings are ſeveral; and although there be death, &c. alleged in the one, yet it is not material as to the other ſuit; nor is there any cauſe that the other, againſt whom the verdict is found, ſhould aſſign it for error, and he cited for this point 5 E. 4. 7. and of that opinion was Brampſton, Jones, and Croke; whereupon rule was given that the judgment ſhould be affirmed.

† Fol. 756.

* [525]

9. *If a man be vouched, and enters into warranty, and loſes*, he may have a writ of error, and *aſſign the errors* which happened *betwixt the demandant and the tenant, or* betwixt the *demandant and the vouchee*. F. N. B. 21. (C).

10. And *ſo he in the reverſion* who prays to be *received upon the default of the tenant for life, or for his faint pleading*, if he be received, and pleads, and loſes, he ſhall have a writ of error, and *aſſign the error betwixt the demandant and the tenant, or* between the *demandant and him who prays to be received*. F. N. B. 21. (C).

11. Note alſo, the *vouchee may aſſign error between the demandant and tenant*, and ſo of tenant per reſceit. 8 H. 8. 4, 5. 8 H. 4. 3. But the tenant (himſelf) ſhall not have error, becauſe he is out of court. Quære, 17 E. 2. Recovery in Value, 32. F. N. B. 21. (C), in the new notes there (b).

12. Writ of error *to reverſe a judgment* given *in an aſſiſe againſt A. and* 19 *others*, Hill. 43 Eliz. but nothing being done thereupon, a *ſcire facias was ſued* quare executionem habere non debet, returnable quinque Paſch. *A. appeared*, and *the others exacti non venerunt;* and *A. only aſſigns the errors*, and this aſſignment was held to be null and void, *without ſuing a ſummons and ſeverance of the*

Yelv. 3. S. C. for all ought to have aſſigned the errors together, and by this the writ of error is diſ-

continued; but he that appeared *the others.* Cro. E. 891, 892. pl. 8. Trin. 44 Eliz. B. R. Cromwell v. Andrews.

ought to have prayed proceſs ad ſequand' ſimul, and upon this judgment of ſeverance ought to have enſued, for before appearance there cannot be any judgment of ſeverance without proceſs, but otherwiſe it is after appearance.

[526] (S) Aſſignee.

In what Judgment Error may be aſſigned.

[By Default or falſe Surmiſe.]

This ſeems to be miſprinted, and that it ſhould be 19 Aſſ. pl. 8. [1. A Man may aſſign *error upon law in a judgment* given againſt him *by default.* 19 Aſſ. 10.]

—— A judgment by default is a judgment, but if it be erroneous it cannot be affirmed. Sty. 122. Trin. 24 Car. per Roll J. in caſe of Crook v. Samm.

Br. Error, pl. 117. cites 19 Aſſ. 8. S. P. and Roll ſeems miſprinted. [2. *So* a man may aſſign error *in fact* upon a judgment given againſt him by default. 19 Aſſ. 10.]

Br. Error, pl. 117. cites 19 Aſſ. 8. S. P.— [and Roll ſeems to be miſprinted.] [3. *As* in a *writ of meſne againſt two coparcenors*, if *one dies* pending the writ, and after *both are fore-judged*, upon their default, the *ſurvivor and the heir of him that is dead* may aſſign for error the death at the time of the judgment of him that is dead. 19 Aſſ. 10. adjudged, though it be matter in fact.]

And Brooke ſays, ſic vide that upon judgment upon default matter in fact may be alleged for error.—— See (P. b) infra, pl. 17. S. C.

Cro. C. 426. pl. 17. Tyffin's caſe, S. C. and it was objected, that the death of one of the defendants ought to have been ſurmiſed before the iſſue tried, and therefore Henden Serjeant very much urged it to be an error; but it was reſolved by all the Court, that ſuch ſurmiſe needs not to be in judicial proceſs to alter it, and therefore although a venire facias iſſued againſt a dead perſon, yet one of the defendants being alive is ſufficient, and no cauſe of error; whereupon the judgment was affirmed.

[4. In an *ejectione firmæ againſt two*, if *after iſſue joined, and venire facias awarded, one of the defendants dies*, and after a *verdict is given* at the niſi prius *for the plaintiff*, and after, *before judgment, the plaintiff ſurmiſes the death of one*, ut ſupra, and prays *judgment againſt the other*, and judgment *is given* accordingly, *without any anſwer to it by the plaintiff* [*defendant*]; if it be *not true that he died as is ſurmiſed*, it may be aſſigned for error; for inaſmuch as the plaintiff had made this ſurmiſe, this being a matter of fact, the plaintiff [defendant] cannot have any anſwer thereto, (the uſe not being thereupon to enter that the plaintiff [defendant] did not deny it,) the *plaintiff* [*defendant*] *hath no other remedy but to aſſign it for error.* Mich. 11 Car. B. R. between Tiffin and Lenton, per Curiam.]

Error of a judgment in C. B. in treſpaſs of aſſault and battery were aſſigned; that the action was brought againſt H. and J. S. and J. S. died before the laſt continuance; it was holden, that in regard the judgment was only againſt H. that the writ ſhould abate as againſt J. S. and the judgment ſtand good againſt H. Cro. E. 145. pl. 4. Mich. 31 & 32 Eliz. Hill v. Tempeſt.

In treſpaſs againſt divers, one dies pending the action, and notwithſtanding the venire and diſtringas mentions all, and the verdict is againſt all, if this matter be ſurmiſed before judgment, ſo that the judgment be againſt the ſurvivors, it is well enough. Vent. 249. Mich. 25 Car. 2. B. R. Anon.

Aſſumpſit

Aſſumpſit was againſt two men, mean betwixt the verdict and the judgment one of them died, and notwithſtanding judgment was given; the judgment was reverſed; for the opinion of the Court was, that the death of one of the parties did abate the writ. Cro. E. 105. pl. 19. Trin. 30 Eliz. B. R. Meggot v. Broughton.——It was ſaid, that the caſe is not like the caſe of an action of treſpaſs, for every treſpaſs done by many is ſeveral by each of them, but every aſſumpſit is joint and not ſeveral. 2 Le. 54. pl. 77. Mich. 29 Eliz. B. R. Megot v. Broughton.

See (Q. a) infra, pl. 1. S. C.——See (I. c) infra, pl. 11.

[527]

5. An action of *trover was brought by five*, and *before verdict one of them died*, and *yet they proceeded to trial, and a verdict* was given *for the plaintiffs, and they ſuggeſted that one of them was dead, and judgment was given for the reſt*; this was error, for every one ought to recover according to that right only which he had at the bringing the action; and this differs from the caſe in treſpaſs where one defendant dies. Upon a writ of error adjudged by three judges, (the fourth, viz. Dolbin doubting) and the judgment reverſed accordingly, and Spring's caſe 2 Bulſt. 262. diſapproved, and ſaid the reaſon of the judgment in that caſe was miſtaken. Raym. 463. Paſch. 34 Car. 2. Hedgewood & al' v. Bayly & al'.

Skinn. 39. pl. 7. Wedgewood v. Baily, S. C. ſays, that all the Court (Dolben and the others) were of opinion, that the judgment ſhould be reverſed mainly upon the reaſon of READ and REDMAN'S CASE, 10 Rep. 134. and 2 Bulſt. 262. not allowed, but thought by Pemberton that Coke's opinion was miſtaken by the reporter, and ſo it was reverſed.—2 Show. 177. pl. 173. S. C. adjornatur.——S. C. cited that the judgment could not be entered, 3 Mod. 249. Arg.——See the ſtat. 8 & 9 W. 3. cap. 11. ſ. 7. at tit. Abatement (Q. a).

(T) In what Judgment; and by *whom*.

[1. IN *debt* the *plaintiff recovers* by judgment *againſt B. who* after *dies*, and upon a ſcire facias againſt the tertenants, *three are returned tertenants, who appear and plead ſeveral pleas*, and thereupon there are *ſeveral judgments againſt them*; and after *one* of them brings a writ of error, he *cannot aſſign error in the firſt judgment given againſt B.* as that the judgment was not that B. ſit in miſericordia, *becauſe* he is *not privy* thereto. Tr. 9 Car. B. R. between HILL AND WITLACH adjudged, and upon ſuch writ of error and aſſignment the firſt judgment affirmed.]

[2. If a *judgment* be given *againſt the principal, and* after *another* judgment *againſt the bail* in a ſcire facias, the *bail cannot* in a writ of error *aſſign error in the firſt judgment, becauſe* he is not privy thereto. Hill. 11 Car. B. R. between HARDY AND BROWN adjudged in a writ of error upon a judgment in Rippon, but the judgment given in the ſcire facias againſt the bail was reverſed.]

S. P. by Roll J. Sty. 39. Trin. 23 Car.—— See (K), pl. 25. S. C.

3. If the *defendant in the firſt action dies before ca. ſa. ſued*, and *afterwards the plaintiff obtains judgment againſt the bail in ſci. fa.* Audita querela lies and not error. Ld. Raym. Rep. 27. Mich. 6 W. & M. Lampton v. Collingwood.

Fol. 757.

(U) *What Thing* may be *aſſigned* for Error.

[Things contrary to the Certificate or Record, or Admittance of the Party.]

[1. A Thing *againſt the certificate of the juſtices of record cannot* be aſſigned. 1 M. 89. 3. Dyer, 4. 5 Ma. 163. 56.]

[2. *But* otherwiſe where the aſſignment *ſtood with the certificate*, &c. Dyer, 1 Ma. 89. 3. *as* the *death of the conuſor before ingroſſing and recording the king's ſilver.*]

[528] S. C. cited per Cur. Cro. J. 12. Paſch. 1 Jac. B. R. in pl. 15.

[3. *But* if the *judge* of the niſi prius *dies before the certificate of the verdict and day in Bank*, and notwithſtanding the clerk of the aſſiſe returns the verdict, which is received and entered, he *cannot* after *aſſign for error the death of the juſtice* aforeſaid, becauſe it is contrary to what the court de Banco did as judges. Dyer, 4. 5 M. 163. 56.]

[4. In a writ of error *to reverſe a fine*, it cannot be aſſigned for error, that the *conuſor was dead before the teſte of the dedimus* poteſtatem, for this is directly contrary to the record of the conuſance taken by the commiſſioners. Dyer, 1 Ma. 89.]

Cro. E. 468, 469. (bis) pl. 27. S. C. & S. P. agreed per Curiam. —Ow. 21. S. C. but S. P. does not appear. —Mo. 413. pl. 569. S. C. but not fully S. P.

[5. In a writ of *error to reverſe a fine*, it cannot be aſſigned for error that the *conuſor died between the teſte of the writ of covenant and the return thereof*, though the *conuſance in* this was *taken by dedimus poteſtatem in the country*, although it was objected that this aſſignment ſtood with the record, inaſmuch as the dedimus poteſtatem iſſued before the writ of covenant, and ſo it might be that he died after the conuſance, and between the teſte of the writ of covenant and the return; for it ſeems it cannot be intended or averred, that the dedimus iſſued before the writ of covenant, for by the dedimus the writ of covenant is ſuppoſed to be pending, and ſo this death ought to be before the conuſance taken, and ſo againſt the certificate of the commiſſioners. M. 38, 39 El. B. R. between WRIGHT AND THE MAYOR OF WICKHAM adjudged per Curiam.]

Cro. E. 468. (bis) pl. 27. S. C. held accordingly. — 2 Jo. 181. Mich. 33 Car. 2. B. R. Cockman v. Farrer, S. P. accordingly. — Raym. 461. S. C. accordingly. — 2 Sid. 94, 95. Trin. 1658. B. R. Row v. Evelyn, S. P. per Cur.

[6. *But* it may be aſſigned for error, *that after the conuſance* taken, *and before the certificate* thereof, the conuſor died, for this ſtands with the record. M. 38, 39 El. B. R. in WRIGHT'S CASE.]

Cro. E. 677. pl. 7. S. C. the Court ſpake nothing to this error, nor ſeemed much to regard it; et adjornatur. — Cro. J. 11, 12. pl. 15. Paſch. 1 Jac. B. R. the S. C. adjudged accordingly per tot. Cur. and the fine was affirmed. — Yelv. 33, 34. S. C. adjudged that this ſhall not be aſſigned for error; for the record is an eſtoppel, and he might as well ſay, and for the ſame reaſon, that there was no ſuch

[7. In a writ of error to reverſe a fine, it cannot be aſſigned for error *that the dedimus* poteſtatem *was directed to Sir Roger Manwood, Knight, where* there was not any ſuch *at the time*, but *he was but an eſquire*, and yet he certified it according to the writ, for this is againſt the record. Dubitatur, 43, 44 El. B. R. between ARUNDEL AND ARUNDEL.]

ſuch Roger Manwood in rerum natura, which he cannot do, becauſe it is againſt the record.——S. C. cited Arg. 3 Mod. 141.

8. If in *aſſiſe of freſh-force*, which paſſed againſt the defendant, the *record* had *made mention that he had been attached and ſummoned*, and *he was not* attached and ſummoned, *he ſhall not aſſign this for error*; for it is contrary to the record, and then it ſeems that he is put to the action againſt the ſheriff who returned it. Br. Error, pl. 116. cites 19 Aſſ. 7.

9. *Upon judgment upon default, matter in fact may be alleged for error.* Br. Error, pl. 117. cites 19 Aſſ. 8.

10. *As two brought* writ of *error becauſe writ of meſne* was brought *againſt the one and the father of the other*, who were forejudged by judgment, where the father was dead at the time of the judgment given, by which the *other coparcenor, and the heir of him who was dead, brought writ of error, for they were co-heirs in gavelkind*, and aſſigned for error the death of the father before judgment, by which the judgment was reverſed, and the plaintiffs reſtored to their meſnalty, and the tenant to be attendant on them as before. [529] Br. Error, pl. 117. cites 19 Aſſ. 8.

11. Error to reverſe a judgment in the court of M. becauſe the *judgment was entered before the mayor and J. S.* and J. D. alderman-nis, &c. and at the ſame time the *plaintiff was made mayor pending the ſuit*; ſed non allocatur; for if he admits him to be his own judge it is not error. Cro. E. 320. pl. 8. Paſch. 36 Eliz. B. R. Walſh v. Collinger.

12. Another error was, that the *preſcription is to hold courts before the mayor and two aldermen*, and it is *alleged that at ſuch a court held before the mayor and J. S. and J. D. aldermen, &c. and alleges in facto that the ſaid J. S. was not then alderman*; the Court held that to be a manifeſt error, for that the Court cannot be holden unleſs there be two aldermen at the leaſt, and if J. S. was not an alderman, there were not two aldermen, and for that cauſe the judgment was reverſed. Cro. E. 320. in S. C.

13. A *ſtatute-merchant was by mittimus removed out of the Chancery into C. B.* and *execution awarded there ſuper tenorem recordi*; reſolved, that in that caſe the conuſor *cannot allege for* error, *that the ſtatute wants one of the ſeals* that ought to be to it, becauſe he has admitted the ſame in C. B. Mo. 570. pl. 778. Trin. 41 Eliz. B. R. Worſley v. Charnock.

14. Error to reverſe a judgment in the court of Abington, which *court is mentioned to be held before the mayor, ſecundum conſuetudinem burgi a tempore cujus*, &c. but it does not appear there was any ſuch cuſtom there to hold pleas; it was reſolved the aſſignment, being directly againſt the record, is not receivable; and the judgment was affirmed. Cro. J. 359. pl. 19. Mich. 12 Jac. B. R. Whiſtler v. Lee.

Roll. Rep. 53. pl. 26. S. C. and the writ of error held not good; for the writ admits it to be a court of record, and therefore it cannot be aſſigned that there is no ſuch cuſtom.——2 Bulſt. 243. S. C. and judgment affirmed accordingly.——Jenk. 327. pl. 47. S. C. the ſuit by the writ of error admits it to be a court.

15. If the *defendant appears by J. G. his attorney*, it cannot be *aſſigned for error, that the ſaid J. G. was dead before the day of appearance*, becauſe that it is againſt the record; adjudged upon a writ of error in the Exchequer-chamber. Cro. C. 53. pl. 11. Mich. 2 Car. Morris v. Fletcher.

Sid. 238. pl. 8. S. C. and the Court held it to be error.

16. *Nothing* is aſſignable for error *which proves the writ abateable, but* that only *which proves it abated*; as where error was brought of a judgment in ejectment, and it was aſſigned that after verdict and before judgment the plaintiff entered, the Court held it not aſſignable, and affirmed the judgment. Lev. 155. Hill. 16 & 17 Car. 2. B. R. Bois v. Norcliffe.

2 Jo. 81. Hippeſley v. Tucke, S.C. adjudged by all, præter Wild, that the error is well aſſignable, and

17. In a writ of error upon a *judgment in an inferior court*, it may be aſſigned for *error, that the mayor, who was the judge, had not received the ſacrament, and taken the oaths according to the* 25 *Car.* 2. becauſe his office is made void, and ſo the proceedings coram non judice; adjudged, and judgment reverſed accordingly. 2 Lev. 184. Mich. 27 Car. 2. Hipply v. Tuck.

though it cannot be alleged that he was not judge, yet it may be that he was not mayor, and without ſuch averment the ſtatute would be uſeleſs.——2 Mod. 193. Ipſley v. Turk, S. C. and judgment reverſed.——3 Keb. 721. pl. 6. S. C. and judgment reverſed.——S. C. cited Arg. 2 Ld. Raym. Rep. 885. Paſch. 2 Ann. but denied by Holt Ch. J. to be good law.

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Sid. 94. pl. 20. Mullens v. Weldy S.C. & S.P. agreed per Cur. and that one

18. In a writ of error *upon a judgment in the Palace-Court held coram Jacobo Duce Ormond*, it cannot be *aſſigned for error, that the duke was not there*, becauſe that is contrary to the record; adjudged, *the Court* in fact *being held before his deputy according to the patent.* 1 Lev. 76. Trin. 14 Car. 2. Molins v. Wheatley.

cannot aſſign error contrary to a record out of an inferior court, any more than out of one of the great courts here.——Lev. 311. cites S.C. and ſeveral other caſes to the ſame purpoſe.

2 Jo. 137. Deveney v. Norris, S.C. reſolved e contra.—2 Ld. Raym. Rep. 885. S. C. cited by Holt Ch.

19. It is not *aſſignable* for error *that the perſon who tried the cauſe was not judge, by reaſon of his not having taken the oaths, and ſubſcribed the declaration, according to the ſtatute* 13 *Car.* 2. ſtat. 2. cap. 1. For this is contrary to the record and admittance of the parties. 2 Lev. 242. Hill. 30 & 31 Car. 2. B. R. Denning v. Norris.

J. who ſays he was (and as Jones reports him to be) counſel in the cauſe, and argued that it was error, but ſays the Court held there, that ſince the defendant had admitted the judge to be a judge by pleading to the action, he was eſtopped to ſay afterwards that he was not a judge.

20. Nothing ſhall be aſſigned for error *which the party might have pleaded to the action, and had a proper time ſo to do*; Arg. ſaid it is a rule; but becauſe in the principal caſe the plaintiff had no time to plead the matter; for *by the death of* J. S. *(one of the tertenants) before the return of the* writ of *reſummons all the proceedings* on the ſci. fa. *were diſcontinued, and the parties out of court*, and ſo had no time to plead any thing afterwards, and the death of one tertenant puts the whole without day; and for that Holt Ch. J. cited Keilw. 69. Fitzh. tit. Error, pl. 7. and judgment was given for the plaintiff in error; and the Court ſaid, that the defendant

muſt

muſt bring a new ſci. fa. againſt the tertenants, becauſe the old writ was put without day cauſa qua ſupra. Carth. 200, 201. Mich. 3 W. & M. in B. R. Blake v. Geil.

21. Error in fact coram nobis upon a *judgment in ſcire facias againſt the bail*, the ſcire facias *ſuggeſted that Lampton ſurvived, whereas in fact the other ſurvived;* but per Cur. the writ of error lies not in this caſe, for *the merits of the cauſe or foundation of the ſuit cannot be aſſigned for error in fact, but only miſtakes in fact pendente placito, which might hinder the proceedings*, as where an infant appears by attorney, but this being the very gift of the action, the party can be relieved only by audita querela. Comb. 325. Paſch. 7 W. 3. B. R. Lampton v. Collingwood.

1 Salk. 262. pl. 3. S. C. held accordingly, and quaſhed the writ of error, and ſaid he muſt bring his audita querela.—— Carth. 282. S. C. adjudged accordingly; and per Holt Ch. J. it will not lie, becauſe the fact aſſigned for error is in the ſuggeſtion of the writ itſelf, and not in any of the proceedings in the cauſe.——4 Mod. 314. S. C. the widow and adminiſtratrix of one of the defendants after two nichils returned, and judgment awarded againſt her by default, brought a writ of error coram vobis reſiden', and the error in fact aſſigned was, that ſhe never was ſummoned, but the writ was quaſhed. Afterwards ſhe brought audita querela, ſuggeſting the ſame, and that her huſband died in the life of the other debtor, and ſo his eſtate was thereby diſcharged of the debt; and the Court held, upon the authority of the caſe of BARCOCK v. THOMPSON, that the adminiſtratrix ſhould have an audita querela, becauſe now ſhe has no other remedy.

22. It is not aſſignable for error *that he who returned the writ was not ſheriff.* 2 Ld. Raym. Rep. 884. Paſch. 2 Ann. Andrews v. Linton.

23. *Debt* on a bond; non eſt factum pleaded; *verdict and judgment for the plaintiff* in C. B. *error* on this judgment *was aſſigned, that the defendant died before the day of niſi prius;* and held that it was not aſſignable for error, becauſe *the record mentioned that he appeared that day;* judgment was affirmed November 7, 1729. 2 Ld. Raym. Rep. 1415. in a note of the reporter, cites Mich. 3 Geo. 2. B. R. Plommer v. Webb.

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(U. 2) Stile, &c. of the King.

See tit. Contra Pacem (A).

1. WRIT of error was brought on a judgment, reciting that it was *in curia noſtra, viz. Jac.* 2. whereas all the *proceedings were in the reign of Car.* 2. this was held a fault incurable, and a judgment in B. R. reverſed in the Exchequer-chamber, and thereupon the plaintiff brought another writ of error. Carth. 158. Mich. 2 W. & M. in B. R. Dicken v. Greenvill.

2. *So* in a writ of error of a judgment in C. B. the writ recited the *loquela* to be *curia noſtra*, viz. *Will.* 3. when it was a loquela in the time of *W. & M.* and the Court denied to alter or amend it by the inſtructions to the curſitor. Carth. 520. Paſch. 12 W. 3. B. R. Tonkyn v. Crocker.

See tit. Pledges (B).

(U. 3) Want of entering Pledges, Bail, &c.

1. THE *plaintiff an attorney in C. B. ſued an attachment of privilege* againſt the defendant, *and recovered* againſt him *by non ſum informatus*, and upon a writ of error brought, this being certified, and *in nullo eſt erratum pleaded*, and becauſe he did not find pledges the judgment was reverſed. Cro. J. 329. pl. 7. Mich. 11 Jac. B. R. De la Hay v. Vaughan.

2. After a verdict for the plaintiff in an *action of aſſault* in B. R. the error aſſigned was, that there were *no bail in B. R.* Upon a certiorari awarded, the *Ch. J. certified bail there of John Hayes, but without any addition, and with a blank for the place of his habitation*; and thereupon the judgment was reverſed, becauſe it did not appear that they were bail for the party who was ſued; and ſo he was never in the cuſtody of the marſhal, and if not, then he could not be ſued in B. R. Mo. 694. pl. 961. Bucknell v. Hayes.

3. Error to reverſe a judgment in C. B. in which the plaintiff *alleged diminution for want of an original*, and upon a certiorari to the *cuſtos brevium* he *certified no original, and that there was not any original between the ſaid parties remaining with him, becauſe there were no pledges that was aſſigned for error*; and it was agreed that if no pledges had been found it had been error; but adjudged that *pledges ſhall be intended to be on the original*, (though it could not be found,) becauſe *in C. B. they are always entered on the original, and not on the roll*; and where there is no original, that is a fault which is aided by the ſtatute, though a bad original is not. Sid. 84. pl. 12. Trin. 14 Car. B. R. Wheeler v. Wilkinſon.

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(X) A Thing *for his Advantage.*

[*Not againſt a Record.*]

* Br. Error, pl. 37. cites S. C.

† Br. Aſſiſe, pl. 56.

[1. A Man may aſſign the *want of* the *warrant of attorney of his own attorney*, which is for his advantage. * 7 H. 4. 16. and his own default. † 11 H. 4. 44. 88.]

cites 11 H. 4. 44. that if in præcipe quod reddat he loſes his land where the attorney had no warrant, and the tenant is ouſted, he ſhall have aſſiſe; but Brooke ſays, that the contrary ſeems to be law. ——— Fitzh. Judgment, pl. 71. cites S. C. accordingly. But ibid. Fitzherbert cites Hill. 35 H. 6. that in treſpaſs judgment was given notwithſtanding ſuch allegation; and 13 R. 2. that judgment was given for the plaintiff, notwithſtanding the defendant alleged ſuch matter in detinue.

See (A), pl. 4. S. C. and the notes there.

[2. In ſcire facias againſt the *bail* after judgment againſt the principal, it is no plea for the defendant to *ſay*, that the *principal died before judgment*, for *this is againſt the record*, inaſmuch as a judgment ought not to have been given againſt a dead perſon. Mich. 32, 33 El. B. R. between WALTER plaintiff, AND PERRY AND SPRING defendants, per Curiam, præter Wray, who doubted, quære,

quære, for by intendment the party was not preſent in court at the judgment, and this is error in fact.]

[3. In a writ of error upon a *judgment* given *at the great ſeſſions in Wales*, by the ſtatute of 34 H. 8. the juſtices there may make deputies, who may give judgment, and this judgment was given by J. S. who is *ſuppoſed by the record to be a deputy of the juſtice*, it cannot be * aſſigned for error that the ſaid J. S. *was not deputy to the ſaid juſtice*, for this is againſt the record. Tr. 12 Ja. B. R. between FLOYD AND BEST adjudged in a writ of error.]

Roll. Rep. 51. pl. 21. S. C. & S. P. ruled * Fol. 758. by Coke Ch. J. accordingly.

[4. In a writ of error *to reverſe a judgment* given in B. *in a formedon*, it may [not] be aſſigned for error, that whereas the record is, *that the venire facias to try the iſſue*, which was tried in that cauſe, *was returned by J. S.* ſheriff of the county of D. that the ſaid J. S. was *not then ſheriff of the ſaid county*, for this is againſt the admiſſion of the Court, who know their officers, and have recorded him to be their officer of the Court. Mich. 11 Car. B. R. between SMITH AND SMITH, ſuch matter was aſſigned for error, and this certified by a record under the ſeal of the Exchequer, ſcilicet, that he was ſheriff, upon which the judgment was affirmed; but ſome then ſaid this could not be aſſigned for error againſt the record of the court de B. Intratur M. 10 Car. Rot. 192. Vide 12 H. 4. B. R. Return de bre, 40.]

Cro. C. 410. pl. 5. S. C. but S. P. does not appear.—Ibid. 421. pl. 12. S. C. & S. P. the defendant in error pleaded that J. S. was made ſheriff before the return of the writ, prout patet de recordo,

and upon nul tiel record pleaded, at the day he procured in court the letters patents. The judgment was affirmed.——Original returned by one not ſheriff is not aſſignable for error. 1 Salk. 265. pl. 9. Paſch. 2 Ann. B. R. Andrews v. Linton.

[5. If error be aſſigned, that whereas *by the record the defendant appears by* FRANCIS DENNINGTON *his attorney, where his name is* HENRY DENNINGTON, and the warrant of attorney is certified, by which he is named Francis Dennington, the judgment ſhall be affirmed; for this averment is againſt the record, and therefore it is not to be aſſigned for error. P. 15 Car. B. R. between WEBLYN AND KIRBY adjudged in a writ of error upon a judgment in Banco. Intratur H. 14 Car. Rot. 1195.]

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[6. In a writ of error upon a judgment in Banco, the plaintiff may aſſign for error, that *whereas the record de Banco is, that the defendant there appeared per J. Newton, his attorney, and pleaded non ſum informatus*, upon which judgment was given for the plaintiff, *that J. Newton was not then any attorney, but was forejudged uſque* and during all the term in which he ſo appeared and pleaded; and upon a writ directed de Banco it is *certified accordingly*; and per Curiam, this may be aſſigned for error, becauſe this is not the act of the Court, as an admittatur by guardian is. H. 10 Car. B. R. between BAWTRIE AND HERNE per Curiam, the judgment given in Banco reverſed accordingly. Intratur Tr. 9 Car. Rot. 207. contra Mich. 6 Ja. Rot. 435. and in another action the ſame term. Rot. 506. between LUMLEY AND MARWOOD adjudged quia contra recordum.]

2 Roll. Rep. 53. Haydon v. Miller, S. C. but S. P. does not appear.——Jenk. 332. pl. 66. cites Cro. J. 521. 16 Jac. Heydon v. Mynn. Where D. has appeared as an attorney for A. in an action brought by A. againſt B. it cannot

be aſſigned for error that D. was not an attorney, or that there is no ſuch perſon in rerum natura; for it is againſt the record; and the admittance of him for an attorney by the Court makes him an attorney, if

if he was not an attorney before this admittance. In a writ of error brought in this ſuit, and error aſſigned ut ſupra, the defendant in the writ of error in this caſe pleads in nullo eſt erratum; this does not confeſs that he was not an attorney; but this plea eſt quaſi a demurrer, that this is not an error at all. Judged and affirmed in error.

[7. In a writ of error upon a *judgment in an inferior court*, if the ſtile of the Court be *curia tenta coram J. S. ſeneſchallo curiæ*, &c. a tempore, &c. an error may be *aſſigned that J. S. was not ſteward at the time* of the court held, for this is an error in fact. Hill. 9 Car. B. R. between HATCH AND NICHOLS, per Curiam in a writ of error upon a judgment in the court of the Tower of London, but the judgment was affirmed, becauſe the error was not well aſſigned, for that *it was aſſigned that J. S. had no authority to hold court*, which was more general, and not matter in fact to be tried by the county, but may be a matter in law.]

[8. Upon an iſſue tried, *if* WILLIAM ATKINSON *de R. be returned and ſworn of the principal & alii de circumſtantibus alſo ſworn, among whom* WILLIAM ATKINSON *without addition is returned and ſworn*, and a verdict given for the plaintiff, and judgment in a writ of error, *the defendant cannot aſſign for error that the ſaid* WILLIAM ATKINSON *of the principal, and of the tales was one and the ſame perſon, and ſo there were but* 11 *jurors* that tried the cauſe, for this is againſt the record, inaſmuch as the record is, that alii de circumſtantibus jurati, of which WILLIAM ATKINSON is one, and therefore if the record be true, this cannot be one and the ſame perſon. P. 14 Car. B. R. between STEVENSON AND ESTOFT per Curiam adjudged, this being aſſigned for error, and the firſt judgment affirmed accordingly.]

Fol. 759.

This caſe is not law. 2 Lutw. 1569. Mod. 81. Cox v. St. Aubin, agreed that it is not aſſignable for error.

[9. In an action upon the *caſe upon a promiſe in the borough court* of Bewdly in comitatu Worceſtriæ, if the plaintiff declares there *that the defendant at* Bewdly *within the juriſdiction of the court, in conſideration of* 1 *l.* given to him by the plaintiff, *aſſumed to pay* 5 *l. to the plaintiff, if* at any time after *he ſhould ſell at any fair held within the borough of Walſal within the juriſdiction of the ſaid court, any woollen cloth*, and avers that the defendant after ſold at a fair held at Walſal aforeſaid, within the juriſdiction of the court, a woollen cloth, and therefore he had brought this action, and the defendant pleads that he did not ſell the ſaid woollen cloth at Walſal aforeſaid, modo & forma, upon which iſſue is taken and tried at Bewdly by a venire facias de 12 de burgo de Bewdly, and a verdict and judgment there given for the plaintiff, the *defendant in* a writ *of error may aſſign* it for error, *that Walſal is in comitatu Staffordiæ, and out of the liberty of the ſaid borough* of Bewdly, for this is a *matter in fact*. Mich. 11 Car. B. R. between LEA AND CEELY adjudged in a writ of error, and the firſt judgment reverſed, in which the defendant in the writ of error being warned, made default, which in law was as much as if he had pleaded in nullo eſt erratum, which acknowledges the matter in fact aſſigned to be true. Intratur Tr. 11 Car.]

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[10. If an action upon the *caſe* be brought *againſt A. S. a feme covert, as a feme ſole, and ſhe appears and pleads there as a feme ſole*, and judgment is given againſt her, and thereupon *ſhe and J. S.* her

her huſband bring a writ of error, they may *aſſign* for error *that ſhe was a feme covert at the time of the appearance and pleading*, &c. for otherwiſe the wife might be taken in execution without the conſent or conuſance of the huſband, and ſo he ſhould be bereaved of the ſociety of his wife, for he has no other remedy to defeat it. Mich. 15 Car. B. R. per Curiam, between * EDWARDS AND SIMPSON, in a writ of error upon ſuch judgment in the court of Marſhalſea. Intratur Mich. 15 Car. 18 E. 4. 4. per Curiam, accordingly. Tr. 1651. between † HAYWARD AND WILLIAMS, adjudged in a writ of error, and the judgment reverſed accordingly. Intratur H. 1649. Rot. 824.]

* See (K) pl. 18. S.C. and the notes there.

† See (K) pl. 18. S.C. and the notes there.

11. It was argued if judgment may be *reverſed for the damages and ſtand for the land*; Brooke ſays it ſeems that no. Br. Error, pl. 12. cites 28 H. 6. 10.

12. In *treſpaſs* the defendant pleaded not guilty, and the judgment paſſed, and error brought and aſſigned, becauſe *after the iſſue joined, and before verdict, the defendant's attorney died* at D. and by the opinion of the Court this is not error; for the writ ſhall not abate by the death of the attorney, nor the iſſue by it is not waived nor diſcontinued; for he may appear by another attorney, or in perſon, and the continuance is not entered between the attornies, but between the parties, and a man cannot aſſign error but in proper perſon, and ought to ſue proceſs immediately after delay of the other party; per Trem. Br. Error, pl. 144. cites 5 H. 7. 3.

13. A man cannot aſſign any thing for error which is for his advantage, as to aſſign that he had day, and *that the day was given much longer than the common day*, or that he was *eſſoined* where he ought not, or *had aid granted* to him where he ought not. 2 Saund. 46. cites F. N. B. 22. (F).

14. A man ſhall not reverſe a judgment for error, unleſs he can ſhew that the error is to his prejudice. 5 Rep. 39. b. per Cur. Trin. 34 Eliz. B. R. in Tey's caſe, ad finem, cites 8 H. 5. 2. b. and F. N. B. 11.

15. In the firſt action the *jury gave 4d. coſts, and the Court* gave *de incremento* 23s. *In the judgment the 4d. was omitted*, and this was aſſigned for error. The Court held that for that cauſe the judgment ſhould be reverſed, although it is for the party's advantage. 4 Le. 61. pl. 154. Hill. 31 Eliz. B. R. Buſhy v. Milfield.

16. Error is brought by the defendant upon a judgment in a court of piepowders; the error aſſigned is, *that the defendant was not amerced*; this was allowed for error; for *although it be for the advantage of the defendant, yet it concerns the king* and his profit. Jenk. 211. pl. 48.

17. The plaintiff in error ought to aſſign nothing for error but that which makes to his diſadvantage; and therefore he cannot aſſign for error that a *day over was given beyond the time expreſſed* in the writ. 2 Sid. 94, 95. Trin. 1658. Per Glyn Ch. J. in the caſe of Row v. Evelyn. [535]

18. *A. tenant in tail, remainder to B. in tail, remainder to C. in tail; A. and B. levy a fine*, which proves erroneous. *C. may bring error*,

error, for the levying the fine was for his diſadvantage; per Cur. 2 Sid. 92. 95. Trin. 1658. Row v. Evelyn.

Ld. Raym. Rep. 594. S. P. by Holt Ch. J. and cites it as a caſe in Hill. 12 W. 3. Roſier v. Sawkins.—

19. Where the Court awards a *reſpondeas ouſter when the judgment ought to be final*, it can do no harm, becauſe the defendant cannot aſſign it for error no more than he can the awarding an *eſſoign* where it ought not to have been, being for his advantage; per Holt Ch. J. 12 Mod. 525. Trin. 13 W. 3. in caſe of Slanney v. Slanney.

S. P. admitted by Holt Ch. J. 2 Ld. Raym. Rep. 1018. Hill. 2 Ann.

(Y) *Who may aſſign* the Error.

Where *he that hath Benefit* by the Error.

A man ſhall not reverſe judgment by error unleſs he can ſhew that the error is to his diſadvantage. 5 Rep. 39. b.

[1. WHERE the *error* is *by the default of the Court*, though this be for the advantage of one party, yet the party that hath the benefit by it may aſſign it for error, for the courſe of the Court ought to be obſerved. Mich. 15 Ja. B. R. between HOLMES AND TWISTE agreed per Curiam. Co. 8. BEECHER, 59. reſolved.]

[2. *As if in* an action of *debt it be found, that* the *defendant owes the plaintiff* 5 l. *and the jury aſſeſs damages to* 2d. *and coſts* 2d. *and* after *judgment is* given, *that the plaintiff ſhall recover debitum & damna præd' to* 2d. *and no judgment* is given *for the coſts*, though this is for the advantage of the defendant, yet he may aſſign it for error, becauſe this is the *error of the Court* to alter the manner of judgments. Mich. 15 Ja. B. R. between HOLMES AND TWISTE; adjudged, and the judgment reverſed accordingly.]

Cro. J. 211. pl. 3. Beecher v. Shirley S. C. & S. P. held accordingly.— Jenk. 283. pl. 12. S. C. & S. P. for it concerns the king's profit, and the public is concerned where the king is concerned. ——— S. C. cited 2 Saund. 47. at the end of pl. 4. ——— But ſee ſtat. 16 & 17 Car. 2. cap. 8. ſ. 1. at tit. Amendment (P), that no judgment ſhall be reverſed for want of a miſericordia.

[3. *So* the *plaintiff* in a ſuit *retracts*, by which judgment is given againſt him, *but he is not amerced* as he ought, though this is for his own advantage, yet for that the amercement ought to be parcel of the judgment, and ſo the judgment is not perfect without it, he may aſſign it for error. Co. 8. BEECHER, 59. reſolved.]

[4. *So in every caſe* where a judgment is given againſt a man in which he ought to be amerced, if he be not amerced he may aſſign it * for error though it be for his own advantage. Co. 8. BEECHER, 59. reſolved.]

* Fol. 76c.

[536] [5. *So* if a man be *amerced* by judgment *where he ought to be fined*, though this be for his advantage, yet he may aſſign it for error, for that the form of the judgment which is the act of the Court, is altered by it. Co. 8. BEECHER, 59. adjudged.]

[6. [*But*]

[6. [*But*] *in* a writ *of annuity* if the iſſue be *found for the plaintiff, and no damages found for him, and judgment* is given *according to the verdict*, the defendant cannot aſſign it for error that no damages were taxed againſt him, becauſe this is for his advantage, and here the *defect* is not in the judgment, as it is where there is a capiatur for a miſericordia, but *in the verdict*. Mich. 12 Ja. B. R. between BENT AND MARSH per Curiam.]

11 Rep. 56. a. Bentham's caſe, alias Marſh v. Bentham, S. C. and judgment was affirmed, becauſe the plaintiff had releaſed his damages and coſts, which is for the defendant's benefit. ——— Roll. Rep. 283. pl. 40. S. C. & S. P. and judgment affirmed; for the defect here is in the verdict, and not in the judgment, and the releaſe has made it all clear. ——— 2 Bulſt. 279, 280. S. C. held accordingly, and judgment affirmed. ——— Jenk. 286. pl. 20. S. C. the plaintiff ſhall have judgment for the reaſon abovementioned, and likewiſe the releaſe ſhall be underſtood to be before the verdict; adjudged and affirmed in error. ——— See (R. b) pl. 1. S. C. and pl. 7. S. C.

[7. A man cannot aſſign error *in proceſs or delay* which is for his own advantage. Co. 8. BEECHER, 59. reſolved. Fitzh. Nat. Brev. 21. F.]

[8. *Upon an iſſue between a peer* of the realm *and another*, if the *venire facias* be quod ſummoneat 12 liberos & legales homines, and *does not ſay tam milites quam alios*, as the Regiſter is, though *the peer* of the realm *may aſſign it for error, yet the other cannot*, becauſe it does not concern him. P. 40 El. B. R. between the Earl of WORCESTER and TRADE.]

9. Error of judgment *in treſpaſs of aſſault and battery*, becauſe the *judgment was quod ſit in miſericordia*, whereas it ſhould be quod capiatur. Tanfield moved, that this is for the plaintiff's benefit, and is the default of the clerk, and ſo ſhall not be aſſigned for error; but the judgment for that cauſe was reverſed. Cro. E. 84. pl. 2. Hill. 30 Eliz. B. R. Crow's caſe.

Cro. E. 107. pl. 2. Mich. 30 & 31 Eliz. B. R. Belicote v. Tallboys. The judgment was capiatur where it ought to have been miſericordia, and the judgment was reverſed.

10. The *conuſor ſhall not aſſign error in the grant and render by which he himſelf takes the eſtate*, any more than the conuſee ſhall do in the conuſance, for that would be to defeat the eſtate given him by the fine; *nor* ſhall the *recoveror* bring writ of error *to defeat the record in which himſelf recovered* the judgment in error, being to be reſtored to all that he loſt by the fine or judgment, and not to avoid and loſe what he gained by them. 3 Rep. 32. b. Trin. 34 Eliz. B. R. the third reſolution in Tey's caſe.

If an infant levies a fine, and takes back an eſtate for life or in tail by render, he ſhall not after avoid the fine by error, but is without remedy. Mo. 74. pl. 202. Trin. 6 Eliz. in the Star-chamber by Catlyn.

11. If a *plaintiff is not amerced where he ought to be*, it is error, yet he may aſſign it for error though it be to his advantage, for it *concerns the king's profit*, and the public is concerned where the king is concerned. Jenk. 283. pl. 6.

12. In error to reverſe a *judgment in ejectment*, the error aſſigned was, becauſe the *judgment is not quod capiatur*, as it ought to be, it being vi & armis; and it was reverſed. Poph. 203. Mich. 2 Car. B. R. Rocheſter v. Rickhouſe.

13. In

Vent. 60. S. C. ſtates it that the error aſſigned was, that the Court had awarded a petit cape where they ſhould have given judgment upon the nient dedire; but the Court held that this was only the awarding of proceſs more than ſhould be, and in advantage of the tenant, and therefore reſolved they could not reverſe it for error. And Twiſden ſaid, that admitting it were erroneous they might then give judgment in this Court.

13. In a writ of error brought *by the tenant* of a judgment in the grand ſeſſions in Wales, it cannot be *aſſigned* for error, *that the Court awarded a grand cape, where they ought to have given judgment for the demandant to recover*, becauſe the award of the grand cape was only in delay of the demandant, and not to the prejudice of the tenant, and therefore not by him to be alleged for error, becauſe it is not ad grave damnum querentis, as the writ of error ſuppoſes; adjudged. 2 Saund 45, 46. Paſch. 20 Car. 2. Williams v. Gwyn.

14. The *giving oyer where it ought not* to be allowed, is no error, nor aſſignable by the defendant, being in his advantage; *but the denial of it where it ought to be allowed, is error*; quod Powell conceſſit. 2 Ld. Raym. Rep. 970. Trin. 2 Ann. in caſe of Longueville v. Thiſtleworth Inhabitants.

(Z) Where the Error came *by the Default of him that aſſigns it.*

See (X), pl. 1 S. C. and the notes there.

[1. A Man may aſſign the *want of a warrant of attorney of his own attorney*, though it be his own default. 11 H. 4. 44. 48.]

(A. a) *In what Thing* it may be aſſigned.

Fitzh. Error, pl. 63. cites 11 H. 4. 4.

[1. IT cannot be aſſigned *in a record* which is *not in the court where the* writ of *error is brought*. 11 H. 4. 47.]

[which is the commencement of the caſe, and continued at fol. 47. b. pl. 22.] ——— Br. Error, pl. 46. cites S. C. but S. P. does not appear. ——— See (H) ſupra Worſely v. Charnock.

Fitzh. Error, pl. 63. cites S. C. ——— Br. Error, pl. 46. cites S. C. & S. P.

[2. If a man *recovers an annuity and hath judgment in a ſcire facias thereupon*, if a writ of *error* be *brought upon the judgment in the ſcire facias only*, he *cannot aſſign error in the firſt judgment*, for that was not come before them. 11 H. 4. 4. 47. adjudged.]

[3. In a writ of error upon a judgment in Banco, if the plaintiff *aſſigns* for error that *whereas a venire facias was returned by J. S. as ſheriff of* the city of Exeter, *he was not ſheriff of* the city, this error is not well aſſigned, becauſe the venire facias is not certified upon which the error is aſſigned, for this is upon record in Banco, and this court cannot take notice of this matter of record by averment without certificate thereof; for he *ought to have had this certified, and after certificate* thereof, *then to aver that whereas it is mentioned by the record to be returned by J. S.*

J. S. *ſheriff, that he was not then ſheriff.* Paſch. 1649. between BARCROFT AND RICHARDS adjudged, not being well aſſigned, and the * judgment affirmed accordingly. Intratur T. 23 Car. Rot. 1311. B. R.]

[4. Error may be aſſigned *in every part of the record.* 18 E. 4. 9.]

5. The plaintiff aſſigned for error, *that where he* in the Exchequer *pleaded ſufficient plea in bar* before the barons, *upon which the other party, then plaintiff, demurred, and the barons awarded that he ſhould recover where they ought to have awarded that he ſhould be barred;* and per Cur. the now plaintiff ſhall not be compelled to ſhew cauſe why the plea is not good; for by his pretence the plea is good, and *he ſhall not be compelled to ſhew diſability of his own plea;* for he is to affirm the plea. Br. Error, pl. 108. cites 39 H. 6. 52.

6. *But* he who is to prove the plea ill, as where a man aſſigns for error *that the Court awarded a plea good,* and barred the plaintiff, *where the plea was ill* and inſufficient, there *he ſhall ſhew cauſe of* the inſufficiency; quod fuit conceſſum. Ibid.

(B. a) *In what Thing* it may be aſſigned *upon the Writ.*

[1. IF a *feme recovers land in* a writ of *error,* and after the *ſheriff returns damages from the writ purchaſed to the delivery of ſeiſin,* when it *ought to be* from the writ purchaſed *uſque diem judicii,* and after the *tenant brings* a writ of *error in redditione judicii,* he may upon this writ *aſſign error in the judgment given for the damages, upon the return of the ſheriff;* for the laſt judgment is not an execution but an inqueſt (*) of office by the ſtatute of Merton, and it is uſed always to bring but one writ in ſuch caſe, and there is not any writ quia judicia reddita ſunt, but judicium. Trin. 11 Ja. B. R. between PORTER AND AGER adjudged.]

Cro. J. 324. pl. 4. S. C. but S. P. does not appeor.—— 2 Bulſt. 119, 120. S. C.

* Fol. 761.

but S. P. does not appear.—— See (E. b) pl. 5. Tie v. Atkins.——And ſee (M. c) pl. 9. S. C.

2. Error on a judgment in a ſci. fa. upon a recognizance, the *writ bore teſte die Solis,* which is not dies juridicus; and it was reverſed. Dyer, 168. a. pl. 17. Trin. 1 Eliz. Barett v. Cleydon.

(C. a) *In what Thing* it may be aſſigned *upon the Writ.*

[1. IN a writ of *error upon an outlawry after a judgment in a rediſſeiſin,* an *error may be aſſigned in the record of the rediſſeiſin* (ſcilicet, the *caption out of the land*), and this is ſufficient to reverſe the outlawry, though the judgment of the rediſſeiſin continues, for

for the outlawry cannot be good upon an erroneous judgment. 11 H. 4. * b. 94. adjudged Co. 8. Altham † 158. b.]

* Fitzh. Error, pl. 64. cites 11 H. 4. 6. and the error was brought upon the judgment of rediſſeiſin, as well as upon the judgment of outlawry. ——— Fitzh. Error, pl. 64. cites 11 H. ‖ 4. 6. [and ſo it ſhould be in Roll, and this caſe is continued in the Year-book at fol. 94.] and is as well upon the rediſſeiſin as upon the outlawry. ——— Br. Error, pl. 45. cites 9 H. 4. 5. that upon judgment given by the ſheriff in writ of rediſſeiſin writ of error lies, and ſays ſee judgment in this and the firſt judgment reverſed, and cites tit. Rediſſeiſin, pl. 1. [where the caſe is taken more at large.]

† This is miſprinted, and ſhould be 152. b. where the caſe in the Year-book is cited and taken ſomewhat fully.

‖ [539]

2. C. and A. recovered in a writ of account againſt R. Hill. 29 Eliz. R. aſſigned for error *that the ſaid writ of account was brought againſt him as receiver of monies for to render account quando ad hoc requiſitus fuerit*, whereas it ought to have been more ſpecial; but the Court held the writ good, and ſaid that it was ſo held in one GOMERSAL'S CASE, viz. quod reddat ei rationabilem computum ſuum de tempore quo fuit receptor denariorum ipſius A. 2 Le. 118. pl. 160. Hill. 30 Eliz. B. R. Collet v. Robſton.

3 Le. 230. pl. 311. Trin. 31 Eliz. B. R. the S. C. in totidem verbis. — Cro. E. 82. pl. 1. Robſert v. Andrews and Cockett, S. C. and judgment was affirmed.

(D. a) *How* it may be *aſſigned.*

[1. IF two *bring ſeveral writs of error and ſeveral ſcire facias's to reverſe a judgment in an aſſiſe* againſt them, they may aſſign errors jointly. 11 H. 4. 92. b. adjudged.]

Br. Error, pl. 50. cites S. C.

[2. In a writ of error it is *no good aſſignment* of error *quod in omnibus erratum eſt*; for the Court is not bound to inquire of the errors, if the party does not ſhew them to him. 6 E. 4. 6.]

Br. Attaint, pl. 86. cites S. C. — Br. Error, pl. 163. cites S. C. & S. P. by Sulliard.

[3. In a *dum fuit infra ætatem againſt three*, as daughters and heirs of J. S. if the plaintiff recovers by default, and the defendants bring error and aſſign their nonage for error, without alleging that their anceſtor died ſeiſed, &c. [Quære if good or not?] Dyer. 2 Mar. 104. 10. adjudged.]

4. Divers parties *upon divers writs of error* may aſſign the errors in common or ſeverally. Br. Error, pl. 50. cites 11 H. 4. 52. 65. 92. per Hulſ. and Gaſc.

5. The form to aſſign errors is to put a bill into the court, and to ſay that *in hoc erratum eſt*, &c. and to *ſhew in certain what things*, *et in hoc erratum eſt*, *&c.* and *ſhew in certain another thing*, et *ſic de ſingulis* in which he will aſſign the errors; but to ſay in omnibus erratum eſt, is not good becauſe of the uncertainty. F. N. B. 20. (G) the ſecond part.

Cro. E. 891. pl. 8. Andrew v. Ld.

6. If a writ of error *upon a judgment in an aſſiſe be brought by four*, and *only one appears*, and the others make default, *he cannot aſſign*

aſſign errors alone till the others are ſummoned and ſevered; adjudged. Yelv. 3, 4. Paſch. 44 Eliz. Cromwell v. Andrews. Cromwell, S.C. & S.P. reſolved accordingly.

7. If *two are outlawed in an appeal of murder*, and they bring a writ of error to reverſe it, and *one appears*, but the other does not, *he ſhall not aſſign errors till the other appears*, becauſe he has joined with him * in the writ of error; adjudged. 1 Sid. 316. Hill. 18 and 19 Car. 2. The King v. Tothill & al'. 2 Keb. 141. pl. 11. S. C. and in a nota there ſays, that both were brought to the bar to aſſign the error jointly, and one alone cannot do it without ſummons and ſeverance.

* [540]

(E. a) A Man *cannot aſſign Error in Fact, and* alſo Error *in Law.*

[And how to take Advantage of ſuch Aſſignment.] pl. 2.

[And what ſhall be ſaid Error in Fact, and what Error in Law.] pl. 3, 4.

[1. A Man cannot aſſign for error *that judgment was given for the plaintiff, where it ſhould have been given for the defendant, and alſo an error in fact.* Trin. 10 Car. Camera Scaccarii between DAVIS AND SELBY adjudged in a writ of error upon a judgment in B. R. where the error in *fact was, that the plaintiff* who brought the action as *adminiſtratrix to her huſband, was a feme covert, and* that *her huſband* was *then in full life.*]

[2. *But* if a man aſſigns for error *that* the *judgment was given for the plaintiff, where it ought to have been for the defendant, and* alſo *that he being defendant appeared there by attorney, being then within age*, and the *defendant in* the writ of *error pleads in nullo eſt erratum*, he ſhall *not have advantage for the doubleneſs, if he does not ſhew it ſpecially in his plea*, but the judgment ſhall be reverſed, inaſmuch as he acknowledges himſelf to be within age, which is a matter of fact. Mich. 11 Car. B. R. between MAYHEW AND BASNET adjudged, and a judgment given in an inferior court reverſed accordingly.] One cannot aſſign an error in fact, and another error in law; for this is double, and may be demurred to; per Roll J. Sty. 69. Mich. 23 Car. B. R.

——Where there is error in fact and error in law, it muſt be demurred to for the doubleneſs, otherwiſe no advantage ſhall be taken of it on a general demurrer. Agreed per Cur. Lev. 76. Mich. 14 Car. 2. B. R. Molins v. Wetby.——Sid. 94. pl. 20. Mullens v. Weldy, S. C. but S. P. does not appear.

[3. In a writ of error upon a judgment in an *inferior court* if the ſtile of the Court be *curia tenta coram J. S. ſeneſchallo curiæ*, &c. *a tempore*, &c. an error may be *aſſigned that J. S. was not ſteward at the time of the court held.* Hill. 9 Car. B. R. between HATCH AND NICHOLS; per Curiam, in a writ of error upon a judgment in the court of the Tower of London, for this is error in fact.]

[4. *But* in the ſaid caſe *if* the error be *aſſigned that J. S. had not any authority to hold court*, this is not well aſſigned, for this is uncer-

tain, and * matter in law peradventure, and more general, and not matter of fact to be tried by the country. Hill. 9 Car. B. R. between HATCH AND NICHOLS adjudged per Curiam, and the judgment given in the court of the Tower of London affirmed accordingly. Intratur, Trin. 9 Car. Rot. 426.]

* Fol. 762.

† [541] ‡ Hob. 264. pl. 343. Lancaſtell v. Sidley, S.C. accordingly. ¶ Hob. 264, 265. pl. 344. S. C. Error of a judgment in debt in B. R. was aſſigned, becauſe the bill was aſſigned the 11 Feb. and the bail was filed 12 Feb. ſo as the bill was before any bail, and it did not appear that the defendant was in cuſtodia mareſchalli, but becauſe the very day of filing the bill is not material, for whenever it is filed it has relation to the firſt day of the term, this error was diſallowed. Cro. J. 684. pl. 13. Mich. 13 Jac. in Cam. Scacc. Platt v. Plummer. ——— Hob. 70. pl. 82. S. C. accordingly. ——— Jenk. 295. pl. 44. S. C. affirmed in error; for bail relates to the firſt day of the term.

[5. In writ of error *upon a judgment in B. R.* he *cannot aſſign* for error *that there is not any bail filed for the defendant*, for this is not material *if he was in cuſtodia mareſchalli*, &c. for if he was in cuſtodia, the proceedings might be againſt him without any bail, but *if he was not in cuſtodia, he ought to aſſign* the error, *that he was not bailed nor in cuſtodia*. Hobart's Reports, caſe 341. † ‡ LANCASTEL'S CASE, and 342. between ¶ WILLIS AND WOODHOUSE adjudged, but quære, whether he may aſſign it contrary to the record, that he was not in cuſtodia mareſchalli when the declaration ſuppoſes it, and the other ſo anſwers.]

Error aſſigned was, that there was not any bail upon the file, and this was certified accordingly, and that he was not in cuſtodia mareſchalli; and it was held by all the juſtices and barons, that it could not be aſſigned for error, for it is contrary to the record; for the declaration is againſt him as in cuſtodia mareſchalli, and he appears and pleads to the iſſue as a priſoner who was in cuſtodia mareſchalli, therefore he ſhall not be now received to ſay the contrary; wherefore the judgment was affirmed. Cro. J. 568. pl. 7. Paſch. 18 Jac. B. R. Webley v. Gilman.

9. A man may aſſign *as many errors in law as he will*, but he can aſſign *only one error en fait*, becauſe this error en fait is to be tried by the country, and the errors in the record ſhall be tried by the juſtices. F. N. B. 20. (E).

Error was aſſigned that the defendant was an infant at the time of the judgment given againſt him, et hoc paratus eſt verificare prout Curia vult, to which the other pleads, in nullo eſt erratum; this is a good plea; for it lies not in the breaſt of the Court to know whether he be within age or not; but if he had concluded, et hoc paratus eſt verificare only, without more, this had been good and traverſable, and to be tried by the country; and judgment affirmed. Buſt. 37. Trin. 8 Jac. Barker's caſe.

7. In replevin there are *two avowants, one of them was an infant, and appeared by attorney* when he ſhould appear by guardian, and this was aſſigned for error; but in the *aſſignment* of it he *concluded et hoc paratus eſt verificare*, &c. and the defendant pleaded in nullo eſt erratum; per Cur. he *ought to have concluded to the country*, becauſe the error which he aſſigned is an *error in fact*, and the jurors only ſhall be triers of it, and not the judges, therefore it is as if there had been no error aſſigned at all; for the defendant by pleading in nullo eſt erratum has not confeſſed it to be error, but only put himſelf on the judgment of the Court, who cannot be triers of it; and judgment affirmed. Yelv. 58. Hill. 2 Jac. B. R. King v. Goſpor.

Lev. 105. Slaughter v. Tucker, S. P. and ſeems to be S. C. and the plaintiff waived the ſaid error, and aſſigned new error.

8. If one aſſigns error in fact, and alſo error in law, it is double, and the other party *may well demur upon it*; but it ſeems that the *aſſignment of error in fact is no waver of the aſſignment of error in law*; ſic dictum fuit. Sid. 147. pl. 7. in a nota, Trin. 15 Car. 2. B. R. Anon.

9. Error

9. Error upon a judgment given in C. B. *in caſe upon ſeveral promiſes*, in which upon non aſſumpſit pleaded, *as to two of the counts, verdict and judgment were given for the plaintiff, and as to the reſt for the defendant*; and the *error aſſigned was, that the defendant was an infant at the time* of the promiſe made, *and alſo appeared by attorney*; to which aſſignment the defendant in error demurred ſpecially, becauſe it contained matter of fact and of law alſo; and therefore the judgment was affirmed. 2 Ld. Raym. 883. Paſch. 2 Ann. Burdett v. Wheatley.

10. Error in fact was aſſigned, viz. *that the plaintiff was a feme covert at the time of the action brought*, ſed non allocatur; becauſe it might have been pleaded in abatement, and it is a *general rule not to ſuffer that to be aſſigned for error in fact, which might have been* taken advantage of, by being *pleaded in abatement*. 10 Mod. 166. Trin. 12 Ann. B. R. Groſvenor v. Stephens.

(F. a) *At what Time* it may be *aſſigned*. [542]

[Or what may be aſſigned for Error after a Scire Facias.]

[1. *AFTER a ſcire facias* awarded againſt the defendant, he *cannot aſſign* any error which is *matter of fact*. * 22 E. 4. 45. Fitzh. Nat. Brev. 20. E. 8 H. 4. 23.]

* Br. Error, pl. 188. cites S. C. —— Jenk. 140. pl. 86. cites S. C. ——After errors aſſigned, and a ſcire facias againſt the defendant upon that aſſignment, he ſhall not aſſign an error in fact, as to ſay that the plaintiff was dead at the time of the judgment, or before the judgment, &c. F. N. B. 20. (E)

After award of execution on a ſcire feci defendant cannot have advantage of matter pleadable to that; otherwiſe after two nihils. 1 Salk. 264. Witket v. Creamer.

[2. *As in avoidance of an outlawry*, to ſay *that he was in France*, or other place *under ſuch captain in war*, for this is matter of fact, for it ſhall be tried by certificate of the captain. 22 E. 4. 46.]

Br. Error pl. 188. cites S. C.

[3. *Or* in avoidance *of a judgment* given *for the plaintiff in* a writ of *dower, to ſay*, that *there is not any warrant of attorney for the tenants certified*, for this is matter of fact. 22 E. 4. 45. adjudged. But quære this, for it ſeems this is not matter of fact, but to be tried by the record.]

Br. Error, pl. 188. cites S. C. —— Jenk. 140. pl. 86. cites S. C. and it is repugnant to ſay that no warrant of attorney was entered, and to pray a certificate to be made of it; and the ſcire facias admits the record to be full.

[4. *But after a ſcire facias* awarded, the plaintiff *may aſſign errors* in the record. † 22 E. 4. 45. 34 Aſſ. ‡ 6.]

† Br. Error, pl. 188. cites S. C. ——Jenk. 140. pl. 86. cites S. C. for the record is in court, but the warrant of attorney is not ſo.

‡ Quære if this ſhould not be pl. 7.

[5. *As* to ſay *there is not any original*. 22 E. 4. 45.]

Br. Error, pl. 188. cites S. C.

[6. *Or* to ſay *in avoidance of an outlawry*, that *he was but quarto exactus*, for this is to be tried by the record of the exigent, when it is certified. 22 E. 4. 46.]

7. The plaintiff *may aſſign other errors in another term apparent in the record, but the defendant cannot then allege diminution;* quod nota. Br. Error, pl. 12. cites 28 H. 6. 10.

2 Le. 2. pl. 3. Werdman v. Yate, S. C. adjornatur.

8. Error; *after errors examined* the *plaintiff diſcontinued his writ, and obtained a new writ out of the Chancery, to remove the reſidue of the record*, which being ſent in B. R. he *brings a new writ* of error *coram vobis reſidet*, and would aſſign errors upon the new part of the record. It was ſaid, it was not warranted by any courſe; for this is to allege diminution after in nullo eſt erratum pleaded. It was the opinion of the juſtices, that inaſmuch as the firſt writ is diſcontinued, and this is a new writ ſued, the *plaintiff is not tied to the former errors, but may aſſign other errors at his pleaſure*, for it is now as if no error were aſſigned before, and he may aſſign other errors *in the record*, *or* other errors *out of the record*. Cro. E. 155. pl. 38. and 281. pl. 2. Trin. 34 Eliz. B. R. Yates v. Windham.

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Jenk. 25. pl. 48. S.P. the parties have no day in court till the plaintiff in error ſues a ſci. fac. ad audiendum errores, or the defendant in error ſues a ſci. fac. quare executionem habere non debet.

9. A writ of error may *ſleep ſeven years or more;* for it is only a commiſſion, and the parties have no day in court by it; *but* the defendant in a writ of error may *by motion force the plaintiff in error to aſſign errors the ſame term*, and bring a ſci. fac. returnable the ſame term, or the next term. Jenk. 140. pl. 86.

10. The Court was moved that there was a ſcire facias iſſued out to certify errors, and *time was deſired to aſſign them;* but the Court anſwered, that the bringing of the writ of error is delay enough, and therefore if you have *not aſſigned* the errors *according to the rules of the Court, they ſhall not be now accepted.* Sty. 208. Hill. 1649. Hudſon's caſe.

(G. a) At what *Time* it *ought to be* aſſigned.

Fitzh. Error, pl. 11. cites S. C. Sty. 281. S. C. adjornatur.—— Ibid. 288. S. C. ruled to ſhew cauſe why judgment ſhould not be affirmed, and like liberty to bring an audita querela.—

[1. THE plaintiff in error *ought to aſſign ſome error before he ſhall have* any *ſcire facias ad audiend' errores.* 24 E. 3. 31.]

[2. If *A. recovers againſt B. in Banco*, and *C. is bail for B.* and after a *ſcire facias is awarded againſt C.* the bail, and *after two nihils returned, a judgment is given againſt C.* and after he brings a writ of error in Banco Regis upon this judgment, *he cannot aſſign* for error *that there was not any capias returned againſt B.* the principal *before the ſcire facias* ſued, *for* that *if he had appeared* and had not pleaded it, or had been returned ſummoned, and had not appeared and pleaded this matter, he ſhould not aſſign it for error, becauſe *he might have pleaded it to the ſcire facias*, and here the return of the two nihils amounts to a ſummons and is all one with it, and this is a matter of record and not a matter of fact, and there would be no

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end if he ſhould be admitted to aſſign it after ſuch judgment, in which if he had appeared he might have been aided. Trin. 1651. between BARCOCK AND TOMPSON adjudged, and the firſt judgment affirmed. Intratur. M. 1650. Rot. 444.] Ibid. 323, 324. Paſch. 1652. S. C. adjudged for the plaintiff.

Scire facias was brought againſt the adminiſtratrix of one of the two perſons againſt whom judgment was given, and after two nihils returned judgment was awarded againſt her by default; afterwards ſhe brought a writ of error coram vobis reſiden', and the error in fact aſſigned was, that ſhe was never ſummoned. The queſtion was, whether this writ of error would lie or not? becauſe the two nihils returned amount to a ſcire feci; and ſo there being a judgment by default after two nihils, it is too late now to bring a writ of error. And upon the authority of the caſe of BARCOCK v. TOMPSON reported by Style, and mentioned by Ld. Roll, and agreed by him, the writ of error was quaſhed. 4 Mod. 314. Mich. 6 W. & M. in B. R. Lampton v. Collingwood.

3. Error *of a judgment in dower;* he aſſigned error that the *tenant in writ of dower appeared by attorney who had no warrant* here, and *prayed writ to certify* if any warrant be or not, and was ouſted of it; for when the record is removed, if the plaintiff will aſſign any error in fact, he ought to aſſign it before that ſcire facias iſſues againſt the defendant; for *after this ſcire facias iſſues he ſhall not aſſign any error in fact*, and therefore he was denied the certificate by award. Br. Error, pl. 188. cites 22 E. 4. 45.

4. *And* where a man *aſſigns that he was ultra mare at the time of the outlawry*, &c. he ſhall do it before ſcire facias awarded againſt the defendant. Ibid. [544]

5. *And* per Huſſey, a man ſhall not aſſign *diminution* after ſuch ſcire facias. Ibid.

6. *So* where *original* is wanting, or *capias or exigent is wanting;* for *by the ſuing of the ſcire facias he affirms that the record is full;* per Huſſey, quod non contradicitur. Ibid.

7. A man outlawed of felony, and brought to the bar to ſay why he ſhould not be put to death, pleaded that he was *impriſoned* in the caſtle of Oxon, at the time of the outlawry, and *did not ſay under whoſe cuſtody, nor in what county Oxon is, nor took averment, et hoc*, &c. and by the juſtices, he ſhall not aſſign error before the writ of error by him purchaſed, and againſt the king does not lie a writ of ſcire facias upon errors aſſigned, becauſe the king is always in court a third perſon preſent, therefore the *priſoner muſt plead every thing certain at firſt.* Br. Error, pl. 135. cites 1 H. 7. 13.

8. When the record is removed, errors muſt be aſſigned *before ſci. fa. ad audiend' errores is* ſued out. F. N. B. 20. (E).

9. And the error *ought to be aſſigned the ſame term*, and a ſci. fa. ad audiend' error' ſued out returnable either that term, or the term enſuing, elſe all the matter is diſcontinued. F. N. B. 20. (G).

10. When the *record comes into court*, the plaintiff ſhall aſſign his errors and have a ſci. fa. before the record *ſhall be entered*, for that ſhall not be entered *until the parties have a day by ſci. fa.* F. N. B. 22. (F).

11. *In civil caſes* the errors neither are nor can be aſſigned *before the writ of error is allowed, and the record removed;* but *in caſes of outlawry of felony or attainder of felony* the error ought to be firſt

aſſigned and allowed before a writ of error ſhall be granted. Jenk. 165, 166. in pl. 19.

12. The plaintiff brought a writ of error upon a judgment obtained againſt him; and afterwards the *record was removed* into B. R. he for ſome time *neglected to ſue out a ſcire facias ad audiend' errores;* whereupon the *plaintiff in the original action ſued out a ſcire facias quare executionem habere non*, &c. and upon 2 nihils returned had judgment, and execution executed. Carth. 40. Trin. 1 W. & M. in B. R. Moſeley v. Cocks.

13. 10 & 11 *W.* 3. *cap.* 14. *No fine, recovery, or judgment ſhall be reverſed for error, unleſs writ of error is brought within twenty years after ſuch fine levied, &c.*

14. In ejectment judgment is not complete till damages are found, and yet a writ of error lies of the judgment *before any damages are found;* becauſe by the judgment that is given the poſſeſſion is touched immediately; and where a judgment is final for any part, writ of error will lie. 7 Mod. 100. Mich. 1 Ann. B. R. ſeems admitted in the caſe of the Queen v. Darby.

15. If the *plaintiff in error lies ſtill after a writ of error brought*, this is no diſcontinuance of the writ, but that the *defendant in error* has no other way but to *bring a ſcire facias againſt him, to ſhew cauſe quare executionem non haberet*, and it will be no plea for the plaintiff in error to plead that there is a writ of error depending, but he *muſt aſſign his errors forthwith* after ſuch ſcire facias brought; and in this caſe there is a difference, (viz.) if the ſcire facias is entered on the ſame roll with the writ of error, then he may aſſign errors without a ſcire facias ad audiendum errores, otherwiſe not; per Holt Ch. J. 3 Salk. 144. pl. 1. Lynch v. Coot.

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16. In a writ of error quod coram vobis reſidet, the Court on motion made a rule that plaintiff ſhould aſſign his errors *within four days*. Barnard. Rep. in B. R. 328. Paſch. 3 Geo. 2. Cowworth v. Throuſtout.

In a like caſe the Court gave a week only. Barnard. Rep. in B. R. Paſch. 4 Geo. 3. Goodright v. Jennings.

(G. a. 2) Bar of Execution.

Where the bringing a Writ of Error will bar the Execution of the former Judgment.

1. WHERE a writ of error is brought *upon a judgment in annuity in C. B.* that court cannot proceed upon a ſci. fac. to execute this judgment. Jenk. 74. pl. 40. cites 10 H. 6. 6. 17 E. 3. Fitzh. quare incumbravit, and Dr. Drury's caſe, 8 Rep. 42.

2. *But* where a judgment is given *in debt*, and the record is removed by error, yet *before reverſal an original writ of debt lies upon this record.* Jenk. 74. pl. 40. cites 4 H. 6. 31. and Dyer, 32.

3. *In treſpaſs after judgment by default a writ is awarded to inquire of damages*, and before the return thereof a writ of error is brought,

brought, yet this writ to inquire of damages ſhall be executed, though iſſued after the writ of error was brought; for in this caſe the writ of error does not lie *before the return of the writ of inquiry*, becauſe till then *no perfect judgment is given by which the defendant may be damaged;* but it is *otherwiſe in ejectione firmæ, or writ of dower*, and a writ of inquiry of damages awarded; *for the land and dower are recovered by the firſt judgments.* Jenk. 74. pl. 40.

4. *Execution* was made *after allowance of a writ of error in parliament.* It was moved that the writ of execution was ſealed before the writ of error taken out, and as bail to it was not put in, it could not be a ſuperſedeas. The Court allowed, that *where bail is afterwards put in, the writ of error is a ſuperſedeas by relation from the very ſealing of it*, but as bail was not yet put in, the time of ſervice of the execution was at preſent to be conſidered as regular; but *where indeed no bail is to be put in, the writ of error is a ſuperſedeas from the ſealing it.* Barnard. Rep. in B. R. 176. Trin. 2 Geo. 2. Gurnel v. Fawl.

(G. a. 3) By whom.

Where ſeveral Perſons may have ſeveral Writs, or muſt all join.

1. A *Præcipe quod reddat* is brought againſt a *tenant;* he *vouches; judgment* is given for the demandant *againſt the tenant, and for the tenant againſt the vouchee;* they may have ſeveral writs of error upon this judgment; the vouchee may aſſign error between the demandant and the tenant, but the tenant cannot aſſign error between the demandant and the vouchee. The vouchee may have prejudice by this error, but not ſo the tenant, becauſe he has recovered in value; if the tenant reverſes the judgment, the vouchee ſhall have a ſcire facias to reſtore the value; if the vouchee prevails by means of the writ of error brought by the vouchee, the tenant ſhall be reſtored. Jenk. 69. pl. 31. [546]

2. *So* where an erroneous recovery is had againſt *tenant for life, he in the reverſion, and the tenants ſhall have ſeveral writs* of error, and judgment for one of them, and execution thereof ſhall reveſt their eſtates. Jenk. 69. pl. 31.

3. Error of a *judgment in ejectment againſt ſeveral* defendants, and the *writ concluded ad damnum ipſorum*, which muſt be againſt all, when it appeared by the record that the *judgment was only againſt three, and* that *all the reſt were acquitted;* per Cur. yet the writ of error is well brought, for all muſt join in the writ, which is only a commiſſion to examine errors; *and ad damnum ipſorum may be intended only of thoſe who were found guilty*, viz. that they were damnified by this judgment. 3 Salk. 146. pl. 8. Ball v. Richards.

Vent. 165. Mich. 23 Car. 2. B. R. Brell v. Richards, S. C. reſolved accordingly, and they all held that the judgment ought to be reverſed againſt.——

2 Keb. 823. pl. 30. and 844. pl. 83. S. C. and the judgment wholly reverſed.

4. If *one executor appears upon the capias, and another makes default*, judgment ſhall be againſt both de bonis teſtatoris; and the judgment being againſt both, *one only ought not to bring the writ of error, but both muſt join*: for the judgment is ad grave damnum of them all. 1 Salk. 312. pl. 17. Paſch. 1 Ann. B. R. Rouſe v. Etherington.

Fol. 763.

(H. a) Scire Facias *ad audiendum.*

In what Caſes it ſhall be *ſued.*

Fitzh. Error, pl. 24. cites Trin. 18 H. 6. 17. S. C.

[1. IF theſe *matters* which are *aſſigned* for error, *appear* to the Court *to be no error, nor colour of error*, it ſhall not grant any ſcire facias. 18 H. 6. 18, 19. Curia.]

Fitzh. Error, pl. 24. cites Trin. 18 H. 6. 17. S. C.

[2. If a *matter of fact* be *aſſigned* for error, a ſcire facias ſhall be granted. 18 H. 6. 19.]

3. *In a falſe judgment againſt an abbot the plaintiff was nonſuit*, and the *abbot had a ſcire facias* againſt the plaintiff to ſhew why he ſhould not have execution, and to have the judgment executed returnable at 15 Paſch. at which day the *plaintiff appeared, and aſſigned his errors, and tendered ſureties to ſue with effect*, and prayed a ſcire facias againſt the abbot to hear errors. And the opinion of the Court was, that he might aſſign the errors againſt the abbot, without ſuing any ſcire facias againſt him, becauſe *they had day by the roll*. F. N. B. 18. (F).

4. *But if the falſe judgment abate for default in the writ*, the plaintiff ſhall not have a ſci. fa. ad audiend' errores upon the record certified, and if the plaintiff dies, if the falſe judgment be given in a writ of droit patent, the heir ſhall have a writ of ſci. fa. ad audiend' errores. F. N. B. 18. (G).

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5. *Three women and the huſband of one recovered debt* in C. B. and judgment affirmed in B. R. *The huſband died.* The women ſued out a capias againſt the party without firſt ſuing a ſci. fa. But adjudged that a ſci. fa. ought to have been firſt ſued forth, becauſe perhaps the defendant might have a releaſe of the huſband who was dead to plead. Mo. 367. pl. 503. Mich. 36 & 37 Eliz. Iſam's caſe.

Made perpetual by 4 Jac. 2. cap. 17.

6. 17 *Car.* 2. *cap.* 8. *ſ.* 2. *Where any judgment after a verdict ſhall be had by any executor or adminiſtrator, an adminiſtrator de bonis non may ſue a ſci. fa. and take execution upon ſuch judgment.*

7. The *Exchequer-chamber doth not award a ſcire facias ad audiend'* errores, but notice is given to the parties concerned. Vent. 34. Trin. 21 Car. 2. B. R. Anon. in a note.

8. A ſcire facias ad audiendum errores went *againſt the executors*, where the *defendant in the writ of error died.* Vent. 34. Trin. 21 Car.

21 Car. 2. the ſecondary informed the Court of this as the caſe of Thyn v. Cory.

9. In an *information qui tam*, &c. upon 5 Eliz. *for uſing a trade* contra formam ſtatuti, and judgment pro quer', and writ of error brought; per Cur. in the caſe of indictments, there needs no ſcire facias for the party to aſſign his errors, but a rule is ſufficient, becauſe the queen is always in court by her Attorney-general; but a rule in this cauſe being moved for, the Court ſaid they had ordered precedents to be ſearched, but could find none, and therefore the defendant in error muſt proceed as he can by law. Trin. 8 Ann. B. R. The Queen & al' v. Ford.

(I. a) [Scire Facias.]

Againſt whom it lies.

[*Tertenants.*]

[1. IF a *man condemned* in an aſſiſe *be outlawed for the fine of the king*, and he *brings* a writ of *error to reverſe the outlawry only*, there *ſhall not be* any *ſcire facias againſt the recoveror*, becauſe the outlawry is at the ſuit of the king only. 7 H. 4. 40.] Fitzh. Error, pl. 62. cites 7 H. 4. 39. S. C.

[2. But *otherways* it had been *if* the writ of error had been *brought of the judgment and the outlawry only*. 7 H. 4. 40.] Fitzh. Error, pl. 62. cites Paſch. 7 H. 4. 39. S. C.

[3. If a man be *outlawed at the ſuit of a common perſon*, and he *brings error to reverſe* the outlawry, *he ought to ſue a ſcire facias againſt the party*. * 7 H. 4. 40. 9 H. 4. 3. admitted. Contra 11 H. 4. 94.] * Fitzh. Error, pl. 62. cites 7 H. 4. 39. S. C.

[4. *But* if a man be outlawed *upon proceſs at the ſuit of A. who dies*, and he brings error to reverſe the outlawry, he ſhall *not* ſue a ſcire facias *againſt the executor*, becauſe he cannot proceed † upon this original, which is abated by the death of the teſtator. 9 H. 4. 3.] Br. Error, pl. 44. cites S. C.—— Br. Utlagary, pl. 9. cites S. C. ——Fitzh. Utlagary, pl. 9. cites S. C.

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[5. Upon a writ of *error againſt the heir* of him that recovers, a *ſcire facias lies againſt the heir and tertenants*. 8 H. 4. 17.] Br. Error, pl. 42. cites 8 H. 4. 18. S. C. —— Fitzh. Error, pl. 60. cites S. C.

6. A writ of error was brought to reverſe a fine. Some of the juſtices thought that it is the *beſt way to award a ſcire facias againſt the tertenant, before the Court proceeds* to examination of the errors, for *he may have ſomething to plead in bar, as releaſe, &c.* and ſo ſave the Court the trouble of examining the errors; and though the judgment ought to be reverſed againſt the party and privy, yet the plaintiff could not have reſtitution till the tertenant be made privy by A writ of error was brought to reverſe a recovery ſuffered in the grand ſeſſions of Wales. The queſtion was, whe-

ther there ought to be a ſcire facia

by a ſcire facias; for if he be otherwiſe cuſted he may have aſſiſe. Dy. 321. a. pl. 21. Hill. 15 Eliz.

againſt the tertenants and the heir? The heir in this caſe is an infant, ſo that it was inſiſted that if he be admitted to be a defendant, he ought not to appear during his minority, and there is no remedy till his full age. Per Curiam, it is not neceſſary in point of law, but it ſeems to be the courſe of the Court, and that muſt be followed: and it is reaſonable it ſhould be ſo; becauſe the errors upon a recovery ſhould not be examined before all the parties are in court, and therefore there ſhould be a ſci. fa. againſt the heir and the tertenants. 3 Mod. 274. Hill. 1 W. & M. in B. R. Anon.

7. *Scire facias* on a judgment in debt was brought *againſt the bail.* It was aſſigned for error that it *is not mentioned that proceſs was awarded againſt the principal;* and judgment was reverſed. Cro. E. 177. pl. 6. Paſch. 32 Eliz. B. R. Herd v. Burſtow.

8. Error aſſigned was that the *bail was taken in execution without any ſcire facias iſſued out againſt him;* this was held to be error, and a ſuperſedeas was granted to deliver him out of execution. 2 Bulſt. 133. Mich. 11 Jac. Kirkby v. Ungle.

2 Bulſt. 231. Huxley v. Harriſon, S.C. & S.P. by Man Secondary.

9. In caſe of a ſci. fa. *againſt an adminiſtrator*, the courſe is to grant it *ſometimes generally againſt adminiſtrator, and ſometimes againſt ſuch a one particularly as adminiſtrator;* per Mann, Clerk. Roll. Rep. 23. pl. 32. Paſch. 12 Jac. B. R. in the caſe of Harriſon v. Hukeſley.

10. *The writ of ſci. fa. anciently was ſpecial, naming the tertenants*, but of late ſuch courſe has been charged as appears by 8 H. 4. 18. and the writ awarded generally, and *when the writ is general, non tenure is no plea* in abatement; per Bridgman. Bridgm. 72. Hill. 13 Jac.

11. The ſcire facias *againſt the tertenant* is not ad audiendum errores, but *ad audiend' proceſſum & recordum*, and therefore he cannot plead in abatement of the writ but only in bar; Arg. to which Twiſden and Windham inclined. Lev. 72. Mich. 14 Car. 2. B. R. in caſe of Wynn v. Loyd.

Hardr. 164. Hill. 1659. cites 21 E. 4. and 21 H. 7. S. P.

12. *Appellees of murder were outlawed*, and brought error, and *apparent errors were aſſigned*, but the Court notwithſtanding would not reverſe the outlawry till a *ſcire facias returned againſt the lords mediate and immediate.* Sid. 316. pl. 1. Hill. 18 & 19 Car. 2. B. R. The King v. Tothill & al'.

2 Show. 505. pl. 466. S. C. The Court upon this motion was of opinion that awarding it to the tertenants was not ex neceſſitate juris, but diſcretionary.

13. If a writ of error is brought *to reverſe a common recovery*, the Court before reverſal thereof *ought to award a ſcire facias againſt the tertenants*, and this is not merely diſcretionary, but *ex neceſſitate juris*, for they may have a matter to plead in bar as a releaſe, &c. * Arg. and held accordingly per Curiam; for it is not only a cautionary writ, but it is a legal caution which in a matter makes it neceſſary; ſed adjornatur. 3 Mod. 119. Hill. 2 & 3 Jac. 2. Kingſton v. Herbert.

——Comb. 42. S. C. and per Cur. the reverſal of the recovery ought to be vacated; and it was ruled accordingly, niſi, &c.——S. P. in error to reverſe a fine, and argued that it is in the diſcretion of the Court to grant it, and that it lies as well after as before judgment in the writ of error, and of this opinion was Newdigate Ch. J. and cited 8 H. 6. and 43 E. 3. in point, and that in D. 320, 321. no ſcire facias was awarded; Hill J. ſaid, that it ought to have iſſued before as in 21 E. 4. and 21 H. 7. in error to reverſe an outlawry, a ſci. fa. to the lords mediate and immediate; and Nicholas J. doubted; et a jornatur. Hardr. 163. Hill. 1659. B. R. Ford v. Braſſham.

(I. a. 2) Examination of Errors. At what Time. After Execution awarded.

1. A Man *recovered in* writ of *debt*, and the *defendant brought writ of error*, and removed the record in B. R. and there *did nothing*, *by which the plaintiff prayed execution*, and could not have it without ſcire facias, by which he *ſued ſcire facias and alias*, *and the defendant was twice returned nihil*, by which the *plaintiff had ca. ſa.* and after exigent, becauſe it was entered quod defendens exactus fuit et non comparuit, and *upon the exigent he came and tendered the money to the Court* as he ought, as it ſeems, and *prayed ſcire facias ad audiendum errores*, *and ſuperſedeas*, *and had it*, *becauſe the exactus fuit et non comparuit was upon the ſcire facias of execution*, *and not upon the writ of error*, and *ſo he is not nonſuited upon the writ of error*, and ſo ſee notwithſtanding the matter above, they ſhall proceed upon the writ of error, and the advantage of it is not loſt. Br. Error, pl. 6. cites 9 H. 6. 13. Br. Nonſuit, pl. 2. cites S. C.

2. If the *defendant in error ſues out a ſcire facias quare executionem habere non debet*, this is *merely collateral to the record removed*, and yet by matter ex poſt facto may become a record, as if the plaintiff upon the return of the ſcire facias appears and pleads a releaſe or other matter, as he well may, then this is a record annexed to the firſt record removed; but if upon the return of the ſcire facias the *plaintiff appears and aſſigns errors*, or has a day given him to aſſign them, and upon this record aſſigns his errors *inſufficiently*, this *ſcire facias is but a piece of paper filed to the record*, no proceeding being thereupon. Yelv. 6, 7. Trin. 44 Eliz. B. R. Crumwell v. Andrews.

3. In *ſcire facias ad audiendum* errores, and ſcire facias *returned*, *et quod præmonitus non venit*, the Court without pleading will examine the errors. Keb. 662. pl. 53. Hill. 15 & 16 Car. 2. B. R. Molineux v. Nelſon.

4. A ſci. fac. does not lie on a judgment *pending a writ of error* brought on that judgment, but the writ of error pending is a good plea to the ſci. facias; and the whole proceedings were ſet aſide on motion as irregular, without driving the defendant to an audita querela. 2 Ld. Raym. Rep. 1295. Mich. 8 Ann. in Cam. Scacc. Ludlow v. Lennard.

(K. a) *How* it ſhall be *joined in Demurrer or Rejoinder* to the Error aſſigned. [550]

[*In Nullo eſt Erratum.*]

[1. IF a man outlawed brings a writ of *error to reverſe* the *outlawry*, *and aſſigns* his errors, the *king's attorney ſhall not plead in nullo eſt erratum*, *and ſo a demurrer*, as they uſed to do *between*

tween common perſons, but only upon the aſſignment of the error the *Court ſhall give a day to the king's counſel to maintain the outlawry, and it is entered curia adviſare vult till* the outlawry is *reverſed or affirmed.* Mich. 14 Ja. B. R. per Curiam and Clerks in CHAPMAN's caſe.]

[2. If the plaintiff in the writ of error *aſſigns* an *error in fact, if the defendant will put in iſſue the truth of the fact, he ought to rejoin by denial of the fact, and ſo join iſſue* thereupon, and ſhall not ſay * *in nullo eſt erratum,* for by this he *acknowledges the fact* alleged to be *true.* Dyer, 3 E. 6. † 7 E. 4. 16. and ‡ 9 E. 4. 32. it ſeems to be intended.]

* Though in nullo eſt erratum be pleaded it is not any confeſſion, but quaſi a demurrer, becauſe it is not an error aſſignable. Per Cur. Cro. J. 29. in pl. 5. Paſch. 2 Jac. B. R.

[3. *But* when an error in fact is aſſigned, *if* the *defendant will acknowledge the fact to be* ſo *as alleged, and yet that by the law this is not error,* he *ought to rejoin in nullo eſt erratum,* for by this he acknowledges the fact, and yet that by the law that is not error. Dyer, 3 E. 6. f. 7.]

In nullo eſt erratum is a demurrer, but is not a confeſſion of error in fact not well aſſigned. Lev. 311. Hill. 22 & 23 Car. 2. B. R——A writ of error aſſigned nonage in two of the defendants, where all appeared by attorney, the defendant pleaded in nullo eſt erratum; the judgment was reverſed in toto, becauſe this plea is a confeſſion of this matter in fact, it being a demurrer, and no way left for the demurrer to try it; but he ought to have pleaded to the infancy, ſo that iſſue might be taken upon it. Lev. 294. Trin. 22 Car. 2. B. R. Grell v. Richards.——A demurrer in law is never a confeſſion of a thing againſt the record, but of that only which may ſtand with the record; for otherwiſe his confeſſion would be vain, and ſhould not bind the Court. Per Popham. Cro. J. 12. pl. 15. Paſch. 1 Jac. B. R.

When error in fact is well aſſigned for error, in nullo eſt erratum amounts to a confeſſion of the fact, as if infancy be aſſigned, the plaintiff cannot plead in nullo eſt erratum, becauſe by it he confeſſes the infancy, but he ought to take iſſue; but if the party aſſign for error that the Court did not ſit, or that the defendant did not appear, which aſſignments are of matters of fact, but not well made, there in nullo eſt erratum amounts to a demurrer. Per Hale Ch. J. Raym. 231. Mich. 25 Car. 2. B. R. Okecover v. Overbury.

† Br. Error, pl. 165. cites S. C.——Fitzh. Error, pl. 43. cites S. C.

‡ Br. Error, pl. 93. cites S. C.——Fitzh. Error, pl. 45. cites S. C.

Br. Error, pl. 93. cites S. C.—— Fitzh. Error, pl. 45. cites S. C.

[4. *So* if error be *alleged in the body of the record,* in nullo eſt erratum is a good rejoinder, for this ſhall put the matter in the judgment of the Court, the record being agreed to be ſo. 9 E. 4. 32.]

——But otherwiſe it is of error in the record, as want of capias, or the like, there he may ſay in nullo eſt erratum, and there if the defendant will confeſs the error, the Court ought not to reverſe the judgment till they be aſcertained of the error. Br. Error, pl. 165. cites 7 E. 4. 16.

Fol. 764.

§ Br. Error, pl. 93. cites S. C.—— Fitzh. Error, pl. 45. cites S. C.

¶ Fitzh. Error, pl. 43. cites S. C.—— Br. Error, pl. 165. cites S. C.

[5. *So* if error be *alleged in a matter of record which is not of the body of the record, but* in a *collateral* thing, *as quod non habetur aliquod recordum* of reſummons, in nullo eſt erratum is a good rejoinder, for if the plaintiff in the writ of error does not ‖ pray a diminution, and thereupon procure a certificate from the inferior court, that there is not any re-ſummons before the rejoinder entered, this aſſignment is of no effect, but void, inaſmuch as this is to be tried by the record itſelf; and *no diminution can be alleged after the rejoinder entered.* § 9 E. 4. 32. ¶ 7 E. 4. 16. for if the defendant will confeſs the error, yet the Court ought not to reverſe the judgment till they are aſcertained of the error by the record itſelf.]

‖ [551]

6. In nullo eſt erratum cannot be pleaded *to an error aſſigned en fait*, but he ought to anſwer to the error en fait. Dy. 65. pl. 7. Mich. 3 E. 6. in caſe of Ld. Arundell v. Ld. Windſor.

7. Error aſſigned was, that the *defendant appeared per J. S. attornatur ſuum*, and that *there was not any ſuch perſon as J. S. in rerum natura*; the defendant pleaded in nullo eſt erratum, which is a confeſſion, and yet the Court held it no error, becauſe *it is againſt the record*, and the party is eſtopped to ſay the contrary, but he might have aſſigned that J. S. had not any warrant of attorney; and judgment affirmed. Cro. E. 665. pl. 18. Paſch. 41 Eliz. C. B. Croſſe v. Tyrer.

8. The *parties being at iſſue, and an habeas corpora awarded*, C. B. in which the action depended, awarded a *ſuperſedeas quia improvide*, &c. which *was delivered to the ſheriff, and yet he returned the jury*, and *the cauſe was tried* at the aſſiſes, and a *verdict for the plaintiff*; this matter was aſſigned for error; the defendant in error *pleaded in nullo eſt erratum*, and adjudged error; for the error aſſigned is a *matter in fact depending on a matter of record, and ſo* the plea *is a confeſſion*, that ſuch a ſuperſedeas was awarded, and delivered to the ſheriff before trial, and conſequently after the ſuperſedeas delivered the hands of the ſheriff were bound. Yelv. 57. Mich. 2 Jac. B. R. King v. Andrews.

9. A *double error in fact was aſſigned*; and per Holt Ch. J. the way is to plead in nullo eſt erratum, and *ſhew the duplicity for cauſe to affirm the judgment*. But if apparent error appears on the record, notwithſtanding the ill aſſigning of the error in fact by reaſon of the duplicity, judgment ought to be reverſed for ſuch apparent error; but no ſuch error appearing here on the record, the judgment was affirmed becauſe of the duplicity of the error in fact; per Curiam. 12 Mod. 650, 651. Hill. 13 W. 3. Gibbs v. Walkley.

10. *Debt on a bond*, and the plaintiff having had a verdict and judgment in C. B. a writ of error was now brought by the defendants; and it was aſſigned for error, that *one of the defendants died before the day of niſi prius*; Strange for the defendant in error moved, that it *appears on the record that both the defendants joined in bringing this writ of error*; ſo that *the error now aſſigned is contrary to the record*, and conſequently an error which the plaintiffs are eſtopped to aſſign; and therefore the plea of in nullo eſt erratum is a demurrer to it, and cites 1 Ro. Ab. 758. pl. 8. And the Court being of this opinion, the judgment was affirmed. Gibb. 109, 110. Mich. 3 Geo. 2. B. R. Webb v. Plumner & al'.

(L. a) Diminution. [552]

[Alleged; how. Not contrary to the Record.]

[1. A Man cannot allege diminution *contrary to the record* which is *certified*. Paſch. 41 El. B. R.] Diminution ſhall not be alleged in inferior courts. Sid. 40. 364. Shall not be alleged when it appears there is want of continuance. Sid. 348. ——1 Salk. 266. pl. 11. Paſch. 3 Ann. B. R. in caſe of Hale v. Clare, S. P.

2. *As*

[2. *As* if in a writ of error it be *certified that the judgment was* that defendant *ſit in miſericordia*, the defendant in the writ of error *cannot allege* diminution, ſcilicet, *that the record is quod capiatur*, becauſe this is contrary to the record certified. Paſch. 41 El. B. R.]

Roll. Rep. 200. pl. 2. S. C. held accordingly.

[3. If upon a writ of error the record be *certified that a challenge was to the ſheriff for couſinage, and after thereupon a venire facias to the coroner* upon diminution, it *cannot be certified that the challenge* to the couſinage *was after the return of the venire facias*, becauſe this is contrary to the record before certified, for nothing can be certified but that which ſtands with the firſt record. Trin. 13 Ja. B. R. between FLOYD AND BETHELL.]

4. It cannot be alleged *upon a bill of exceptions*, as to ſay that a miniſter, as ſheriff, &c. was examined, which is omitted. Br. Error, pl 50. cites 11 H. 4. 52. 65. 92. per Huls.

5. Error in B. R. of *a judgment given in Briſtow*, inaſmuch as *the attachment was returned, Tueſday was in feſto Sancti Edmundi*, where the *feaſt was Wedneſday*; the defendant *alleged diminution*, that the record is *Tueſday the ſixteenth day of July, anno* 5 *E.* 4. *in feſto Sancti Edmundi*, and ſo theſe words *(Sancti Edmundi) void*, and the reſt is the day, and prayed writ to certify it; and per Jenny and Laicon this diminution is not good; for it is to falſify the record; for *diminution cannot be alleged in that which is contrary to the record*. But in that which may ſtand with, &c. But per Billing and Needham, this ſtands with it. Br. Error, pl. 168. 11 E. 4. 10.

6. Aſſiſe was brought by A. againſt B. and others, and paſſed for A. and B. and the others brought writ of error, and aſſigned for error the *miſnoſmer of one of the jurors, but not how*, and *alſo that the diſſeiſin was found with force, by which the juſtices ſhould treble the damages, where it was not found if* the diſſeiſin *was before the ſtatute of forcible entry or after*, and *to the firſt error the defendant prayed that it be amended*, and *to the other error he pleaded* that in this, nor in any other part of the record, *in nullo eſt erratum*, and prayed that the judgment be affirmed, and day was given till the next term, at which day the *plaintiff ſaid that it appeared in the record of aſſiſe that they were at iſſue upon two matters out of the point of aſſiſe, and that the one was found, and the other not inquired*, and yet *damages were given for all*, and therefore error; to which *the defendant alleged diminution, and prayed writ* to the juſtices to certify it; to which the *plaintiff ſaid, that at another time he brought ſci. fac. upon this writ of error againſt the defendant, upon which he appeared, and the plaintiff aſſigned the errors, to which the defendant had pleaded in nullo eſt erratum, and prayed that they proceed to the examination of errors*, and upon this day is given to this term; and therefore [553] *judgment if he may now allege diminution*, and after the judgment was reverſed; and ſo ſee, that the alleging of diminution ſhall not ſerve here; for per Danby and others, the *defendant before he pleaded ought to have ſeen that he had the whole record* except the writ, proceſs, warrant of attorney, and the like; quod nota. And ſo ſee that the other *may aſſign other errors in another term apparent*

parent in the record, but the defendant cannot then allege diminution; quod nota; and there it was argued if judgment may be *reverſed for the damages and ſtand for the land;* and it ſeems that no; and that if aſſiſe be *taken by parcels* that it is error; quod nota. Br. Error, pl. 12. cites 28 H. 6. 10. Lord Clinton v. Cliderowe.

7. Error aſſigned was, *for want of a warrant of attorney;* the *plaintiff in error prayed a certiorari to the Ch. J. of C. B. and another to the cuſtos brevium*, and they both *returned non inveni aliquod warrantum;* he who obtained the judgment *died.* The plaintiff brought *another writ of error by Journey's accompts againſt his ſon and heir*, who appeared, and then the *plaintiff alleged diminution* in hoc, *that the warrant of attorney was not certified*, and *prayed a new certiorari to the Ch. J. and another to the cuſtos brevium;* it was objected, that it ought not to be granted twice in the ſame action, eſpecially when the firſt has been returned by one who is a judge of record, (viz.) by the Ch. J. who has certified, that non inveni aliquod warrantum, for which reaſon diminution cannot be alleged in this warrant of attorney, if another certiorari ſhould be granted; but on the other ſide it was ſaid, that this certiorari was only to inform the Court, and that if it was granted, and the judge ſhould certify, that habetur aliquod warrantum, that certificate would not be contrary to the firſt, becauſe that was non inveni aliquod warrantum, both which may be true and ſtand together; it ſeemed to Wray Ch. J. that it would be hard to grant a certiorari, but if any variance could be alleged, it ſhould be otherwiſe, as was adjudged in LASSEL'S CASE, where it was certified that there was no warrant of attorney, and afterwards, upon a motion for a new certiorari, as in this caſe, and becauſe the original was between John Laſſels, Eſq. executorem teſtamenti, &c. where he was not named executor in the firſt certiorari, and upon that matter a new certiorari was granted. Le. 22. pl. 28. Trin. 26 Eliz. B. R. Dayrell v. Thinn.

Mo. 148. pl. 295. DORRELL v. THYN, S. C. that the Ch. J. certified non inveni aliquod warrantum attornat', and that the cuſtos brevium certified quod non habetur aliquod warrantum attornat', and thereupon ſci. fa. iſſued againſt the defendant, who appeared and prayed aid of the queen, and had it, and then died; and a new writ of error was awarded againſt the heir and ſci. fac. after errors aſſigned, upon which he appeared and pleaded, and alleged diminution in not certifying the warrant of attorney; whereupon the defendant demurred. And adjudged that he cannot allege diminution, nor have new writ contrary to the two firſt certificates in the firſt writ of error.

8. In a writ of error, if they *allege diminution of the poſtea & habeas corpora, and there is none to be found*, the judgment is erroneous, becauſe there is no warrant to enter the verdict on a plea roll. Gilb. Hiſt. of C. B. 138. cites Cro. E. 340. Long v. Mitchell.

Cro. E. 340. pl. 5. Mich. 36 & 37 Eliz. B. R. the S. C. and the Court held it error; ſed adjornatur.

9. Error of a judgment in C. B. becauſe there was *not any warrant of attorney for the plaintiff* (the judgment being for the defendant). Upon a certiorari it was returned, there was not any warrant of attorney in that term; it was the opinion of the Court, that it is *not material in what term it be entered, ſo it be entered at all*; and therefore it was commanded, that the reverſal of the judgment ſhould be ſtayed until it was certified; and thereupon the

Bulſt. 21. S. C. The judges ſaid to the plaintiff in error, that this was his fault and neglect, that the

judgment for the reverſal was not entered of record; for if the ſame had been entered, then this motion had been prevented, but for this omiſſion a certiorari was granted by the rule of court.

the parties compounded. Cro. J. 277. pl. 7. Paſch. 9 Jac. B. R. Smith v. Skipwith.

[554] 10. In error *upon indictments* to reverſe them, if the error be *aſſigned in the outlawry only*, diminution may be alleged, there being only a tranſcript of the record; per Fleming Ch. J. Bulſt. 181. Paſch. 10 Jac. B. R. in caſe of Baker v. Baker.

11. Error was brought of a judgment in aſſumpſit in C. B. After the record certified, the plaintiff in error alleged diminution *for want of an original, which was certified and entered*, and then he aſſigned for error a *variance betwixt the original and declaration*, (as in truth there was, for the original was vicious,) and he brought a ſci. fa. ad audiendum errores; the *defendant ſuggeſted, that there was another original*, and that the plaintiff in error had procured an ill original to be certified, and thereupon the *defendant prayed a certiorari to certify the other* original, which was granted; for though one perſon can have but one certiorari, yet ſeveral perſons may have ſeveral writs to certify. Cro. J. 597. pl. 20. Mich. 18 Jac. B. R. Johns v. Bowen.

12. *In the venire facias to the ſheriff of J.* the word *vicecomiti was omitted*, and yet the *ſheriff of S. returned the panel, and his name was endorſed*, this was held error; but becauſe on the roll the writ was awarded vicecomiti S. and the omiſſion in the venire facias was the default of the clerk, it was agreed it ſhould be amended; and judgment affirmed, niſi, &c. Cro. C. 595. pl. 12. Mich. 16 Car. Sloper v. Child.

13. Error was aſſigned to reverſe a judgment in *ejectment after verdict*, that the *demiſe was laid before the plaintiff had any title, as upon the record appeared*, for the demiſe was on the eſſoin-day, and the declaration was of the ſame term; but per Curiam, this being after a verdict the chief juſtices ſaid, that if the plaintiff in error would take advantage of this matter, he ſhould have alleged diminution, and procured the original writ to be certified, and if that was returnable before the plaintiff's title it would be error. Carth. 288. Mich. 5 W. & M. in B. R. Cook v. Darbiſon.

14. *In inferior courts* no diminution can be alleged. 12 Mod. 536. Trin. 13 W. 3. Lancaſter v. Lovelace.

(M. a) Diminution.

Certiorari.

S. C. cited Noy, 83, 84. —2 Roll. Rep. 471. Mich. 22 Jac. B. R.

[1. *AFTER in nullo eſt erratum* pleaded, the *Court* to inform their conſciences *may award a certiorari to amend the record.* Paſch. 11 Ja. B. R. Co. 5. Bishop, 37. b.]

Anon. S. P. though they cannot have it ex rigore juris, becauſe they have had certiorari at the ſuit of the party, but they may have certiorari ad informandam conſcientiam ex gratia Curiæ; and Ley Ch. J. would have amended the record, and then it was ſaid, that in the Exchequer-chamber

chamber they might move for a new certiorari, and there they would certify it according to the amendment; and one MOLINEUX'S CASE was cited, where, upon error in C. B. the record was amended here in B. R. by the record itself which was brought hither, and by a clerk of C. B. which was done also by advice of the court of C. B. concurring with them.——Lat. 152. Felton v. Weaver, S. C. accordingly.

[2. *So* after in nullo eſt erratum pleaded, the Court may award a certiorari *to reverſe the judgment*. Paſch. 11 Ja. B. R. between * HUNSLEY AND OSBURN adjudged. Co. Lib. d'Entries, fol. 267, 268. BOSWELL'S CASE. And fol. 242. DOWNAL'S CASE. Fol. 266. † LANCAST AND LOA. Mich. 2 Car. between WEAVER AND FELTON adjudged. Intratur Hill. 1 Car. Rot. 647. B. R.]

* 2 Bulſt. 71. Paſch. 11 Jac. Hunley v. Alport, S. P. and ſeems to be S. C. and a certiorari was granted.

†[555]

[3. *If* after in nullo eſt erratum pleaded *another part of the record is brought in by certiorari, and made of record*, there the *Court ought to reverſe the judgment, if the matter ſo requires*. Co. 5. BISHOP, 37. b. My Reports, 14 Ja. between the ‡ Biſhop of ROCHESTER AND YOUNG adjudged, which intratur Paſch. 33 El. Rot. 361.]

‡ Roll. Rep. 132. pl. 26. S. C. and judgment was reverſed.—— 3 Bulſt. 224. Young v. the Biſhop of Rocheſter, S. C. but S. P. does not appear.

[4. After in nullo eſt erratum pleaded, *if one party allege* upon record a *diminution* of the record *to reverſe it, and prays a certiorari* to certify it, and thereupon a writ of certiorari is ſued out, *and the record thereupon is certified, but before it is entered of record the Court is informed of this matter, this ſhall not be received*, becauſe it comes in by the prayer of the party after in nullo eſt erratum pleaded, which is not to be allowed, but upon information to the Court, the Court may grant it. Mich. 2 Car. ‖ between WEAVER AND FELTON, B. R. adjudged, and ſuch certificate diſallowed, and a new writ of certiorari granted by the Court, which intratur Hill. 1 Car. Rot. 647. and then the record of § the BISHOP'S CASE was ſhewn to the Court, where the defendant did not plead in nullo eſt erratum, as the book is Co. 5. But it paſſed againſt the defendant by nil dicit, and after diminution alleged, as it is in the book.]

Jo. 139. 140. pl. 5. S. C. reſolved that the certiorari was not well awarded; for after in nullo eſt erratum pleaded, neither the plaintiff nor defendant can allege diminution; for by the joinder they allow the record; and a nota is there added, that BISHOP'S CASE in Coke does not agree with the record; for there the defendant had not joined in nullo eſt erratum, but did not ſay any thing, ideo remanet indefenſus.——Noy, 83, 84. S. C. held accordingly, but yet the Court ex officio may award a certiorari ad informand' conſcientiam, and that which is certified ſhall be annexed to the record, and is called a rider-roll, and ſays ſee 22 E. 4. 46. a. 28 H. 6. 10. Dy. 32. b. 9 E. 4. 32. b. And note in CHAPMAN'S CASE the difference is, if a diminution be alleged in a thing collateral, as warranty of attorney, or any mean proceſs that is not of the body of the record, ſo diminution may be alleged after in nullo eſt erratum; but otherwiſe if it be of the ſubſtance and part of the record itſelf, as if returned in the detinue only, where the firſt action was in the debet and detinet, and ſays ſee 1 H. 7. 21. which reconciles many differences.——Lat. 152. Felton v. Weaver, S. C.

‖ Fol. 765.

§ The word (the) ſhould be omitted, and it ſhould be only (Biſhop's caſe), and is at 5 Rep. 37. a.

[5. In *treſpaſs* in B. R. judgment was given for the plaintiff by default, and a writ of error brought in Camera Scaccarii, and there *aſſigned* for error, *that there was not any writ of inquiry of damages filed*, and upon a writ of *certiorari certified that there was not any ſuch writ, yet after another certiorari* granted, and

upon this *the writ of inquiry certified*, and upon this the judgment affirmed. Hill. 5 Car. between ROROR AND ESCOURT, adjudged.]

[6. [*So*] in a *writ of right* in B. R. after judgment a writ of error is brought in Camera Scaccarii, and the *want of continuances assigned for error*, and upon a certiorari the want of continuances certified; yet after upon another certiorari the continuances were certified, and upon this the judgment affirmed. Hill. 5 Car. between WATERHOUSE AND COPLY adjudged, and a like case between TRAVIS AND SCOT.]

* [556] Error of a judgment in C. B. in covenant; the plaintiff in error assigned for error want of original, and had a certiorari, upon which it was certified, that there was no original; afterwards the defendant applied to the Court of Chancery, and upon affidavits that instructions were given to the cursitor for an original, but they were lost, the court of Chancery allowed that the original should be supplied; upon which the defendant in error prayed another certiorari, and an original was certified of the same term in which the default of an original was certified before; and now it was moved by Mr. Broderick, that this was irregular, for before the second certiorari was returned, the defendant ought to have given a copy of the original to the attorney of the plaintiff, and the master informed the Court that the course was so when the second original certified was of another term, but it being in this case of another term, the motion was allowed. Comyns's Rep. 118. pl. 83. Pasch. 13 W. 3. B. R. Sir Richard Levin v. .....

[7. In an action upon the case in Banco, Hill. 6 Car. *and judgment* after given for the plaintiff *upon demurrer*, and upon this a writ of error brought, and *assigned* for error, *that there was not any original in the cause de H.* [*Hill.*] 6 *Car. and* upon a certiorari * it was *certified accordingly*; and upon this the *plaintiff says, that there was an original in the said cause de P.* [*Pasch.*] 6 *Car. and for the non-appearance of the defendant upon the return of the summons a capias awarded returnable T.* 6 *Car. and an alias returnable M.* 6 *Car. and a pluries returnable H.* 6 *Car. upon which the defendant appeared, and the plaintiff declared, and the defendant pleaded*, &c. *and* upon this prayed a certiorari to certify *the original*, which is *certified accordingly, but none of the other writs, nor any continuance is certified between Pasch.* 6 *Car. and Hill.* 6 *Car.* and so a discontinuance of the suit for what appears to the Court. Mich. 13 Car. B. R. between LOWNES AND COGGAN adjudged, and the first judgment reversed for this cause.]

Godb. 407. pl. 488. S. C. adjornatur. 2 Roll. Rep. 352, 353. S. C. but no judgment. — In a writ of error after the record removed, diminution of the original was alleged, and there it was pretended that judgment was given upon another original, and one of the originals was before, and the other after the judgment; and there the judgment was reversed, because it cannot appear to the contrary but that the judgment was given upon the latter original; Arg. Godb. 408. cites Pasch. 25 H. 8. Rot. 25. Plot & Ux' v. Treventry.

[8. In a writ of error, if *error be assigned in the original*, and thereupon a certiorari is granted and an *original is certified, which is erroneous*; after the other party prays a certiorari for another original; and thereupon *another* original *is certified, which* is a *good* original; and after in nullo est erratum is pleaded, the Court ought to intend that the judgment was given upon the good original, and not upon the erroneous original, and so ought to affirm the judgment; for they ought to intend more favourably for the judgment, and to intend it to be well given. 21 Ja. between CROUCH AND HAINS. B. R. adjudged in a writ of error.]

In an action upon the case brought upon an assumpsit, error assigned was, because that no place was limited where the payment should be made; the original was, that the promise was in consideration that the plaintiff did lend to the defendant so much, he at London did promise to pay the same to him again; there were two originals which bore date the same day, judgment was in that case for the plaintiff, and the

the defendant brought a writ of error, and alleged diminution of the original, then the other original was certified; the defendant in the writ of error ſaid, that the original upon which the recovery was grounded, was an original which had a place certain; the judges did affirm the ſame to be the true original which did maintain the judgment, and agree with the proceedings, otherwiſe great miſchief would follow; Arg. Godb. 408. cites Trin 18 Jac. Rot. 1613. Bowen v. Jones. ——— 2 Roll. Rep. 353. S. C. cited. ——— S C. cited Godb. 306.

[9. *So* in a writ of error, if error be aſſigned in the original, and upon a certiorari granted, an erroneous original is returned, *and upon this in nullo eſt erratum is pleaded*, and after the Court ad informandam conſcientiam grant another certiorari for another original, and upon this *a good original is certified*, the Court ought to intend that this is the original upon which the judgment was given, in favour of judgments which ought to be intended to be good. Mich. 1649. between KERTON AND AVERY, and the judgment in Banco affirmed accordingly. Intratur Mich. 23 Car. Rot. 239.]

Sty. 176. Mich. 1649. Avery v. Kirton, S. C. and per Roll Ch. J. the certiorari is general and not inter partes prædict', but the certificate is inter partes prædict', and the Court may take the right original that is certified, and the judges are not * bound by the plea in nullo eſt erratum that is pleaded, but may grant a new original writ of error, but the party cannot require it, for he is concluded by his own plea, and if he diſcontinue his original he may have a new one, but not if he plead, and the certiorari is good and well certified, and therefore judgment ought to be affirmed; per Roll Ch. J. and Jerman, Nicholas, and Aſk to the ſame effect, and ſo judgment was affirmed.

* [557]

10. Where *two take the tenancy ſeverally, and plead in bar*, if the aſſiſe *inquire of the bar, before that they inquire of the tenancy*, this is error, and as to the point of the tenancy not inquired, the defendant of this alleged diminution, and prayed that it be certified, alleging that it was inquired; and had it, &c. Br. Error, pl. 52. cites 11 H. 4. 67, 68.

Br. Aſſiſe, pl. 57. cites S. C.

11. If the defendant pleads *in nullo eſt erratum*, there he *cannot allege diminution*; for *by the iſſue they are agreed that there is the whole record.* Br. Error, pl. 166. cites 7 E. 4. 25.

12. *If the juſtices* of C. B. or other juſtices upon the writ of error *will not certify* all the record, then the party who ſues the writ of error *may allege diminution* of the record, *and pray a writ* unto the juſtices who certified the record before, *to certify all the record.* F. N. B. 25. (A).

13. If a writ of *error* is *brought in C. B. of a judgment in an inferior court*, and the *judgment is there affirmed*, and then a writ of error is *brought in B. R. on the judgment ſo affirmed*; in that caſe no diminution can be alleged of the record in the inferior court; for now the judgment in C. B. is only in queſtion; ſo reſolved Paſch. 20 Jac. B. R. Banniſter v. Kennedy. F. N. B. 25. (A) in the new notes there (a).

14. If in a writ of error *upon a fine*, an error be *aſſigned in the proclamations, upon* which *a certiorari* goes *to the cuſtos brevium*, and upon his certificate *it appears that two of the proclamations were made in one day, but it appears in the chirograph office, that all the proclamations were duly made*, Wray Ch. J. held that the defendant ought to have his prayer; for the chirographer makes the proclamations, and is the principal officer as to them, and the cuſtos brevium, having only an abſtract thereof, upon the prayer of the defendant, a new certiorari was directed to the chirographer, who

having certified the proclamations duly made, and upon examination of the clerks of C. B. by the juſtices in B. R. who anſwered according to what was ſaid by Wray Ch. J. they awarded, that the proclamations with the cuſtos brevium ſhould be amended according to thoſe in the cuſtody of the chirographer. 3 Le. 106, 107. pl. 157. Trin. 26. Eliz. Rag v. Bowly.

A writ of certiorari de novo was granted after the plaintiff had pleaded in nullo eſt erratum;

15. In error the *plaintiff prayed a certiorari to the cuſtos brevium to certify an original writ upon which a common recovery was had*, and it was granted him, and the cuſtos brevium *certified that there was no original*, and afterwards the *defendant prayed another certiorari, and had it.* Le. 22. in pl. 28. Trin. 26 Eliz. B. R. Arg. cites it as the caſe of Ld. Norris v. Braybrook.

for this plea of in nullo eſt erratum goes only to that which is contained in the body of the record, and not to any collateral matter, as warrant of attorneys. Le. 176. in pl. 246. Hill. 31 Eliz. B. R. Wray Ch. J. cites it as a caſe greatly debated between Norris and Braybrooke. ——— Mo. 95. pl. 235. Paſch. 12 Eliz. Brabrooke's caſe, S. C. but S. P. does not appear. ——— Ibid. 125. pl. 271. S. C. but S. P. does not appear.

16. After aſſignment of the errors, and in nullo eſt erratum pleaded, it was moved that there was a *manifeſt error in the awarding the venire fac.* and prayed a *certiorari* to certify it. Popham held it not grantable; for though ſometimes *in affirmance of a judgment*, it is uſed in ſuch caſe to award a certiorari to inform their conſciences, becauſe they would not reverſe a judgment if it could be helped, yet never was it grantable *to avoid a judgment*; for it
[558] is the folly of the party that he did not procure it to be removed before the errors aſſigned; but the other juſtices held e contra, that it is *grantable as well in the one caſe as the other*; and awarded accordingly. Cro. E. 836, 837. pl. 9. Trin. 43 Eliz. B. R. Winchomb v. Goddard.

17. Error *upon a judgment in trover againſt huſband and wife*, of a trover and converſion by the wife, and ſeveral errors aſſigned, which were all over-ruled; afterwards upon a *ſuggeſtion that there was not any bail entered for the wife*, the *Court was moved for a certiorari*; it was *objected* againſt the granting it, *that the plaintiff in error had aſſigned ſeveral errors, but not this for one, and that the defendant had pleaded in nullo eſt erratum*, and the record is examined, it is now too late, eſpecially as it is to reverſe a record, but peradventure upon ſuch a ſuggeſtion, to help a record in affirmance of a judgment, they may award a certiorari ex officio. But the Court held, that though the plaintiff in error cannot aſſign this for an error after in nullo eſt erratum pleaded, yet *the Court for their own information may ex officio award ſuch a certiorari upon ſuch a ſuggeſtion after that plea pleaded*; and a certiorari was granted. Cro. J. 5. pl. 6. Paſch. 1 Jac. in Cam. Scacc. Cox v. Cropwell.

Error of a judgment by nil dicit in an action of *debt on a bond*, and the error aſſigned was

18. A *venire facias* was *returned in the time of queen Elizabeth*, and the *hab. corpora juratorum was ſummoned in curia noſtra, whereas it ought to have been in curia nuper reginæ*, for there was not any ſummons in the king's court which was moved to be a manifeſt error, as was reſolved in the caſe of KNOWLS v. BECKINGSHAW in Cam. Scacc. wherefore it was *prayed that certiorari*

might

might be awarded to certify it, which was granted (Popham abſente). But afterwards it being moved for ſtay thereof (Popham being in court), becauſe it was in the diſcretion of the Court to award it or not, it being after in nullo eſt erratum pleaded, and *in diſaffirmance of a judgment*; therefore all agreed that no certiorari ſhould be awarded, but that a ſuperſedeas ſhould be made for ſtay of that which iſſued before; and judgment was affirmed. Cro. J. 138. 141. pl. 16. Mich. 4 Jac. B. R. Read v. Potter.

in the *adjournment of the continuances*; the defendant *pleaded in nullo eſt erratum*, and thereupon a *motion was made for a certiorari* to certify them; the Court doubted at firſt whether they ſhould grant it after in nullo eſt erratum pleaded, becauſe it was in order to reverſe, and not to affirm a judgment; but at laſt it was adjudged, that it might be *granted to inform the truth as well for the reverſal as in affirmance of the judgment*; and awarded accordingly. Cro. J. 445. pl. 24. Mich. 15 Jac. B. R. Anon.

19. *After in nullo eſt erratum* is pleaded the defendant cannot allege diminution, becauſe there *is a perfect iſſue before*; per Cur. Godb. 267. pl. 368. Hill. 13 Jac. B. R. in caſe of Brook v. Gregory.

20. A man *cannot* allege diminution *of any thing which appears in the record to be true*; per Cur. Godb. 267. pl. 368. Hill. 13 Jac. B. R. in caſe of Brook v. Gregory.

21. If a writ of error be brought *upon a judgment in B. R. in Ireland* in a writ of falſe judgment *upon a judgment in the Toulſil*, (which is the court of the mayor and aldermen of Dublin,) and it is aſſigned for *error that there was no plaint entered in the Toulſil, and that* theſe words, *per quod actio accrevit, were omitted in the concluſion of the declaration*; if the defendant alleges diminution, yet *he ſhall not have a certiorari to the Ch. J. of B. R. in Ireland to certify the reſidue* of the record, &c. *and that if any part* of the record *be not before him, that he ſhould write to the mayor and aldermen to certify it, and that he ſhould certify it to this Court*; for by his plea of in nullo eſt erratum in B. R. in Ireland he has admitted the record well certified by the mayor and aldermen, and this Court has no authority to require the court of B. R. in Ireland to write to the mayor, &c. and the judgment of B. R. in Ireland is only here in queſtion. Such writ being iſſued, a ſuperſedeas was granted to the whole, though it was prayed that the ſuperſedeas [559] ſhould be as to the inferior court only. But at another day it being moved, that there might be a certiorari as to the words *per quod*, &c. it was granted. 3 Danv. 17. pl. 11. cites Palm. 285. Paſch. 20 Jac. B. R. Baniſter v. Kennedy.

22. In a writ of error in the Exchequer-chamber upon a judgment in B. R. it was aſſigned for error that *in the bill the plaintiff declared on a leaſe for three years*, but *in the plea roll*, upon which the iſſue was joined, and the record of niſi prius, *it was upon a leaſe for five years*, ſo that the bill and declaration vary, and diminution being alleged by the plaintiff, *a bill was certified*, in which it was *only for five years*; upon which the *defendant had another certiorari, and thereupon a bill was certified*, wherein he declared of a leaſe *for five years*, which warranted the declaration upon the roll and the niſi prius. It was held by all the juſtices and barons, that the ſecond certificate upon diminution alleged by the defendant ſhould be received; for that warranting the roll

and the record of niſi prius, ſhall be intended the true bill, and the other a fictitious one. Cro. C. 91. Trin. 1 Car. Howell v. Thomas.

23. Diminution does not lie *after in nullo eſt erratum is pleaded*, for it is *repugnant* to the plea, which goes to the whole; for this plea implies and refers to the errors aſſigned by the plaintiff, which being the iſſue between them, no other can be aſſigned; and after iſſue joined, ſuch new matter is not to be alleged. But if the original be returned, upon a writ of diminution, after in nullo erratum pleaded, the Court will not reject it. Jenk. 164. pl. 13.

24. In a writ of error *upon a bill of exceptions*, the plaintiff can allege no diminution; for he muſt hold himſelf to the matter of the bill ſealed, and if it be not there it was his folly to omit it. 2 Inſt. 427.

25. Error of a judgment in C. B. in *ejectment* upon non ſum informatus, and the error aſſigned was, that *it appeared by the record that the declaration was before the plaintiff had any cauſe of action*; it was ſaid it doth not appear ſo, but that if that was true, then there was a wrong original certified; whereupon a certiorari was prayed and granted to certify the true one, it being in affirmance of a judgment which ought to be favoured. Style, 352. Mich. 1652. B. R. Jennings v. Downs.

26. Writ of error was brought *upon a judgment given by juſtices of oyer and terminer*; the error aſſigned was *becauſe there was no adjournment*. And upon great debate, it was ruled that writ ſhall be directed to the juſtices to ſupply this diminution. Sid. 40. pl. 3. Paſch. 13 Car. 2. cited by Windham J. as adjudged in Sampſon's caſe.

27. Diminution cannot be alleged upon a writ of error brought upon *a judgment in any inferior court*; per Cur. Sid. 40. pl. 3. Paſch. 13 Car. 2. B. R. Redding's caſe.

28. *After in nullo eſt erratum pleaded*, none may have a certiorari to diſaffirm the judgment, but contra to affirm it, though when it comes in advantage it may be taken of errors, and though the plaintiff may have it before without motion, yet not after ſuch plea pleaded. Keb. 225. pl. 41. Hill. 13 Car. 2. B. R. Furnage v. Norton.

Lev. 105. S. C. 29. Diminution may be alleged *in Wales*, and out of the *courts in counties palatine*, but not in Ely, for that is only a royal franchiſe. Sid. 147. pl. 5. Trin. 15 Car. 2. B. R. Smith v. Smith.

30. In *dower* in nullo eſt erratum was pleaded. It was aſſigned for error that it was *againſt an infant who appeared by attorney*, when he ſhould have appeared by guardian. Per Cur. though it be after in nullo eſt erratum pleaded, yet we may grant a certiorari ad informand' conſcientias; and a dowager is a kind of a purchaſor. 7 Mod. 104. Mich. 1 Ann. B. R. Wood v. Branford.

[560] 31. Where *the defendant has joined in execution* no certiorari is neceſſary; neither is it unleſs the party, when he aſſigns errors, prays

prays it *for want of original*, &c. Keb. 735. pl. 17. Trin. 16 Car. 2. B. R. Swain v. Shin.

32. A *certiorari to Ireland after in nullo eſt erratum pleaded*, was held grantable at the prayer of the defendant in error, ad informandam curiam, and when returned, it will appear if the ſame record or not. Show. 214. Paſch. 3 W & M. Price v. Harſtong.

33. No diminution can be alleged *of a record of an inferior court*. 7 Mod. 103. Mich. 1 Ann. B. R. Le Noyer's caſe.

34. Upon a writ of error in B. R. the *want of an original* was aſſigned for error, and the *defendant, before the return of the certiorari, came in gratis, and pleaded a releaſe in bar*. The plaintiff in error demurred, and the defendant joined in demurrer; this releaſe was agreed to be miſpleaded for *want of a venue*; then the queſtion was, *whether the Court ex officio, might award a certiorari*, that it might appear whether there was an original or not; Holt Ch. J. held they could not, becauſe the defendant, by pleading a releaſe, had admitted the want of an original; beſides, the queſtion was not, whether error or not, but whether barred by the releaſe or not, and therefore the Court cannot depart from the point referred to their judgment; for if they do, then they give judgment on the certiorari, and depart from the plea and demurrer, and joined in demurrer. But the other judges were of a contrary opinion, viz. that the act of the parties might foreclose themſelves, but not the Court; for they are to give judgment upon the whole record, and may award a certiorari ad informand' conſcientiam. 1 Salk. 268. pl. 15. Trin. 3 Ann. B. R. Carlton v. Mortagh.

6 Mod. 113. S. C. adjornatur. —— Ibid. 206. S. C. with the arguments of the judges, and held accordingly by three juſtices, contra Holt —— 2 Ld. Raym. Rep. 1005. S. C. adjudged the plea naught for want of a venue and then it amounted to a confeſſion of the error. But as to the granting a certiorari a rule was made for hearing counſel. ——3 Salk. 399. pl. 3. S. C. and in arguing the demurrer it was admitted that the plaintiff could not pray a certiorari to certify whether there was an original or not, becauſe the defendant had confeſſed by his plea that there was none, the fault being cured by the releaſe of errors, and therefore doubted whether the Court could award a certiorari, and without it they could not reverſe the judgment. ——S. C. cited 1 Salk. 270.

35. Error was brought on a judgment in C. B. and *want of an original aſſigned*; the defendant in error came in gratis, and *alleged diminution*, and prayed a certiorari, and thereupon *a variant original was certified*; upon this he came again at the day given, and *ſuggeſted another original of ſuch a term, and prayed another certiorari*. This appearing on the maſter's report, the queſtion was, whether it was regular? And per Holt Ch. J. *if a record below be of Eaſter term, and a want of original be aſſigned* for error, the *defendant may allege diminution*, and then a *certiorari goes* to the cuſtos brevium *only to certify an original of Eaſter term*, that being the term of which the placita is; if then the *cuſtos brevium certifies a wrong* original, *or that there is no original*, then the *defendant may* come and *ſuggeſt, before in nullo eſt erratum pleaded, that there is an original of another term, viz. Hill. or Mich.* and then *there muſt go a certiorari to the cuſtos brevium to certify that, and another to the Ch. J. of C. B. to certify the continuances*. Alſo if the cuſtos brevium *certify a wrong original of the ſame term the placita is of*, it has been held, the defendant may ſuggeſt there is a right original even of

that very term; and when both are before the Court, the Court will apply the record to that which is a good original. 1 Salk. 266. pl. 13. Trin. 3 Ann. B. R. Burnaby v. Saunderſon.

[561] Want of an original and warrant of attorney was aſſigned for error. The defendant came in gratis without any proceſs, and pleaded inſtanter in nullo eſt erratum; it was moved that this was a confeſſion of the errors, becauſe the defendant has thereby prevented the plaintiff from taking out a certiorari to verify them. The Court reverſed the judgment. Barnard. Rep. in B. R. Mich. 3 Geo. 2. Addey v. Hutchinſon.

36. Error of a judgment in C. B. After verdict the plaintiff in error aſſigned the *want of an original, but did not take out a certiorari, as the courſe is;* the defendant in error *pleaded in nullo eſt erratum;* and per Holt Ch. J. if want of an original be aſſigned for error, and the plaintiff in error does not ſue out a certiorari, the courſe is for the defendant in error to go to the maſter of the office and get a rule for the plaintiff in error to return his certiorari; and in caſe he does not get it done accordingly, the aſſignment of error ſignifies nothing; but if the defendant in error will come gratis and confeſs the error, there need be no certiorari returned; and as to the objection, that there may be a bad original in this caſe, that is another kind of error; for when want of an original is aſſigned for error, the Court will never intend a bad original; the judgment was affirmed. 1 Salk. 267. pl. 14. Smith v. Stoneard.

37. Error in B. R. of a judgment in C. B. the *declaration was, Trin.* 1 *Annæ*, and *want of an original was aſſigned* for error; and upon a certiorari, the original was returned with the continuances, by which it appeared, that *the declaration was Hill.* 13 *Will.* 3. *with imparlances to Trin.* 1 *Annæ, and the original of that term, ſo that the ſuit was depending in the reign of king William before any original;* ſed non allocatur. For per Holt Ch. J. the certiorari as to the continuances was impertinent, and ſo is the matter returned; and as to the reſt, the return is impoſſible and contrary to the record, and therefore *the imparlances ſhall be intended to be in another cauſe;* and judgment affirmed. 1 Salk. 269. pl. 16. Hill. 3 Ann. B. R. Tyſon v. Hilliard.

38. In a writ of error out of C. B. the defendant pleads in nullo eſt erratum; it was *in a ſcire facias againſt bail*, and the plaintiff aſſigned for error *the want of a ſcire facias on the roll.* Reſolved by Holt Ch. J. that this error might be aſſigned, as well as the want of an original bill; and that by pleading *in nullo eſt erratum*, the plaintiff *has confeſſed the error;* but the whole Court, viz. Holt, Ch. J. Powell, Powis, and Gould agreed, that a *certiorari ad informandam conſcientiam* curiæ might be *awarded*, which was done accordingly. 11 Mod. 143. pl. 15. Mich. 6 Ann. B. R. Lawn v. Sawbridge.

39. The plaintiff had a judgment in ejectment, *the general errors were aſſigned, and in nullo eſt erratum pleaded.* It appeared, on arguing the caſe, that the *declaration ſet forth a demiſe*, &c. *and did not ſhew that the plaintiff entered or was poſſeſſed*, and the truth was, that *the declaration was right, but the line in which thoſe words are, was omitted in the tranſcript*, and the Court held this defect to be fatal; thereupon the *plaintiff moved for a certiorari* ad informandam

dam conſcientiam; which was oppoſed, becauſe by in nullo eſt erratum pleaded the defendant affirmed the record to be perfect, and therefore he is now foreclofed to ſay, that there is error by reaſon of ſuch a defect, for that is directly againſt his former ſuppoſal; but yet *the Court is not foreclofed by this admiſſion of the party;* for the writ of error being a commiſſion to them to examine the record, the parties cannot reſtrain them from looking into it; and that wherever by inſpecting the Court may affirm the judgment, they ought to award a certiorari, and a rule was made accordingly for a certiorari upon theſe reaſons, together with an affidavit that the record was right below. 1 Salk. 270. pl. 18. Paſch. 13 Ann. B. R. Meredith v. Davis.

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Fol. 766.

(N. a) What Pleas a *Party* or *Privy*, and what Pleas a *Tertenant* ſhall plead.

Pleader.

[1. IN a writ of error *againſt him that recovers* the defendant may *plead, that after a recovery he levied a fine of the land recovered* to B. *and that five years are paſſed without claim* by the plaintiff, for this fine bars the right by the ſtatute of 4 H. 7. and the defendant may plead in bar of the right, though he be not tenant of the land. Tr. 12 Ja. B. R. between BENFIELD AND BATLAMEW.]

Cro. J. 332. pl. 15. Bartholomew v. Belfield, S. C. reſolved per Curiam upon ſolemn argument. —2 Bulſt. 244. S. C. adjudged. —— Roll. Rep. 36. pl. 5. S. C. adjudged accordingly. —— S. C. cited Ibid. 308. —— S. C. cited 2 Jo. 183. Mich. 33 Car. 2. per Cur.

[2. If a writ of error be brought *againſt the heir of him that recovers*, though he hath nothing in the land, yet *he may plead the releaſe of the demandant of the error.* 9 H. 6. 46. b. 48. per Curiam.]

Br. Error, pl. 9. cites 9 H. 6. 46. S. C. —— Fitzh. Error, pl. 20. cites S. C.

[3. *So* he may plead *that the demandant is a baſtard*, where it is material. 9 H. 6. 46. b. 49. Curia.]

Br. Error, pl. 9. cites 9 H. 6. 46. S. C. —— Fitzh. Error, pl. 20. cites S. C.

[4. *So* he may plead a *releaſe of the right* in the land, though he hath nothing in the land. 9 H. 6. 49.]

And it is a good plea for the tertenant alſo. Br. Error, pl. 9. cites 9 H. 6. 46. S. C. per Radford, ſo that the tertenant was tertenant at the time of making the releaſe, but otherwiſe not; for then it cannot enure. —— Fitzh. Error, pl. 20. cites S. C. —— And a releaſe of his right in the land after recovery is a good bar to a writ of error, becauſe he cannot be reſtored to the land. Co. Litt. 289. a. in principio.

[5. In a ſcire facias againſt a *tertenant* he *may plead a releaſe of the error*, though he be not privy to the judgment. 9 H. 6. 48. Curia.]

Br. Error, pl. 9. cites 9 H. 6. 46. S. C. & S. P. per Radford. —— Fitzh. Error, pl. 20. cites S. C.

[6. *In*

Br. Error, pl. 9. cites 9 H. 6. 46. S.C. & S.P. per Hals.

[6. *In a* writ of *error againſt* him that is *privy*, if the *judgment be reverſed*; yet *in a ſcire facias* againſt the *tertenant* he *may plead a releaſe* in bar, *or* that the demandant is a *baſtard*. 9 H. 6. 47.]

——Fitzh. Error, pl. 20. cites S. C.

Br. Error, pl. 2. cites 9 H. 6. 46. per Martin.

6. Where a *judgment is given in a real action*, a *releaſe of all actions real* is a good bar in a writ of error brought thereupon. Co. Litt. 288. b. ad finem.

7. The tertenant may plead *that the anceſtor was outlawed of felony*, or that he *is not ſon and heir*. Br. Error, pl. 9. cites 9 H. 6. 46. per Hals.

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8. Error was brought *by the heir of him who loſt* the land, *againſt the heir of him who recovered*, and had ſcire facias againſt the heir, who *pleaded jointenancy with B*. And per Brian, this is no plea; for the *ſcire facias is brought for the privity, and not againſt the heir as tertenant*; for it does not ſuppoſe quod terram illam tenet. Per Cateſby ſcire facias brought againſt him who recovered, or his heir upon writ of error, *ſhall not ſay qui terram illam tenet*; but *otherwiſe it is againſt a ſtrange tenant*; and therefore now the judgment ſhall bind without ſcire facias after, and therefore jointenancy is a good plea. But Bill. contra; for this ſcire facias *is only ad audiendum errores*, and the other ſhall be to have execution of the land. Nevertheleſs Yelverton agreed with Cateſby. Br. Error, pl. 167. cites 10 E. 4. 12, 13.

The tertenants have nothing to do with the errors, but only with the proceſs and record; per Twiſden. Keb. 352. in S. C.

9. The *tertenant cannot plead in abatement of a writ of error but only in bar*, as a *releaſe*, &c. in maintenance of his title; for the *ſcire facias againſt him is not ad audiendum errores*, but ad audiendum *proceſſum & recordum*, Arg. and to this Twiſden and Windham inclined. Lev. 72. Mich. 14 Car. 2. B. R. in caſe of Winn v. Loid.

(O. a) At what Time.

Br. Error, pl. 9. cites 9 H. 6. 46. S.C. & S.P. per Hals. —— Fitzh. Error, pl. 20. cites S. C.

[1. IN a writ of error *againſt the heir of the recoveror within age, and a ſcire facias againſt the tertenant*, if the *parol demurs for the heir*, and the judgment is reverſed againſt the tertenant, yet *at full age* the *heir may plead the releaſe of the demandant of the right, or of the errors*, and bar him. 9 H. 6. 48. Curia.]

This in Roll is left imperfect as here.

[2. In a writ of error againſt the heir of the recoveror, if a ſcire facias be awarded againſt the heir and tertenants.]

(P. a) *What* Thing ſhall be Error *in Verdicts, or* in *Proceedings after the Jury returned and before Verdict.*

See (M. c).

[1. IF a man be *indicted for* ſpeaking *ſcandalous words*, &c. and *upon not guilty pleaded it is entered* that the jury upon the return of them appeared, & *ſuper hoc juratores præd' electi triati & ad veritatem de & ſuper premiſſis jurati dicunt ſuper ſacramentum ſuum quod*, &c. and ſo give a verdict, yet this is error, becauſe it is *not ſaid*, that they were *jurati ad veritatem dicendam*, according to the uſual courſe, for they may be ſworn ad veritatem; yet inaſmuch as they are not ſworn to give their verdict according to the truth, there is not any command to give their verdict according to truth, and a verdict is ſo called a veredicto. Hill. 1650. WILLIAMS's caſe, adjudged, and the judgment given at the ſeſſions at Newgate, reverſed accordingly for this error; and then another judgment was given accordingly, in an indictment of perjury ſhewed in a caſe.]

Sty. 244. S. C. adjudged.

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Fol. 767.

(Q. a) *What* Thing ſhall be *Error in Verdicts.*

[1. IF *A. brings an ejectione firmæ againſt B. and C.* and *after iſſue joined B. dies;* and after upon a habeas corpora which mentions the iſſue to be between A. of the one part, and the ſaid B. and C. a *verdict is given againſt B. and C.* that they are guilty, *and damages* are given *againſt them, but a ſurmiſe thereof is made before judgment, and ſo judgment given only againſt C.* this is not erroneous, though the verdict was againſt both, inaſmuch as the judgment was againſt him only that is living. Mich. 11 Car. B. R. between * TIFFIN AND LENTON, adjudged in a writ of error upon a judgment in B. and the firſt judgment affirmed. Intratur Hill. 10 Car. Rot. 501. † 4 H. 7. 7. 3 H. 7. 6.]

* Cro. Car. 426. pl. 17. Tyffin's caſe, S. C. and judgment affirmed. —— Jo. 367. pl. 7. Tippen v. Fenton, S. C. and judgment was affirmed according to the book of 4 H. 7. 6. and 7. a. and 2 Eliz. Sir Cha. Howard's caſe, but if judgment had been given againſt both, it had been error. —— Ld. Ravm. Rep. 601. Trin. 12 W. 3. Arg. cites ſame caſes, and ſays it ſeems to be a ſettled point, that where treſpaſs is brought againſt ſeveral, and they plead not guilty, and then one of them dies, and a venire and diſtringas iſſue to try the iſſue between the plaintiff and the two defendants, and a verdict for the plaintiff againſt both, the plaintiff may ſurmiſe the death of one of the defendants, and ſhall have judgment for the whole againſt the other, and good; and of this opinion the whole Court ſeemed to be as to the dead man.

† Fitzh. Brief, pl. 185. cites S. C. —— See (S) ſupra, pl. 4. S. C. and the notes.

[2. In an action upon the *caſe for ſeveral words ſpoke at ſeveral times*, and upon not guilty pleaded the *jury* find for the plaintiff, and *give intire damages;* upon which a verdict is given, *if the words ſpoke at one day will bear an action, and the words ſpoke on another day will not* bear an action, this is erroneous; for it ſhall be intended the damages were given for the words ſpoke at both times.

See tit. Damages (Q) per totum.

times. Mich. 13 Car. B. R. between ALCOCK AND PARGRAVE, per Curiam adjudged in arreſt of judgment.]

See tit. Damages (Q.) per totum.

[3. *But* in an action upon the caſe *for words ſpoke at one time*, though *part of the words are actionable and part not*, and the jury find him guilty, and tax damages generally, this is a good verdict, for it ſhall be intended that they gave the damages for thoſe words only which are actionable; this is the common practice. Co. 10. OSBORN'S CASE.]

The declaration was, de placito debiti, and then ſhews the ſale of ſuch and ſuch things at ſuch a price, and concludes, that they attingunt to ſuch a ſum, and ſo demands the ſum, whereas in truth the ſums were miſcaſt; it was inſiſted that this was erroneous; but the Court held it to be only the miſpriſion of the clerk, and no error. The reporter adds a quære, if the verdict had found, and the jury had given damages for the intire ſum miſcaſt, it ſeems that it would be error. 2 Roll. Rep. 45. Trin. 16 Jac. B. R. Hill v. Whittingham.——Cro. J. 494. pl. 15. Whittingham v. Hill, S. C. but S. P. does not appear.——See tit. Miſcaſting (A) per totum.

[4. In an action upon the *caſe upon a promiſe*, if the *plaintiff declares that the defendant was indebted to him for wares ſold*, ſcilicet, *for ſuch wares ſo much, for ſuch wares ſo much*, &c. in toto ſo much, &c. and *miſcaſts the total ſum*, (putting more than the total ſum in truth,) and thereupon aſſumed, &c. and the defendant pleads the general iſſue, and it is *found for the plaintiff, and damages given*, and judgment, this is error, becauſe by intendment the jury gave damages according to the total ſum put, and not according to the particulars. Mich. 14 Car. B. R. between MILBORNE AND SHAFTOE adjudged, and judgment given in Newcaſtle reverſed accordingly. Intratur P. 14 Car. Rot. 325. and ſo adjudged. Paſch. 13 Car. B. R. between KELLET AND ASHE in arreſt of judgment.]

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Hob. 88. pl. 115. Hill. 11 Jac. S.C. —— For de minimis non curat lex. —— Jenk. 287. pl. 22. S. C.

[5. *But* if the miſcaſting be *in a ſmall ſum as three farthings more than is declared for in a great ſum*, and this not certain, this ſhall not be ſo minced as to make error. HOBART'S Reports, LASTLOW AND TOMLINSON.]

In treſpaſs, the plaintiff declared of the taking of one parcel of cloth, containing 18 yards, and of another containing 20 yards, and of two other parcels. The jury found him guilty as to five parcels; and judgment given in C. B. but was reverſed; becauſe it ſhall not be intended, one of the firſt pieces containing ſeveral yards contained divers parcels, and then the jury found him guilty of five parcels, whereas the plaintiff declared of four only. 2 Roll. Rep. 415. Mich. 21 Jac. B. R. King v. Hoſkins.

[6. In *trover* and converſion *for divers ſeveral goods*, if the *jury find him guilty for other goods than thoſe in the declaration, and give damages for all*, and judgment is given accordingly, this is error. Paſch. 14 Car. B. R. between GRIFFITH AND CLARK, adjudged in a writ of error upon a judgment in Ireland, and this reverſed accordingly. Intratur Mich. 13 Car. Rot. 205.]

See (B. b) infra, pl. 29. S. C.

[7. In *debt upon an obligation*, if the *defendant pleads non eſt factum*, which is *found for the plaintiff*, and the *jury aſſeſs damages occaſione infraſcripta*, this is good, *without ſaying occaſione detentionis debiti*, for this is tantamount. Paſch. 8 Ja. B. ALCOCK'S CASE, adjudged in Camera Scaccarii in a writ of error.]

Fol. 568.

[8. In an action upon the *caſe*, if the *plaintiff declares for ſlander of his title to certain lands, and alſo for ſpeaking ſcandalous words of his*

his perſon, and *the action is not well alleged as to the ſlander of title* to the land, *but well as to the ſlander of the perſon*, and not guilty is pleaded, and it is *found for the plaintiff, and intire damages* given, this is error; for it ſhall be intended that the jury gave the damages as well for ſlander of the title of land, as to the perſon. Trin. 15 Car. B. R. between NEVILL AND NEVILL, per Curiam; this being moved in arreſt of judgment.]

9. *Aſſiſe by two againſt one*, who *pleaded that the one of the plaintiffs was not ſeiſed ſo that he might be diſſeiſed*, and if, &c. nul. tort; *and againſt the other feoffment of his anceſtor whoſe heir, &c. with warranty; judgment if contrary to the warranty*, &c. And the *jury gave verdict, that the one was not ſeiſed ſo that he might be diſſeiſed, and found the bar againſt the other*; and the juſtices adjudged that the plaintiffs ſhould prejudice nothing by their writ; and the plaintiffs brought writ of *error becauſe the jury found the plea to the writ, and alſo inquired of the bar*, and yet the Court adjudged that they ſhould take nothing by their writ. And per Cur. this judgment was well given, by which the Court was in opinion to have given judgment to affirm the firſt judgment; nota. Br. Aſſiſe, pl. 5. cites 28 H. 6. 9.

10. In *treſpaſs*, &c. the plaintiff had a verdict, and upon a writ of error brought by the defendant he aſſigned for error, that the plaintiff had *declared to his damage of* 40 *l.* and that the *damages aſſeſſed by the jury were* 35 *l. and coſts encreaſed by the Court were* 6 *l. in all* 41 *l.* ſo that he had *recovered more than that whereof he declared*, for that was but for 40 l. but adjudged that the damages aſſeſſed by the jury being leſs than he counted for, though the coſts amount to more, it is not material. Cro. Eliz. 866. pl. 47. Mich. 43 & 44 Eliz. in Cam. Scacc. Comb v. Carew.

11. Judgment in *aſſumpſit*, error aſſigned was, for that the *plaintiff had declared ad damnum* 10 *l.* and the *jury gave him* 10 *l. damages, and* 13 *s.* 4 *d. for coſts, which is more than what he had declared for*; ſed non allocatur; for though the entry is of damages and coſts by the name of damna, yet they are diſtinct, and though the jury had found more damages than the plaintiff had declared for, and judgment had been given, it had been erroneous; but if they had found more coſts than the damages had amounted to, it had not been error; for it may be, that *the coſts of ſuit by long depending might exceed the debt*. Cro. J. 69. pl. 11. Paſch. 3 Jac. B. R. Egles v. Vale.

Yelv. 70. Vale v. Egles, S. C. held accordingly.

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12. In *dower* there was a *judgment by default*, and a writ of ſeiſin to the ſheriff, &c. and alſo a *writ of inquiry, whether the huſband died ſeiſed, and of what eſtate, whether in fee, or in tail*; the *jury found, that the huſband died ſeiſed, but whether in fee or in tail ignorant*, and they found the value of the lands, &c. and quantum temporis elabitur, &c. whereupon judgment was given that ſhe recover, &c. and her damages to 60 l. A writ of error was brought, and after the record removed the widow died, whereupon the plaintiff in error brought a ſci. fa. againſt her executor ad audiend' errores, and upon 2 nihils returned he aſſigned error, (viz.) that there

Noy, 126. Brownlowe v. Littleton S. C. reſolved upon ſearch of precedents that a ſcire facias does not lie againſt the executor for the damages.

ought to be no *judgment to recover damages, becauſe the jury had not found any dying ſeiſed of any eſtate of inheritance* in the huſband, as the writ ſuppoſed, for if he did not die ſeiſed of ſuch an eſtate, the widow ſhall not be endowed; and this was adjudged error. Yelv. 112. Mich. 5 Jac. B. R. Bromley v. Littleton.

13. In treſpaſs the *entry* in the record *was, ad quem diem A. B. and C. D. &c. of the principal panel veniunt & jurati exiſtunt, and becauſe the reſt did not appear, W. N. and J. N. de novo apponuntur qui ad veritatem de infra content' electi, triati & jurati dicunt* ſuper ſacram' ſuum, *omitting theſe uſual words (ſimul cum aliis juratoribus prius impanellat')*, ſo that this was the verdict of the tales only, and not by thoſe with whom they were ſworn; and all the judges and barons being of this opinion, the judgment was reverſed. Cro. J. 207. pl. 3. Paſch. 6 Jac. in Cam. Scacc. Kempton v. Bartell.

14. In *detinue*, the plaintiff *declared to his damage of* 100 *l.* and the jury *found the damages to* 150 *l.* and judgment for ſo much; but upon error brought the judgment was reverſed; for where the plaintiff counts of a certain damage, he is to recover no more than he has counted for. 1 Bulſt. 49. Mich. 8 Jac. Hoblins v. Kimble.

15. Error aſſigned was, becauſe *two ſeveral aſſumpſits* were laid, *whereof the one was void and the other good*, and *verdict* was *for the plaintiff, and intire damages* given by the jury. The Court agreed this to be clear error and reverſed the judgment. 3 Bulſt. 235. Mich. 14 Jac. Porter v. Chapman.

16. The *original* in C. B. *concluded ad damnum* 40 *l.* and the *declaration was ad damnum* 100 *l.* Upon not guilty pleaded, the *jury gave* 12 *d. damages;* and upon a writ of error brought, this variance between the writ and declaration was aſſigned for error; adjudged, this had been a good objection in the original action upon a demurrer to the declaration, but it is not ſo after a verdict, eſpecially after the jury had found 12 d. damages; but if the verdict had found more damages than what was mentioned in the writ, and leſs than in the declaration, yet it had been ill, becauſe there was no writ to warrant ſuch damages; but when the damages are leſs than they are in the writ or count it is otherwiſe, and therefore held by all the juſtices to be well enough. Cro. J. 629. pl. 2. Hill. 19 Jac. B. R. Eardley v. Turnock.

17. Error upon a judgment in B. R. in Ireland, where the *jury gave* 10 *l.* 6 *d. for damages and coſts*, and *the judgment entered was, quod recuperet dampna ſua per juratores aſſeſſa ad valorem* 10 *l.* and *no notice was taken of the* 6 *d. nor was that part releaſed;* and it was held naught, becauſe damages and coſts are all dampna, and both
[567] included by that word in the judgment; and judgment was reverſed niſi; Arg. 2. Show. 56. pl. 42. cites Mich. 30 Car. 2. B. R. Oſborn v. Exton.

18. In debt on an obligation, the *jury in aſſeſſing damages ſay, pro mis' & cuſtag', omitting the words, circa ſectam expenditis*, and ſo it doth not appear for what the coſts and damages were aſſeſſed; the judgment was ordered to be reverſed, niſi. Sty. 164. Mich. 1649. Crible v. Orchard.

19. In

19. In treſpaſs the *iſſue was, de injuria ſua propria abſque tali cauſa*, and the jury *found the defendant not guilty generally*; per Roll Ch. J. this is not good, becauſe it was not a direct finding the iſſue, but only argumentatively; and judgment was reverſed, niſi, &c. Sty. 167. Mich. 1649. Hobbs v. Blanchard.

20. Error was brought upon a *judgment by default in caſe* in C. B. and the error aſſigned here was, that the *jurors upon the writ of inquiry had aſſeſſed more damages than were laid in the declaration*, and the *judgment being quod recuperet dampna ſua prædict' per juratores prædict' aſſeſſ'*, &c. naught; and for this error the judgment was accordingly reverſed. Arg. 2 Show. 56, 57. cites Mich. 29 Car. 2. Webb v. Webb.

Ibid. The reporter ſays, nota that in this caſe the *plaintiff might between the verdict and judgment have releaſed the ſurpluſage of the damages* here meant, and ſuch releaſe being entered upon the record would have rendered the judgment well enough.

21. Error on a *judgment* in B. R. in Ireland which was *by default*, and writ of inquiry; and the *jury aſſeſs 100 l. and 6 d. coſts*, and the *judgment is quod prædict' querens recuperet dampna ſua prædict' ad cent' libras per inquiſition' prædict' compert' & pro increment' 7 l.*, &c. Agreed, that *if ad cent' had been left out*, it had been doubtleſs good; argued therefore, that the reſt ſhould be ſurpluſage, or elſe miſcounting, which will not vitiate the judgment. However the rule was quod reverſetur jud' niſi, &c. 2 Show. 88, 89. pl. 82. 31 & 32 Car. 2. Anger v. Brookhen.

But the reporter ſays quære; for dampna being a general word for the coſts and damages, it ſeems to be a complete judgment in that quod recuperet dampna ſua prædict', and the reſt coming after was ſurpluſage, for if they had ſaid no more than this, quod recuperet dampna ſua prædict' & de incremento, &c. ad requiſition', &c. it would doubtleſs have been well enough. Ibid.

(A. b) *In Judgments.*

No letter in Roll between (Q. a) and (A. b).

What Act or Thing ſhall be ſaid Error.

[1. IF the *huſband ſeiſed in right of his wife makes an ejectment leaſe*, and the *leſſee brings an action thereupon, and hath a verdict, and judgment*, it is not error to *allege the death of the feme before judgment*, by which the intereſt of the baron and leaſe by him made to the plaintiff determined, becauſe the *feme nor her huſband are not parties to the action*, and this depends upon the title of the land, for the plaintiff may ſay the baron was ſeiſed in his own right. Hobart's Reports, 8. between WILKS AND JORDAN adjudged.]

Hob. 5. pl. 10. S. C.—Cro. J. 332. pl. 14. Jordan v. Wikes, S. C. but there it is that the huſband died after the leaſe made, and before the action brought; but the Court held, that in regard the feme had not entered after the death of her huſband, the leaſe is not determined nor void after her huſband's death, but voidable only.—Jenk. 293. pl. 39. S. C. ſays the writ does not abate; and the plaintiff may have judgment and a writ of execution.

[2. If a man brings an *ejectione firmæ in B. R.* and there hath a *verdict for him upon a trial at bar*, and after *before judgment he dies, and after judgment is given for him the ſame term*, this is not error, becauſe the judgment relates to the verdict. Mich. 15 Ja. between

[568] Poph. 192. the Earl of Shrewſbury's caſe ſeems to be S. C. re-

solved that no writ of error should be allowed, nor any superſedeas granted.

between HIDE AND MARKER, which concerned the Earl of SHREWSBURY, per Curiam.]

Roll. Rep. 51. pl. 20. Jordan's caſe, S. C. and per tot. Cur. the judgment was reverſed, and it cannot relate to the niſi prius. ——Sid. 143. pl. 22. Paſch. 15 Car. 2. B. R. Anon. in a nota ſays, the death of one of the parties between the niſi prius and the day in Bank is error, becauſe the writ is thereby abated, though it cannot be pleaded. ——*But by the ſtat* 17 *Car.* 2. *cap.* 8. *ſ.* 1. *made perpetual by* 1 *Jac.* 2. *cap.* 17. *in all actions perſonal, real, or mixt, the death of either party, between the verdict and the judgment, ſhall not be alleged for error, ſo as ſuch judgment be entered within two terms after ſuch verdict.* ——Though the judgment be not entered on the roll till after two terms, yet if it be ſigned within two terms it has been held within the act, whence it appears that the judgment is completed; and ruled that judgment be entered on the roll, and the execution to ſtand. Sid. 385. pl. 17. Mich. 20 Car. 2. B. R. Helie v. Baker.

[3. If a *verdict* paſſes *againſt the plaintiff at niſi prius*, and after, *before the day in Bank, he dies*, and *after judgment is given againſt him*, this is error, inaſmuch as judgment was given againſt a dead perſon. Tr. 12 Ja. B. R, JURDAN'S CASE adjudged.]

Br. Error, pl. 123. cites S. C.

[4. If the *tenant in a real action dies, pending the writ*, and after *judgment is given againſt him*, this is error, becauſe it is given againſt a dead perſon. 28 Aſſ. 17. adjudged.]

Fitzh. Judgment, pl. 193. cites Mich. 27 E. 3. 88. S. P. [This is 27 E. 3. fol. 12. b. pl. 55. S. P.]

[5. In an *action againſt baron and feme* if the *feme* be *received* and *traverſes the action*, and this is *found againſt her by niſi prius*, and after the *baron dies before the day in Bank, at which day the judgment is given*, this is error, becauſe the judgment is given againſt a dead perſon. 27 E. 3. 89.]

4 Le. 15. pl. 55. Blaby v. Eſtwick, S. C. the Court cannot take notice of ſuch death judicially on the allegation, nor hath any of the parties day in court to plead it, but may have a writ of error. ——Cro. E. 202. pl. 32. S. C. accordingly.

† Roll. Rep. 14. pl. 18. Lee v. Rowkeley, S. C. in ejectment the Court adviſed the plaintiff to relinquiſh this action, and only to enter the verdict for evidence, becauſe the giving judgment againſt both will be erroneous; per Doderidge, and Mann prothonotary; but it is there added, that Mich. 12 Jac. Coke ſaid, that the plaintiff may make allegation that the one is dead, and ſhall have judgment againſt the other; and that ſo is the 44 E. 3. ——Cro. J. 356. pl. 12. Rigley v. Lee & Ux' S. C. and becauſe the action, which was an ejectment, is in nature of an action of treſpaſs, and the feme is charged for her own fact, it was adjudged that the action continues againſt the feme, and that judgment ſhould be entered againſt her alone, becauſe the baron was dead. ——But if judgment was given againſt the ſurvivor only upon a ſurmiſe of the death of the other, it had not been error. Jo. 367. Tippen v. Fenton. ——Cro. C. 426. pl. 17. Tyffin's caſe, S. C. ——See (S) pl. 4. and the notes there.

[6. In an *aſſumpſit againſt two*, after a *verdict againſt them* at the aſſiſes by niſi prius, if *one of the defendants dies before the day in Bank*, and after *judgment is given againſt both* according to the verdict, this is erroneous, though the day of niſi prius and day in Bank are one day as to ſome purpoſes, for the judgment was given againſt a dead perſon. Paſch. 32 El. B. R. dubitatur between * BLADY AND EASTWIGG. Paſch. 12 Jac. B. R. between † LEE AND ROWKELY, per Curiam.]

[7. If a *judgment* be given *againſt three executors*, where *one was dead before the judgment*, yet this is not error. Hill. 41 El. B. R. adjudged in a writ of error.]

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Roll. Rep. 14. pl. 18. Paſch. 12 Jac. B. R.

8. A *verdict* was *againſt huſband and wife in ejectione firmæ, after trial by niſi prius, and before the day in Bank the huſband died*; adjudged the action continued againſt the wife, and judgment was entered

entered againſt her; for it is in the nature of an action of treſpaſs, and ſhe is charged for her own act. Cro. J. 356. pl. 12. Mich. 12 Jac. B. R. Rigley v. Lee.

Lee v. Rowkeley, S. C. the Court adviſed the plaintiff to relinquiſh the action, and only to enter the verdict for evidence; for if judgment be given againſt both, and one is dead at the time of the judgment given, it will be erroneous. Per Dodderidge and Man Prothonotary. But Mich. 12 Jac. Coke Ch. J. ſaid, that the plaintiff might allege that the baron is dead, and have judgment againſt the feme, and that ſo is 44 E. 3.

9. If a *verdict* be *given at niſi prius*, and the *plaintiff or defendant dies after the beginning of the term*, yet judgment ſhall be entered, for that relates to the firſt day of the term; agreed per Cur. Het. 157. Mich. 5 Car. C. B. Springall v. Tutterſbury.

10. Judgment was given againſt the defendant, and he brings a writ of error, and aſſigns for *error, that the plaintiff was dead at the time of the judgment given*. The plaintiff's entry is, that the aforeſaid plaintiff by A. B. his attorney venit & dicit, that he is in life, and iſſue thereupon, and found for the plaintiff in the writ of error that he was dead; and Serjeant Maynard moved that the judgment might be reverſed. Allen contra, becauſe there ought to have iſſued a ſcire facias againſt the executors of the party dead. It was adjourned. Raym. 59. Mich. 14 Car. 2. B. R. Dove v. Darkin.

Lev. 80. Darkin v. Done, S. C. and by the opinion of three juſtices the judgment was reverſed, but Forſter Ch. J. e contra, becauſe though it appears by the verdict that the plaintiff was dead, yet it does not appear legally, the verdict itſelf not being lawfully obtained. And it was argued that the attorney who pleaded that he was living, did it without authority; for he could not be attorney to a dead man.——Sid. 93. pl. 17. S. C. reſolved accordingly; and ſaid, that if the executors in this caſe are at any prejudice, they may have action on the caſe againſt the attorney if he appeared without warrant. And Windham J. ſaid that his brothers at Serjeant's Inn ſaid this was good, but that the ſure way had been for the attorney to have pleaded, quod venit pro magiſtro ſuo D. and not that D. venit per attornatum.——Keb. 413, pl. 119. S. C. and judgment reverſed.

11. The *taking of baron between the niſi prius and the day in Bank* ſeems not to be error, it being *only a plea in abatement*. Sid. 143. pl. 22. in a nota. Paſch. 15 Car. 2. B. R. Anon.

12. 17 *Car.* 2. *cap.* 8. *ſ.* 1. *In all actions perſonal, real or mixt, the death of either party between the verdict and the judgment ſhall not be alleged for error, ſo as ſuch judgment be entered within two terms after ſuch verdict.*

12. The ſigning of the judgment within two terms is an entering of the judgment ſo that by the ſtatute 17 Car. 2. cap. 8. it may be *entered on the roll after the death of the party*. Sid. 385. pl. 17. Mich. 20 Car. 2. B. R. Helie v. Baker.

13. In writ of covenant verdict was for the plaintiff, but it being objected that it was a miſ-trial, for that the venire fac. was miſawarded, it being to an adjoining county; but after argument the *Court ruled the venire well awarded; but the caſe having remained two or three terms ſince the poſtea was returned, and no continuances entered, one of the plaintiffs died*, and it was doubted whether judgment could be now entered; and the Secondary ſaid, that they did enter up judgments two terms after the day in Bank, without any continuances; and of this matter the Court would be adviſed.

Vent. 90. Trin. 22 Car. 2. in B. R. S. C. And it was prayed notwithſtanding that judgment might be entered, there being no default in the

Plaintiff, but a delay, which came

Vent. 58, 59. Hill. 21 & 22 Car. 2. in B. R. Criſpe and Jackſon v. Berwick Mayor and Commonalty.

by the act of the Court, and that it was within the ſtatute of this king, that the death of the party between verdict and judgment ſhould not abate the action, and that it was in the diſcretion of the Court whether they would take notice of the death in this caſe; for the defendant has no day in court to plead, there being no continuances entered after the return of the poſtea, and cites Leon. 187. Iſley's caſe, Latch's Rep. 92. [Farnel v. Tupper]. And * the Court were of opinion, that judgment ought to be entered, and there being no continuances, it may be entered as if immediately upon the return of the poſtea.——Lev. 252. Mich. 20 Car. 2. B. R. S. C. adjornatur, but the reporter ſays he heard that judgment was afterwards given for the plaintiff.——Mod. 36. pl. 88. S. C. but adjornatur, to hear counſel,——Raym. 173. S. C. but S. P. does not appear.——Sid. 462. pl. 5. S. C. & S. P. and that judgment was entered as in the life of the party, and that ſuch entry is well warranted both by the common law and by ſtatutes. And that Twiſden J. ſaid, that if the *party had died in the term before the judgment entered*, and the ſame had been ſuggeſted to the Court, yet they would take no notice of it, but ſhould proceed to judgment; and as to the principal caſe it was ſaid, there is no reaſon that the laches of the court ſhould prejudice the plaintiff.

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14. The *plaintiff after verdict for him at the aſſizes died;* it was moved, that notwithſtanding the ſtatute 17 Car. 2. cap. 8. which enacts that the death of either party after verdict, and before judgment, ſhall not be alleged for error, that the defendant coming now before judgment was entered, was out of the ſtatute; ſed Curia contra; for if it ſhall not be alleged after judgment for error by the ſtatute it was certainly *never intended that it ſhould be admitted a ſufficient cauſe to ſtay judgment.* Freem. Rep. 79. pl. 97. Paſch. 1673. C. B. Bellamy v. Player.

Freem Rep. 532. pl. 716. S. C. adjudged in C. B. for the plaintiff. —2 Show. 177. pl. 173. S. C. in B. R. Sed adjornatur

15. Writ of error upon a judgment in C. B. *in trover againſt ſix, where after verdict one of the plaintiffs* comes and *ſuggeſts that his fellow is dead, and prays that he as ſurvivor may have judgment,* and had it there; but the Court here, viz. Pemberton Ch. J. Jones, Raymond, and Dolbin, were of opinion that the judgment ſhould be reverſed mainly upon the reaſon in READ AND REDMAN'S CASE, 10 Rep. 134. Skin. 39. pl. 7. Paſch. 34 Car. 2. B. R. Wedgewood v. Bayly.

——Raym. 463. S. C. in B. R. and judgment was agreed to be reverſed by the opinion of three juſtices againſt Dolben, who deſired time to conſider.——3 Mod. 249. Arg. cites S. C. that the judgment could not be entered; but ſays it is true, that where ſo many are defendants and one dies, the action is not abated, but then it muſt be ſuggeſted on the roll.——8 & 9 *W.* 3. *cap.* 11. *ſ.* 7. *provides, that if there are two or more plaintiffs or defendants, and one dies, if the cauſe of action ſurvives to or againſt the ſurviving plaintiff or defendant, the writ or action ſhall not abate, but ſuch death being ſuggeſted on the record ſhall proceed.*

16. *Error in fact* aſſigned, *that the plaintiff died before the judgment,* but the judgment was affirmed, niſi, &c. And Holt ſaid, he was not well ſatisfied with the caſe of DOVE v. DARCEN, Sid. 93. for there ſhould be a ſcire facias againſt the executors or adminiſtrators, and the truth will appear upon the ſheriff's return. Comb. 320. Paſch. 7 W. 3. B. R. Proberts v. Edmunds.

17. 8 & 9 *W.* 3. *cap.* 11. *ſ.* 2. *If after judgment for the defendant the plaintiff or demandant ſhall ſue a writ of error, and the judgment ſhall be affirmed, or the writ of error diſcontinued, or the plaintiff nonſuit therein, the defendant or tenant ſhall have judgment to recover his coſts, and have execution for the ſame by capias ad ſatisfaciendum, fieri facias, or elegit.*

18. The

18. The *huſband joined in a writ of error*, yet it was ruled that *by his death the writ abated*; otherwiſe it is where the *defendant in error dies after in nullo eſt erratum pleaded*, for there the *Court may proceed* to examine the errors. Comb. 263. Trin. 6 W. & M. in B. R. Fitzgerald v. Clanrickard Counteſs. Show. 76. S. C. but not S. P.

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Fol. 769.

(B. b) In Judgments.

What Things ſhall be Errors in Judgments.

[1. IN an *indictment for not repairing a common highway*, if the *defendants are found guilty*, and a *fine impoſed & quod ſint in miſericordia without a capiatur*, this is error. Hill. 10 Car. B. R. between THE INHABITANTS OF SOMERSHAM, IN COMITATU HUNTINGTON, AND THE KING adjudged; and the firſt judgment reverſed accordingly.] Upon every conviction upon an indictment the judgment is, quod capiatur, and the omiſſion thereof is to the king's prejudice, and for this omiſſion a judgment for the king upon an indictment for recuſancy was reverſed. Cro. C. 504. pl. 6. Trin. 14 Car. B. R. the Marquis of Wincheſter's caſe. ——Jo. 407. pl. 5. The King v. Ld. St. John, S. C. accordingly.

[2. If the *judgment* be *quod the plaintiff or defendant capiatur where it ſhould not be*, this is error, for it is a falſe judgment, and in prejudice of the party. Tr. 15 Ja. between WHEATELEY AND STONE, per totam Curiam in a writ of error at Serjeant's Inn agreed. Dyer, 14 El. 315. 99. admit.] Hob. 180. pl. 215. S. C.

[3. *So* if the plaintiff or defendant be *amerced* by the judgment where he ought not, this is error. Dyer, 44 El. 315. 99. admitted. 6 E. 6. 75. 22.]

[4. *So* if the judgment be *not quod capiatur where it ought to be ſo*, it is erroneous. Mich. 16 Car. B. R. FRIDEAN'S CASE, who was indicted for poiſoning J. S. but he did not die, and found guilty; and judgment to pay ſo much for a fine, and no capiatur quouſque, &c. and for this cauſe reverſed per Curiam; contra 29 E. 3. 30. b. adjudged.]

[5. *So* if the judgment be *not quod ſit in miſericordia*, where it ought to be ſo, it is erroneous. Co. 8. BEECHER'S CASE, 49. reſolved, becauſe the judgment is not perfect without it. Dyer, 14 El. 315. 99. admitted. 6 E. 6. 75. 22.] Cro. J. 211. pl. 3. Beecher v. Shirley, S. C. adjudged.

[6. In an *ejectione firmæ*, if *judgment* be given *upon a demurrer, or by default, or* upon a *non ſum informatus for the plaintiff to recover* the term, *but awarded that there ſhall be a writ of inquiry* of damages, *without ſaying quod capiatur*, this is erroneous; for it may be that he will never inquire of the damages, or make return thereof, and then the fine due upon the capiatur will be loſt. Tr. 1651. between in a writ of error upon a judgment in Banco; and the judgment reverſed accordingly.] Sty. 283. Giles v. Timberley, S. P. and ſeems to be S. C.

[7. If the *judgment* be *quod capiatur where it ought to be quod ſit in miſericordia*, this is erroneous, for by this the judgment is altered, Hob. 180. pl. 215. S. C.——

Cro. E. 107. pl. 2. Mich. 30 & 31 Eliz. B. R. Pellicote v. Taylboys, S. P. adjudged, and the former judgment reverſed.

and this is in prejudice of the party. Tr. 15 Ja. between WHETELY AND STONE, in a writ of error at Serjeant's-inn, agreed per totam Curiam.]

Cro. J. 211. pl. 3. Beecher v. Shirley, S. C. and judgment reverſed accordingly.—Cro. E. 84. pl. 2. Hill. 30 Eliz. B. R. Crow's caſe, S. P. and the firſt judgment reverſed.——Freem. Rep. 281. pl. (320. c.) S. P. and judgment reverſed, cites Trin. 1673. B. R. Underwood v. Burlacy.——Cro. J. 538. pl. 5. Trin. 17 Jac. B. R. Miller v. the King, S. P. aſſigned for error on a judgment on a penal ſtatute, and judgment was reverſed.

[8. *So* if the judgment be *quod ſit in miſericordia where it ought to be* quod *capiatur*, this is erroneous, for the cauſe aforeſaid. Co. 8. BEECHER, 59. P. 3 Ja. B. R. between RIVERS AND GUYNN adjudged, and the firſt judgment reverſed. P. 43 El. B. R. Tr. 14 Car. * B. R. between MARGATRODE AND BEVERLY, adjudged in a writ of error. Intratur P. 14 Rot. 168.]

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[9. If the judgment be *quod ſit in miſericordia & quod capiatur, where it ought to be only in miſericordia*, this is error. Mich. 8 Car. B. R. Intratur Tr. 8 Car. Rot. 477. between KENT AND FOWKES reſolved, and ſuch judgment given in Lincoln reverſed.]

[10. And *in theſe caſes* the error is in the whole judgment, and *the whole ſhall be reverſed* for it, *as well the judgment of the party as for the king*. Co. 8. BEECHER, 59. reſolved. Tr. 15 Ja. between WHETELY AND STONE, in a writ of error at Serjeant's-inn, agreed per totam Curiam. Quære Dyer, 14 El. 315.]

† Fol. 770.

[11. In an *information againſt an ingroſſer*, upon the ſtatute of 5 Ed. 6. if the *judgment* be againſt the ingroſſer *quod capiatur*, &c. *without expreſſing* in certain *that he ſhall be impriſoned for the time limited in the ſtatute*, ſcilicet per two months; yet this is not error in the judgment, for this is the common (†) courſe of ſuch judgments where a certain time is limited for the impriſonment, for the word &c. ſupplies all. Tr. 16 Ja. between THE KING AND CURTIS. H. 15 Ja. B. R. between BROWN AND MARSHAL adjudged; and it was ſaid by the clerks, that this is the common courſe.]

Palm. 509. Gayer v. Goter, S. C. and judgment affirmed niſi, &c. Jo. 171. pl. 4. Gofer v. Gregory, S. P. and ſeems to be S. C. and the firſt judgment was affirmed.

[12. In *debt upon an obligation*, if *upon non eſt factum* pleaded, *it is found his deed*, upon which *judgment* is given quod defendant ſit *in miſericordia & quod capiatur*; this double judgment is erroneous, and this makes the whole judgment erroneous. P. 3 Ja. B. R. between BANKS AND PEMBLETON adjudged in a writ of error. Mich. 8 Car. B. R. between KENT AND FOWKES adjudged, and a judgment given in Lincoln in an action upon the caſe, where the judgment ſhould be quod capiatur reverſed accordingly. Intratur Tr. 8. Rot. 477.]

[13. In an action upon the *caſe upon a promiſe*, if *judgment* be given for the plaintiff *upon demurrer*, and a *writ of damages awarded, and* thereupon *damages taxed to* 35 *l.* and upon this

judgment

judgment is given *quod querens recuperet damna præd' ad* 37*l. per juratores præd' aſſeſſa*, yet this judgment is not erroneous, becauſe the judgment is perfect by the firſt words, quod recuperet damna prædicta, without more, and therefore *the ſummoning thereof* afterwards *is but ſurplus;* and therefore this being miſtaken it does not vitiate the judgment. H. 3 Car. B. R. between GUIER AND GOTER adjudged in a writ of error upon a judgment in the city of Pool in Southampton; which Intratur M. 2 Car. Rot. 247.]

[14. In an action of *debt* if the defendant *pleads nil debet*, and the *jury find* it *for the plaintiff*, and *tax damages to* 12*d. and* for *coſts* 12*d.* and thereupon *judgment* is given *quod querens recuperet debitum ſuum præd' & debita ſua præd'* (inſtead of *damna*) this is erroneous, for the word *debita* does not include damna. Mich. 11 Car. B. R. betwen MORGAN AND BAYLY adjudged per Curiam, and ſuch judgment given in Southwark reverſed accordingly in a writ of error. Intratur Tr. 9 Car. Rot. 895.]

[15. In *debt*, if *judgment* be given for the plaintiff *by default* [573] of the defendant, and the *judgment* is *quod recuperet debitum & damna occaſione detentionis debiti ad* 13*s.* 4*d. ex aſſenſu ſuo per Curiam de incremento adjudicat'*, this is a good judgment, though *no mention of the coſts;* for *damages include coſts.* Mich. 11 Car. B. R. between PIERCE AND BROWN adjudged in a writ of error to reverſe a judgment given in the hundred court of Slaughter. Intratur P 10 Car. Rot. 1335. but it was ſaid alſo in this caſe that the defendant ſhall not aſſign for error the not giving of coſts, becauſe it was for his advantage.]

[16. In an action upon the *caſe upon a promiſe*, if the defendant pleads non aſſumpſit, and the jury *find for the plaintiff*, and *tax damages and coſts*, and upon this *judgment* is given *quod querens recuperet damna & cuſtagia per juratores præd' aſſeſſa &* 40*s. de incremento per Curiam*, and does *not ſay whether for damages or coſts*, yet this is good, for it ſhall be intended for coſts, becauſe the Court could not increaſe the damages. Tr. 11 Car. B. R. between COOLING AND LAWRENCE adjudged in a writ of error upon judgment in the court of Coventry. Intratur Tr. 10 Car. Rot. 1328. Co. Entries, 22. SNAG'S CASE.]

[17. In an action of *debt*, if upon *nil debet* pleaded it be *found that the defendant owes the plaintiff* 5*l.* debt, and the *jury aſſeſs the damages to* 2*d. and* the *coſts* 2*d.* and the *judgment* is entered, *that the plaintiff* ſhall *recover debitum & damna præd' to* 2*d.* and *ſays nothing of the coſts*, the judgment is erroneous, though the damna generally comprehends as well coſts as damages; for in this caſe it is limited but to 2d. and ſo no judgment for the other 2d. Mich. 15 Ja. B. R. between HOMES AND TWISTE adjudged in a writ of error, and the judgment reverſed.]

[18. In a *trover* and converſion of goods, if the defendant be *found guilty of part, and for part not guilty*, but *no judgment* is *given for thoſe of which he is found not guilty*, ſcilicet, *quod eat inde ſine die*, as it ought to be, this is erroneous. Hill. 13 Jac. B. R. between WOOD AND DR. SUTCLIFF per Curiam.]

Cro. J. 439, 440. pl. 2. Wood v. Suckling, S. C. and judgment reverſed — Roll. Rep. 293. pl. 8. S. C. adjudged. — 3 Bulſt. 150, 151. S. C. but S. P. does not appear.

[19. If a man *recovers debt or damages upon a verdict*, and *judgment is given thereof, and 2s. de incremento generally, without saying* in the record, as the uſe is, *ex requiſitione querentis, or ex aſſenſu partium*, this judgment is erroneous. Paſch. 15 Jac. B. R. HARDYE AND MAYHEW; the judgment reverſed for this. Mich. 15 Jac. B. R. between FAR AND LOGGINS per Curiam; the judgment reverſed; which Intratur Mich. 12 Car. Rot. 259. Mich. 18 Jac. B. R. between * SARKE AND YEOMANS adjudged in a writ of error, and ſo the ſame term adjudged between † CONCELLOR AND AIER, and *no diverſity where the judgment is upon nil dicit, and where upon verdict.* Hil. 2 Car. B. R. between ‡ LAWRENCE AND GAD adjudged an erroneous judgment, which was ideo ad petitionem querentis conſideratum eſt quod querens recuperet, &c. & damna de incremento, ſo much becauſe the petition was not in the right place.]

* Cro J. 587. pl. 10. Sache v. Yeoman, S. C. and the firſt judgment reverſed.

† Cro. J. 587. in pl. 10. cites a like judgment reverſed for this cauſe, in caſe of Cowſlaw v. Eyre, S. C. ——Palm. 148. Conſlade v. Ayres, S. C. and the firſt judgment was reverſed.

‡ Poph. 211, 212. Good's caſe, S. P. and ſeems to be S. C. adjudged accordingly. —— Lat. 177. Good v. Lawrence, S. C. and the firſt judgment reverſed.

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See pl. 18. S. C. and the notes there.

[20. In a *trover* and converſion, if the defendant be *found guilty of part, and not guilty of the reſt*, upon which *judgment* is given *for that for which he is found guilty, and no judgment* is given *quod eat inde ſine die for the reſidue, it is erroneous.* M. 15 Jac. B. R. between WOOD AND SUTCLIFFE, this was moved for an error, but not reſolved, but the judgment reverſed for other error.]

[21. If a man *recovers in* an action upon the *caſe*, and the *judgment* is entered *ideo conceſſum eſt quod querens recuperet* where the uſual word is ideo *conſideratum eſt*, &c. this is erroneous, though *conceſſum* be equivalent to the word *conſideratum*, becauſe the uſual form ought to be obſerved. Mich. 13 Jac. B. R. 42. between ‖ ROBINS AND SAMBIN. Dubitatur Hill. 11 Car. B. R. between § DALAMORE AND HESKINS adjudged in a writ of error, and the judgment given at Bath reverſed accordingly. Intratur Tr. 11 Car. Rot. 900.]

‖ Cro. J. 278. pl. 53. S. C. adjornatur.—— Ibid. 386. pl. 17. Robins v. Sanders, S. C. and to make good this entry divers precedents were cited in the precedents of Ld. Coke; but it was anſwered, that it was a miſpriſion of the printer.——— 3 Bulſt. 92. S. C. and the judgment agreed to be erroneous.

§ Cro. C. 442. pl. 13. Slocomb's caſe, S. P. ruled accordingly, and ſeems to be S. C.——Lat. 76. in a nota, S. P. and judgment was reverſed. —— Ibid. 83. Hill. 22 Jac. Hern v. Warden, S. P. and judgment reverſed.——Noy, 77. Heene v. Warden, S. C. accordingly. —— Ibid. 188. Mich. 2 Car. Cook v. Williams, S. P. and judgment reverſed.——Noy, 77. cites Cooper v. Williams, S. C. and judgment reverſed accordingly.——S. P. Bulſt. 125, 126. Paſch. 9 Jac. B. R. Fuller v. Righteous, in a judgment given at Lynne, and the whole Court were of opinion that conceſſum eſt is not good, and as to the judgment in 1 Rep. 83. in Corbet's caſe, and 119. in Chudleigh's caſe, being ideo conceſſum eſt quod, &c. Cur. theſe judgments are falſe printed, and Mann Secondary informed the Court that the roll was right, viz. ideo conſideratum eſt; quod nota. ——— But ſee tit. Amendment, (P).——But ſee Hob. 17. pl. 28. at the end of the caſe of Read v. Hawke. And Ibid. 19. pl. 34. Fitzhughes's caſe. And Ibid. 194. pl. 245. at the end of the caſe of Winchcomb v. Pulleſton, in which caſes is the word conceſſum.

[22. If the *judgment* be *ideo conſideratum, conceſſum & adjudicatum eſt quod querens recuperet*, &c. though the words *conceſſum & adjudicatum* are more and more than neceſſary, yet this makes the judgment erroneous, becauſe the *term of judgments ought to be obſerved*, which is conſideratum only. Hill. 2 Car. B. R. between

LAWRENCE

* LAWRENCE AND GAD adjudged in a writ of error. Paſch. 8 Car. B. R. Rot. BAUNTSEY'S CASE, a judgment in an indictment of barretry reverſed, becauſe the judgment was ideo conceſſum eſt quod, &c.] * Lat. 177. Good v. Lawrence, S. C. and ruled to be error; and

ſaid, if they were not tied up to form there never would be an end of new and ſenſeleſs words, and perhaps at laſt it would be neceſſary to have one judgment to expound another. ——Poph. 211, 212. Good's caſe, S. C. and the firſt judgment was reverſed.

[23. If the *judgment* be *ideo conſideratum eſt quod querens recuperaret*, for *recuperet*, this is erroneous. Trin. 3 Car. between STROUD AND BLUNDELL adjudged in B. R. in a writ of error upon a judgment given in Baſingſtoke in Hampſhire. Mich. 14 Car. between PICEKILL AND ROTHERFORD adjudged in a writ upon a judgment in Newcaſtle. Intratur Hill. 13. Rot. 1093.] Lat. 211. Strand v. Lunden, S. C. and judgment reverſed.

[24. If a judgment be ideo *conſideratum fuit* for *conſideratum eſt*, it is erroneous. Trin. 3 Car. B. R. between adjudged in a writ of error upon a judgment given in Lincoln.] Sty. 183. Mich. 1659. Spry v. Mill, S. P. and Roll Ch. J.

ſaid it was a good exception for the uncertainty of the words. ——Comb. 479. Paſch. 10 W. 3. B. R. Hall v. Jackſon, S. P. and held to be fatal.

[25. If an action of *debt* be brought *againſt two by one original with ſeveral præcipes upon one obligation in which they are obliged jointly and ſeverally, and ſeveral declarations are made againſt them, and ſeveral judgments given*, but theſe words are not put in the †judgment, as the uſe is, ſcilicet *(unica tantum fiat executio)*, yet the judgment is not erroneous, becauſe theſe words are uſed to be entered for the direction of the (‡) clerks, and *are of form only*, for though the words are not entered, yet he ſhall have but one execution. Trin. 12 Jac. B. R. between BANKS AND CHAMBERLAIN adjudged.] †[575] Roll. Rep. 44. pl. 11. S. C. and the judgment was affirmed. ‡ Fol. 772.

[26. In an *ejectione* firmæ, if the judgment be *found guilty for part and for part not guilty*, the *judgment is quod defendens ſit quietus*, this is erroneous, for it ought to be quod eat inde ſine die. Trin. 12 Jac. between WILLIAM MORRIS AND CADWALLADER, dubitatur.] Roll. Rep. 51. pl. 22. S. C. Coke, Crooke, and Doderidge, ſeemed to incline

that the judgment was erroneous, but Haughton e contra; but the Court ordered precedents to be ſearched.

[27. In *a quare impedit againſt the ordinary, metropolitan, and others*, if the *ordinary and metropolitan plead that they plead nothing but as ordinary*, upon which the *plaintiff prays judgment* againſt them, *and* judgment *is entered that he ſhall recover againſt them, but* it is *not* alſo entered *quod ceſſet executio, till the plea of the others is determined* as the uſual courſe is, yet if *no execution* be *awarded* till the plea of the others is determined, it is not erroneous. Paſch. 14 Jac. B. R. Trin. 14 Jac. B. R. between GRANGE AND DENNY adjudged in a writ of error.] Roll Rep. 363. pl. 17. S. C. & S. P. held accordingly by Coke Ch. J. but he ſaid, that if execution had been ſued before the laſt judgment it

ſhould be error. ——Ibid. 397. pl. 24. S. C. & S. P. by Coke Ch. J. and the judgment was affirmed. ——3 Bulſt. 174. S. C. & S. P. held accordingly by Coke Ch. J. and notwithſtanding this and other exceptions the judgment was affirmed. ——Jenk. 323. pl. 36. S. C. the ſaid omiſſion was not erroneous, becauſe it was after judgment, and if it be error, it is error in executione judicii, and in this caſe no writ of execution was ſued out againſt them.

2 Roll. Rep. 470. S. C. but a difference was taken where the plaintiff has a verdict for him, there the judgment is quod recuperet debitum & damna, and coſts aſſeſſed by the jury, and farther de incremento per Curiam; but where the judgment is upon non ſum informatus, demurrer or nil dicit, the judgment is quod recuperet debitum & damna, which includes coſts, but in the laſt caſe in B. R. the entry is more ſpecial, viz. tam occaſione detentionis, &c. quam pro miſis & cuſtagiis; and judgment was affirmed.

[28. In an action of *debt in Banco*, if *judgment* be *quod querens recuperet debitum, and ſo much pro damnis occaſione detentionis*, though it be *not nec non pro miſis & cuſtagiis, as* the uſe *in Banco Regis*, yet it is good, for this is the uſe in Banco. Mich. 22 Jac. B. R. between BROAD AND NURSE adjudged in a writ of error.]

[29. In *debt upon an obligation* the defendant *pleads non eſt factum*, which is *found for the plaintiff*, and the *jury aſſeſs damages occaſione infraſcripta*, this is good, *without ſaying occaſione detentionis debiti*, for this is tantamount. Paſch. 8 Jac. B. R. ALCOCK's CASE adjudged in Camera Scaccarii in a writ of error.]

[30. In *ejectione* firmæ, if upon *non ſum informatus pleaded*, judgment be given *quod def. remaneat indefenſus*, without ſaying againſt plaintiff, it is good. Paſch. 12 Jac. B. R. between FRIGET AND MALLORY per Curiam.]

[31. In an action if the *defendant pleads in bar* upon which there *is a demurrer*, and *judgment* is entered in this manner, *quia videtur to the ſaid A. and B.* ſcilicet the mayor and recorder (who were the judges of the court) *juſticiariis dom' regis* that the plea is not good, *ideo conſideratum eſt*, &c. this is good, becauſe the *naming them juſtices is but ſurplus*. Hill. 8 Car. B. R. between GREENHILL AND KING adjudged in a writ of error upon a judgment in Linn. Intratur Trin. 7 Rot. 1572.]

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Ideo conſideratum eſt, without ſaying per Cur. is no error in any of the *great courts*, as the courts here, the courts of Wales, the courts of counties palatine, though otherwiſe in inferior courts. Sid. 147. pl. 5. Trin. 15 Car. 2. B. R. Smith v. Smith. —— Lev. 105. S. C. adjudged. —— Ibid. 143. pl. 21. Paſch. 15 Car. 2. B. R. Anon. S. P. — Saund. 74. Paſch. 19 Car. 2. S. P.

[32. If the *judgment* be entered *in an inferior court* held before the ſteward, *ideo conſideratum eſt per ſeneſchallum quod querens recuperet*, this is good, for this is all one as if it had been ſaid ideo conſideratum eſt per Curiam. Trin. 14 Car. B. R. between STRETCH AND PARKER adjudged in a writ of error. Intratur Mich. 13 Car. Rot. 21. in a writ of error out of Alceſter court. Trin. 13 Car. B. R. between MILL AND MAURIE adjudged good in a writ of error upon a judgment in Exeter, where it was ideo conſideratum eſt * ad eandem curiam by the mayor and bailiffs (who were the judges) quod querens recuperet, and did not ſay per Curiam. Mich. 15 Car. B. R. between MAPOWDER AND LIPPINGCOT it was adjudged in a writ of error there. Intratur Paſch. 15 Car. 95. Mich. 23 Car. B. R. between ROBINSON AND BARNS adjudged upon a judgment in Exeter.]

* Sty. 182, 183. Mich. 1649 in caſe of Spry v. Mill, S. P. aſſigned for error, and that it ſhould have been per eandem curiam, but nothing as to this exception ſaid by the Court. —— Ibid. 194. Hill. 1649. Peiſe v. Mabley, S. P. and upon this and another exception judgment was reverſed.

[33. *But* if it be *ideo conſideratum eſt, and* it is *not ſaid per Cur. nec per ſeneſchallum*, this is erroneous in other judgments. Mich. 14 Car. B. R. between BROWN AND CLAG adjudged in a writ of error, and the judgment given in the new court of Marſhalſea reverſed

reverſed accordingly. Intratur Paſch. 14 Car. Rot. 325. Trin. 15 Car. B. R. between * Moon and Axe adjudged in a writ of error upon a judgment in Exeter. Intratur Mich. 14 Car. Rot. 213. Trin 14 Car. B. R. (†) between Cook and Lewis adjudged in a writ of error upon a judgment in Wenlock court, and this reverſed accordingly. Intratur Trin. 13 Car. Rot. 542. Mich. 14 Car. B. R. between Guy and Connon adjudged in a writ of error upon a judgment in the Marſhalſea, and this reverſed accordingly. Intratur Hill. 13 Rot. 824.]

* Mar. 15, 16. pl. 37. Meade v. Axe, ſeems to be S. C. but does not mention in what court the action

† Fol. 773.

was, nor ſay any thing of per ſeneſchallum; but the Court was clear that the judgment ſhould be reverſed. —— S. P. by Roll Ch. J. Sty. 430. Hill. 1654. in caſe of the Protector v. Richardſon.

[34. In an action upon the caſe upon a *promiſe* and *verdict for the plaintiffs, and damages and coſts* given, and the *judgment* is *quod querens recuperet damna ſua ad 61. per juratores prædictos in forma prædicta aſſeſſa*, and the *damages and coſts are miſtaken, not amounting to ſo much;* yet this is not erroneous, for this is only a miſcaſting, and *damna præd' intends only thoſe which were aſſeſſed*, and ſo the judgment is not for more. Trin. 15 Car. B. R. between Morecock and Hooles per Curiam adjudged good, and the firſt judgment affirmed accordingly in a writ of error. Intratur Paſch. 15 Car. Rot. 416.]

S. C. cited by name of Motlock v. Cowle by Pemberton J. 2 Show. Rep. 89. Hill. 31 & 32 Car. 2. B. R. and that (attingent') is all one with

(ad) and (ad) with (attingent') and whether the (ad) do hit the ſum right or no is but miſcounting, for if more or leſs it were good. Scroggs ſaid, the jury here give particulars, and the judgment is but for one of thoſe particular ſums. Jones ſaid, dampna prædict' is enough, and all the reſt naught and ſurpluſage; and is as much as attingent', for its meaning elſe has no ſenſe; it will be hard to make the word (ad) reſtringent, when the Court ought to give judgment for the whole; ad is the uſual word in all judgments, and reaches the whole, and it was the intent of the Court to give all; where they intend but part, they ſay quod; in C. B. they ſay, dampna ſua prædict' ad then comes the increment', and after that quæ quidem, &c.

[35. If a *judgment* be given *in Banco, ideo conſideratum eſt quod querens* or defendens *recuperet*, &c. and it is *not* conſideratum eſt *per Curiam*, yet this is good, for this is the uſe de Banco & de B. R. Mich. 14 Car. B. R. between Elvyn and Prime adjudged in a writ of error. Intratur Paſch. 14 Rot. 134.] [577]

[36. If a *judgment in Banco* be *ob quod conſideratum eſt*, where it ſhould be *ideo* conſideratum eſt by the uſual courſe, yet this is good in Banco, for this is all one in effect. Mich. 15 Car. B. R. between Drury and Young adjudged in a writ of error. Intratur Trin. 15 Car. Rot. 46.]

[37. In an action upon the caſe upon a *promiſe*, if the defendant *nihil dicit*, per quod the judgment is to be given by nihil dicit, and the *judgment* is entered *quod querens recuperet damna ſua, ſed quia neſcitur quæ damna*, &c. a *writ of inquiry is awarded* where the uſual courſe of entry is *quod querens recuperare debeat damna*, &c. and *not recuperet*, yet this is good in Banco, for it is all one in effect. Mich. 15 Car. B. R. between Drury and Young adjudged in a writ of error. Intratur Trin. 15 Car. Rot. 46.]

38. In *treſpaſs for taking away goods*, &c. the jury found the defendant *guilty as to the taking part* of the goods, *and as to the reſt not guilty;* and the *judgment was, that the plaintiff ſhould recover his damages for part, et quod defendens capiatur, and that yet the plaintiff*

plaintiff ſit in miſericordia pro falſo clamore ſuo againſt the defendant *pro reſiduo tranſgreſſionis*, and this was aſſigned for error; for the judgment ought to have been quod querens nihil capiat per billam pro reſiduo tranſgreſſionis; ſed non allocatur; and the judgment was affirmed. Mo. 692. pl. 956. in Cam. Scacc. Palmer v. Sherwood.

39. Error on a *judgment in debt againſt huſband and wife, upon a bond made by the wife dum ſola fuit*; the *judgment was, that the huſband be in miſericordia, and that the wife capiatur*. This was held error, and the judgment was reverſed; for it ſhould be, that the huſband and wife capiatur. Mo. 704. pl. 982. Hill. 37 Eliz. in Cam. Scacc. Burdolph v. Perry & Ux'.

40. *Judgment* was given *in debt* in C. B. *upon a non ſum informatus*, and error was brought and moved for error; 1ſt, Becauſe there is *no imparlance*. 2dly, Becauſe the *entry was quod defendit vim et injuriam*, when it is not uſual that ſuch a judgment ſhall be given upon a non ſum informatus; yet notwithſtanding that judgment was affirmed. Noy, 36. Mich. 42 & 43 Eliz. B. R. Loyd v. Twyford.

Noy, 4. Bavage v. Clark, S.C. held accordingly, and that the ſame rule is ſo uſed in B. R. and C.B. though Dyer, 67. is contrary, and cites 33 H. 6. 54. 34 H. 6. 20. 44 E. 3. 42. and 45 E. 3. 10.

41. In *debt upon an obligation* the defendant *pleaded non eſt factum, and after relicta verificatione confeſſed the action*. The judgment was, quod ſit in *miſericordia*, and this was aſſigned for error, for that it ought to be *quod capiatur*. But the Court held it no error, becauſe *a fine is not due*, but where the party denies his deed which is found againſt him; and then it is due for his falſe plea, and for the troubling the jury and the Court; and judgment affirmed. Cro. J. 64. pl. 2. Paſch. 2 Jac. B. R. Davis v. Clerk.

Brownl. 87. S. C. ſeems only a tranſlation of Yelv.

42. Error of a *judgment in debt* was aſſigned, becauſe it *was in the diſjunctive*, as quod querens *recuperet dolium ferri vel valorem* ejuſdem ad damna, &c. whereas it ſhould be, quod recuperet dolium ferri, & ſi non, valorem inde; adjudged error. Yelv. 71. Trin. 3 Jac. B. R. Paler v. Hardyman.

43. The *judgment* was *quod querens & plegii ſui ſint in miſericordia pro falſo clamore*, whereas it ought to have been *quia non proſecuti ſunt*; for it ought not to be pro falſo clamore but where the
[578] judgment is after verdict, or upon demurrer, and for this matter it was held manifeſt error, and the judgment was reverſed. Cro. J. 213. pl. 7. Mich. 6 Jac. B. R. Anon.

44. Judgment given *againſt an infant* was *quod capiatur*. Error was brought, and the whole Court agreed that it is a clear error, and therefore judgment was reverſed. Bulſt. 171. Trin. 9 Jac. Daby v. Holbrook.

45. Error of a judgment in C. B. upon an *information for buying cattle, and ſelling them again in the ſame market contra formam ſtatuti*, the judgment was entered quod ſit *in miſericordia*, when it ought to be *quod capiatur*, being upon an information; for it is a contempt, and puniſhable by impriſonment; and per tot. Cur. judgment was reverſed. Godb. 349. pl. 443. Trin. 21 Jac. B. R. Pye v. Bonner.

46. Error

46. Error of a judgment in debt, becauſe judgment was given for the defendant, *quod querens nihil capiat per breve*. It was aſſigned, that the *action* was brought there by an attorney, by *bill of privilege*, and not by *original writ*; ſo the judgment ought to be *nihil capiat per billam*, and not *per breve*; but the Court doubted of it, becauſe it was in the judgment which was by the Court, and would adviſe of it. Cro. C. 580. pl. 5. Paſch. 16 Car. B. R. Raymond v. Burbridge.

47. T. and three others were *convicted of a riot upon view* of two juſtices of peace and the ſheriff of the county, contra formam ſtatuti 13 H. 4. cap. 7. and they were fined by the juſtices; and upon a writ of error brought, the errors aſſigned were, 1ſt, It does not appear that the defendants were convicted by view of the juſtices. 2dly, That the ſheriff did not join in ſetting the fine, whereas the ſtatute ſays, that the ſheriff ſhall be joined with the juſtices in the whole proceedings; and for theſe errors the judgment was reverſed. Raym. 316. Trin. 32 Car. 2. B. R. The King v. Tempeſt & al'.

48. *Judgment* was awarded *in an inferior court by the mayor and bailiffs, without ſaying per Cur.* and this aſſigned for error; but becauſe *it was ſaid in eadem curia*, the Court held it well enough and over-ruled the exception. Comb. 5. Mich. 1 Jac. 2. B. R. Salter v. Bellamy.

49. Writ of error of a judgment in a *recognizance* upon a ſci. fa. was, *quia in adjudicatione executionis ſuper judicium præd'*, inſtead of ſuper *recognitionem præd'*, and was for that quaſhed. 12 Mod. 371. Paſch. 12 W. 3.

50. In debt, if the *original* be *recited* to be *attachiat'*, *inſtead of ſummonit'*, yet we cannot reverſe the judgment becauſe it is only a recital; per Holt Ch. J. 12 Mod. 513. Paſch. 13 W. 3. Anon.

See tit. **Amendment** and **Jeofails**, (K), &c. the ſeveral ſtatutes with the notes. And tit. **Amercement**.

[579]

(C. b) Judgment.

See Falſe Judgment, (F).

What Judgment ſhall be *given upon* the *Reverſal.*

[1. IF the defendant *pleads abatement of the writ*, and this is awarded a good plea, by which the *writ abates*, if the *judgment is reverſed, becauſe this was not a good plea*, the *plaintiff ſhall be reſtored to his original*, and ſhall not be enforced to a new original. 9 H. 6. 38. b.]

Br. Error, pl. 7. cites S. C.

[2. *So* if an *erroneous judgment* be given *upon a proceſs againſt the demandant*, and it *is after reverſed for error in the proceſs*, the demandant ſhall be reſtored to his original, and the tenant ſhall anſwer to it. 21 Aſſ. placito 17.]

If formedon abates by judgment and writ of error thereof brought in B. R. and judgmnt reverſed, immediately upon this writ the tenant ſhall plead de novo, and ſhall anſwer upon the declaration there. Br. Error, pl. 132. cites 1 H. 7. 12. and ſays that it is affirmed accordingly in the next caſe there, that the writ is revived, and that the tenant ſhall anſwer.

[3. *But*

Br. Error, pl. 7. cites 9 H. 6. 38. S. C.

[3. *But* if an *inſufficient plea in bar* be *adjudged a good plea, and* the *judgment after reverſed for this cauſe* by writ of error, the demandant *ſhall not be reſtored to the ſame original.* 9 H. *9. 38. b.]

* This is miſprinted for (6). —— In debt the defendant pleaded in bar, to which the plaintiff demurred. The plea was adjudged good; but upon error brought the bar was adjudged inſufficient. The Court at firſt doubted what judgment ſhould be given; but at laſt it was awarded that the plaintiff ſhould recover his debt and damages. Le. 33. pl. 41. Hill. 28 Eliz. B. R. Taylor v. Moore.

Br. Error, pl. 7. cites S. C.

[4. *But* in this caſe he ſhall be reſtored *to his action.* 9 H. 6. 38. b.

Br. Error, pl. 126. cites 31 Aſſ. pl. 18. 22. S. C.

[5. In an *aſſiſe by an infant*, if the *tenant pleads in bar* upon which the *aſſiſe is awarded at large to inquire of the circumſtance*, becauſe the plaintiff is an infant, and the *inqueſt find for the plaintiff without inquiring of the matters alleged in bar*, by which the plaintiff hath *judgment*, and it is *reverſed* in a writ of error; the *plaintiff at his election ſhall be reſtored to his original*, and ſo attach the tenant thereupon. 31 Aſſ. 22. adjudged.]

Br. Error, pl. 36. cites 31 Aſſ. pl. 18. 22. S. C.

[6. *And* the *judgment ſhall be, that he* ſhall *have a new original at his election.* 31 Aſſ. 22. adjudged.]

Fol. 774.

[7. If the *tenant* in an action *makes default*, and an *eſſoin is caſt for him, which does not lie*, and *notwithſtanding upon challenge thereof* by the demandant, and prayer by him of ſeiſin of the land upon the default, *judgment is given againſt the demandant for not counting that he ſhall take nothing by his writ*, if he brings a writ of error and it *is reverſed* for this cauſe, the *judgment ſhall be, that he* ſhall *recover ſeiſin of the land upon the default*, becauſe the inferior court ought to have given this judgment. 21 E. 3. 46. 62. 21 Aſſ. placito 17. adjudged.]

8. *Such judgment* ſhall be given in a writ of error *as ought to have been given in the firſt court* which erred, quod nota. Br. Error, pl. 64. cites 21 E. 3. 45.

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See tit. Judgment (U).

(D. b) *How Judgment* ſhall be given *upon* the *Reverſal of the firſt* Judgment.

Cro. C. 442. pl. 13. Slocomb's caſe. S. P. and ſeems to be S. C. adjudged accordingly. —S. C. cited Vent. 28.

[1. IN an action upon the *caſe*, if the plaintiff being DELAMORE, declares, that whereas there was a ſuit *in Bath* between the defendant and S. and iſſue thereupon was joined, and at the trial thereof in aula there the plaintiff was ſworn as a witneſs, and ſhewed his oath, and after the defendant having communication with the wife of S. of the ſaid trial and oath, *ſaid theſe words* of the plaintiff, *your brother Delamore* (innuendo the plaintiff exiſtentem fratrem of the ſaid wife) *took a falſe oath againſt me in the hall* (innuendo &c.), *I would not take ſuch an oath for all the world*; after not guilty pleaded, and a *verdict for the plaintiff, yet judgment being there given againſt the plaintiff quod nihil*

nihil capiat, &c. becauſe the declaration is not good, *becauſe* it is *not averred that the plaintiff was brother to the wife of S.* to whom the ſaid words were ſpoken, but only in the innuendo, which is not ſufficient; though *this judgment* given there be reverſed *in Banco Regis* in a writ of error for the inſufficiency in *the judgment*, this *being ideo conceſſum eſt* for *conſideratum eſt*, yet the court de *B. R. ought to give the ſame judgment which ought to have been given at Bath*, ſcilicet, *quod querens nil capiat* per billam. Hill. 11 Car. B. R. between DELAMORE AND HESKINS adjudged. Intratur Trin. 10 Car. Rot. 900.]

[2. In an action upon the *caſe for words*, if *judgment* be given againſt the plaintiff, *that the words are not actionable*, upon which the plaintiff brings a writ of error, and thereupon the firſt *judgment* is *reverſed becauſe the words are actionable*; the Court after reverſal of the firſt judgment *ought to give judgment that the plaintiff* ſhall *recover*, for this court ought to give the ſame judgment that the firſt court might have done. Mich. 14 Car. B. R. between HEKINS AND CHELE adjudged. Intratur Hill. 13 Car. Rot. 696.]

Cro. C. 500. pl. 2. Ceely v. Hopkins. S. C. the firſt judgment was reverſed, and plaintiff recovered.

[3. In an *ejectione* firmæ, upon not guilty pleaded, iſſue is joined and a *ſpecial verdict is found*, and upon this verdict *judgment given againſt the plaintiff*; and after the plaintiff brings a writ of error, and in this the *judgment is reverſed*, the *plaintiff ſhall have judgment* and *recover his term*, his declaration being good, and the law being for him upon the ſpecial verdict; for the court that reverſes the firſt judgment ought to give the ſame judgment which ought to have been given in the firſt ſuit. Mich. 14 Car. B. R. between OMALCONRIE AND AYRES, adjudged in a writ of error upon a judgment in Ireland. Intratur Mich. 13 Car. R. 332.]

Cro. C. 511, 512. pl. 6. Mulcarry v. Eyres, S. C. reſolved that there ſhould be a writ directed to the chief juſtice in Ireland to reverſe the judgment, and commanding him to award execution. ——— S. C. cited per Curiam. 2 Saund. 256, 257. Mich. 22 Car. 2. in caſe of Green v. Cole. ——— Ibid. 319. S. P. and cites Roll's Abr. 774.

4. F. brought *treſpaſs* againſt R. in B. R. And *upon demurrer* upon plea of the defendant it was *adjudged for the defendant*. F. brought error in Cam. Scacc. and there the *judgment in B. R. was reverſed, but no writ of inquiry of damages could be awarded out of the Exchequer * Chamber by the ſtat.* 27 *Eliz. cap.* 8. And now F. *ſues a writ of inquiry out of B. R.* and well; for the firſt judgment being reverſed is not a bar. Noy, 129. Falder v. Ridge.

Cro. J. 206. Paſch. 6 Jac. Faldoe v. Rudge, S. C. adjudged, and that the plaintiff ſhould recover the damages found; for though the ſtat. 27 Eliz. mentions only the returning the record, yet it muſt be intended, that all ſhall be done that is neceſſary in order thereto. ——— Yelv. 74. 76. S. C. adjudged.

* [581]

5. Where the plaintiff *brings error* and the Court reverſe, they give a *new judgment*; otherwiſe where the defendant brings error. 1 Salk. 262. pl. 2. Mich. 4 W. & M. in B. R. Parker v. Harris.

6. In *replevin*, *if the judgment for the plaintiff be reverſed*, ſuch *new judgment* muſt be given as the Court ſhould have given before, which

which cannot be for the avowant, unleſs upon the merits of the avowry, and if that be naught, it *muſt only be nil cap. per billam.* Comb. 398. Mich. 8 W. 3. B. R. Bret v. Bagill.

7. If in error a releaſe is pleaded and found for the plaintiff, yet if there is no error, the Court cannot reverſe the judgment, and if the *releaſe* were *found for the defendant*, a different judgment muſt be given according as the error aſſigned is ſufficient or not; for if *it is a good error* the *judgment muſt be, that the plaintiff be barred* of his writ of error, and not that the judgment be affirmed; if it be not a good error, the judgment be that the firſt judgment be affirmed; per Curiam. 2 Ld. Raym. Rep. 1005, 1006. Hill. 2 Ann. B. R. in caſe of Carleton v. Mortagh.

See tit. Fines (L. b), and Judgment (X).

(E. b) In what Caſes *the whole* Judgment ſhall *be reverſed, or only Part.*

Fol. 775. Roll. Rep. 2. pl. 2. Anon. S. C. adjudged.

[1. IN *a formedon de uno crofto de meſſuagio*, &c. if the *demandant recovers*, and *in a writ of error it is adjudged that a formedon does not lie of a croft*, the judgment for the reſidue ſhall be reverſed alſo, becauſe the writ is not good, inaſmuch as there *cannot be a good judgment upon a bad writ.* Paſch. 12 Jac. B. R. adjudged.]

——2 Bulſt. 214. Ellis v. Wallis, S. C. adjudged.——S. C. cited All. 74.

S. C. cited by Roll. All. 74. and denied the 5 E. 4. to be law. ——S. C. cited Arg. Ld. Raym. Rep. 600.

[2. In an action of *treſpaſs againſt three*, if *one dies pending the writ*, and yet *judgment is given againſt all three*, in a writ of error upon this judgment the whole judgment ſhall be reverſed, becauſe it is intire, though the writ by the death abates but againſt one. Trin. 14 Car. B. R. between SCUDAMORE AND SCRIVEN. Per Curiam, ſuch judgment reverſed. Intratur Mich. 13 Car. Rot. 507.]

Roll. Rep. 24. pl. 2. S. C. adjudged.—— Cro. J. 343. pl. 9. S. C. adjudged. ——Hob. 6. pl. 12. Miles v. Jacob, S. C. the judgment for the indictment, together

[3. If A. brings an action upon the *caſe* againſt B. *for words, and alſo for that he cauſed him to be indicted, upon which indictment he was acquitted*, and *all this is found by verdict, and damages ſeverally given for them; but intire coſts, and one intire judgment* given *for all*, ſcilicet, ideo conſideratum eſt *quod querens recuperet damna & cuſtagia in forma prædicta aſſeſſa*, &c. and *in a writ of error it is adjudged the action does not lie for the words*, the judgment ſhall be reverſed only for the words, and damages for * them, and ſhall ſtand for the reſidue, and the coſts ſhall ſtand intirely. Paſch. 12 Jac. My Reports between † JACOB AND MILLS, in Camera Scaccarii adjudged. Same caſe Hobart's Rep. 8.]

with the damages, was affirmed alſo for all the coſts, becauſe there was juſt cauſe of ſuit, which warranted the coſts, though part of the ſuit was without cauſe.——All. 75. is a nota, that Hoddeſdon Prothonotary told the reporter, that the caſe of Miles v. Jacob in Hobart was not law.

† This caſe denied, and a rule laid down, that where the judgment is part by the common law, and part by the ſtatute, it may be reverſed in part; for that which is a judgment at common law will remain a judgment, and be complete without the other. 1 Salk. 24. Cutting v. Williams.—— 11 Mod. 25. pl. 2. S. C. and the Court denied the authority of Miles v. Jacob in Hobart, 6. for a judgment intire cannot be reverſed in part.——2 Ld. Raym. Rep. 825. in caſe of Williams v. Cutting, and Holt Ch. J. ſaid, that the caſe of Jacob and Miles in Hob. and Mo. 728. Raymer v. Grimſton, were not ſupported by any ſubſequent authority.

[4. If

[4. If A. brings an action upon the *caſe* againſt B. *upon two promiſes*, and *declares that he ſold certain tallow to the defendant, and* upon this the *defendant aſſumed to pay ſo much as it was worth, and that he alſo at another day ſold other tallow, and the defendant made ſuch promiſe for it*, if the *defendant pleads, that after the firſt aſſumpſit, the defendant ſatisfied the plaintiff for the ſaid firſt tallow ſold to him, upon which iſſue is taken; and as to the other promiſe*, the defendant *pleads non aſſumpſit, upon which they are at iſſue alſo*, and the *jury find as to both iſſues, that the defendant aſſumed and promiſed modo & forma prout'*, &c. *and aſſeſs ſeveral damages, and* thereupon *judgment is given for the whole for the plaintiff*; in this caſe, though there were ſeveral damages taxed, and the plaintiff might have relinquiſhed his damages for the firſt, which was not well found, and took judgment for the ſecond, which was well found; yet when one judgment is given for both, the judgment is erroneous. Paſch. 8 Car. B. R. between CRETALL AND MURFIELD, adjudged in a writ of error upon a judgment in Canterbury. Intratur Hill. 6 Car. B. R. Rot. 1128.]

[5. If a *fine* be levied *of land*, of which *part is guildable*, and *part is ancient demeſne, and as to that which is ancient demeſne, the fine is reverſed by writ of diſceit, yet* the fine *ſhall ſtand for the reſidue*; for a mark ſhall be made on the fine, in the nature of a cancelling of that which is ancient demeſne only. 17 H. 7. Kelloway, 43.]

F.N.B. 98. (P). S. P. and the Engliſh editions cite 21 E. 3. 20. 5 E. 4. 6. 17 E. 3. 31. Diſceit, 37. and ——S. P. ibid in the new notes there (a), cites 7 H. 4. 44.——S. P. Arg. Cro. E. 469. (bis). per Curiam, obiter. Jo. 374. pl. 11. Mich. 11 Car. B. R.

[6. In an action of *debt upon a bill, and upon a contract upon an emiſſet*, if the *defendant pleads non eſt factum as to the bill, and nil debet as to the contract*, and *both are found* by verdict *againſt the defendant*, and *judgment* againſt the defendant *quod capiatur for denying his deed; and* it is *not* alſo *quod ſit in miſericordia as to the contract*, as it ought to be, *and intire damages given*; and a writ of error is brought for this, the whole judgment ſhall be reverſed, ſcilicet, as well the judgment upon the bill, as for the contract. * Trin. 11 Car. B. R. between ELTONHEAD AND DEEREMAN reſolved, and a like judgment given in the Marſhalſea reverſed accordingly. Intratur Hill. 10 Rot. 876.]

S. C. cited by Roll. All. 74. Trin. 24 Car. B. R. ——S. C. cited by Roll J. Sty. 125.

* Fol. 776.

[7. *In* a writ of *dower* if the *plaintiff recovers by default*, and upon this a *writ is awarded* to the ſheriff or bailiff, where the recovery is *to deliver to the plaintiff tertiam partem per metas, and to inquire of the value of the year, and how much time is paſt after the firſt demand of dower, and what damages ſhe hath ſuſtained*; and upon this the ſheriff or bailiff *returns, that he had delivered the third part* of the lands, *and the value found by the jury to* 30*l.* † *per ann. and that two years are paſt after the firſt demand, and damages* 50*l.* and thereupon *judgment is given accordingly, to hold in ſeveralty the ſaid third part, and to recover the ſaid damages.* In this caſe, though the judgment is not good as to the damages, inaſmuch as it is *not averred that the huſband of the plaintiff died ſeiſed* (as the uſe is), *nor* is it *ſo found by the jury, nor* was it ſo *commanded by the writ to be inquired,*

Sty. 290. Trin. 1651. S. P. cited by Roll Ch. J. to have been adjudged accordingly.—— S. C. cited by Roll. All. 75. as adjudged.— See (B. a) pl. 1.—— And ſee (M. c) pl. 9. S. C.

†[583]

inquired, by which the judgment as to this is erroneous, yet it ſhall be reverſed only as to this, and ſhall ſtand as to the recovery of the third part of the land. Trin. 13 Car. B. R. between TIE AND ADKINS, adjudged per Curiam in a writ of error, upon ſuch a judgment given in IPSWICH. Intratur Hill. 12 Car. B. R. Rot. 759.]

[8. Co. 5. SPECOT'S CASE, 58. b. 59. adjudged *in a quare impedit*, the *judgment to have a writ to the biſhop*, being the judgment at the common law, *ſhall not be reverſed in a writ of error, though the judgment* given *by the ſtatute* of W. 2. *for the damages be* erroneous and *reverſed.*]

* Cro. 289. pl. 6. S. C. it was moved for the plaintiffs in error, that the judgment being intire for damages againſt both, it ſhall not be reverſed for one only, but for both, and for this was vouched, that in ejectment in Cheſter this very term error was brought by two for the nonage of one, and rule was given for reverſal thereof, but the Court ſaid, they did not remember any ſuch rule given, and that they would well adviſe thereof, and cited 20 E. 4. 7. 28 H. 6. 9. 19 Aſſ. 8. —— S. C. cited and S. P. adjudged, All. 74, 75. Trin. 24 Car. B. R. in caſe of Oates v. Aylett. ——— Sty. 121. Aylett v. Oates, S. C. adjornatur. Ibid. 125. S. C. & S. P. adjudged. ——— S. C. cited Ld. Raym. Rep. 600. ——— S. P. by Roll Ch. J. Sty. 406. Hill. 1654. Anon. —— Error of a judgment in ejectione firmæ, becauſe there were two defendants, and one of them was within age and appeared by attorney where it ought to have been by guardian, and damages and coſts were given intire; adjudged error, and the judgment reverſed againſt both. Cro. J. 303. pl. 3. Trin. 10 Jac. B. R. King v. Marborough. —— S. C. cited Ld. Raym. Rep. 600.

[9. In a writ of error upon a judgment *in treſpaſs* againſt ſeveral, if the *judgment* be *erroneous becauſe one of the defendants was within age, and appeared by attorney*, the judgment ſhall be reverſed in toto againſt all. Paſch. 9 Jac. B. R. Rot. 302. between * BIRD AND BIRD. Contra ORMS AND HIS WIFE in treſpaſs quare clauſum fregit & herbam conſumpſit.]

Sty. 254. S. C. but that is of a writ of error brought by the baron alone; adjornatur. — Ibid. 280. S. C. but it is there ſtated as of a fine brought by the baron and feme, without joining with the others, and S. P. does not appear.

[10. If an *action* be brought *againſt A. as a feme ſole, where ſhe is covert baron, and againſt B. and C.* and they *all plead to iſſue, and A. as a feme ſole*, and after judgment is given againſt them all accordingly, in this caſe *the baron of A. with A., B., and C. may join in error, and aſſign for error the coverture of A.* and thereupon the judgment ſhall be reverſed for all, becauſe it is intire. Trin. 1651. between HAYWARD AND WILLIAMS adjudged. Intratur H. 1649. Rot. 824.]

Cro. E. 806. pl. 7. S. C. and becauſe there was not error found in the firſt judgment it was affirmed. — Win. 5. White v. Williams, but S. P. does not fully appear. ——— S. C. cited by Roll Ch. J. Sty. 290. Trin. 1651.

[11. In an action of *account*, if *judgment* be *given quod computet*, and after *auditors are aſſigned*, and upon his account *judgment is given againſt him* alſo, *and damages and coſts*, and after a writ of error is brought upon both judgments, and thereupon the *laſt judgment is only erroneous.* In this caſe the laſt judgment only ſhall be reverſed, and not the firſt judgment, but this ſhall ſtand in force, for *theſe are two diſtinct judgments* and perfect, for the firſt judgment is ideo conſideratum eſt quod computet & defendens in miſericordia. Hill. 43 El. B. R. between WILLIAMS AND WHITE in a writ of error upon a judgment in Briſtol, adjudged.]

[584] [12. If a *judgment* be given *againſt executors in* an action of *debt, and after a ſcire facias a judgment is given* againſt them *to have execu-*

tion of their proper goods, and a writ of error is brought upon both judgments, in this caſe, if *the firſt judgment* be *good, and the laſt erroneous*, the laſt judgment only ſhall be reverſed, and the firſt judgment ſhall ſtand. Co. 5. PETTIFER, 32. adjudged as it ſeems; but it is *not alleged that the writ of error was upon both judgments, but only in redditione executionis.*]

13. The counteſs of Kent was *endowed in Chancery by the king*, and *among other things there was aſſigned a rent reſerved by patent to the king and his ſucceſſors upon grant of a fair to the prior of B. and his ſucceſſors*; upon which aſſignment *ſhe brought a ſci. fa.* in the Exchequer, and there had *judgment to recover the rent, and the arrearages and damages*; whereupon error was brought in Cam. Scacc. and *the judgment reverſed as to the rent and damages*; becauſe ſhe could not have judgment of the rent being the king's inheritance, nor of the damages in the ſci. fa. but as to the arrearages the judgment was affirmed, becauſe it was her right to have it, and as to this ſhe was privileged to ſue in the Exchequer. Mo. 565. pl. 11. cites 14 E. 3. The Counteſs of Kent's caſe.

S. C. cited 2 And. 129. ——Noy, 117. cites 14 E. 3. Scire Facias, 122. as cited by Crooke in the argument of Boſwell's caſe.

14. If a *fine was good before the proclamations*, and the *proclamations were ill*, and erroneouſly made, this *ſhall not take away the force of the fine* which was good before the proclamations; and adjudged that the *proclamations ſhall be reverſed, and the fine ſtand in force.* Pl. C. 266. a. Mich. 4 & 5 Eliz. B. R. Fyſhe v. Brocket.

15. In caſe, error was aſſigned that the *damages* were *aſſeſſed intirely for divers things which would ſupport an action, ſome of them being uncertainly and inſufficiently alleged*; for he preſcribed to have omnia bona forisfacta, which could not be without charter, alſo to have de fugatione quicquid accidere poſſit, which was alſo uncertain, ſo that when damages for thoſe things intirely are aſſeſſed with other things, and judgment given, the judgment is erroneous; and for that cauſe the judgment was reverſed. Mo. 706, 707. pl. 987. Paſch. 33 Eliz. B. R. and 36 Eliz. B. R. Berkley v. Pembroke.

Cro. E. 560. pl. 17. S. C. & S. P. and judgment reverſed.

16. A writ of error is quaſi a commiſſion, and *may reverſe for part and affirm for part*, and is not abateable, becauſe the fine is good for part. Mo. 366. pl. 499. Paſch. 23 and Mich. 36 & 37 Eliz. in caſe of Barton v. Lever.

17. Error was aſſigned of a judgment in C. B. that the *action* was brought *againſt three perſons, one of whom was within age*, and that they *all appeared by attorney*, whereas he within age ſhould have appeared by guardian, and ſo the judgment being joint was erroneous againſt all; and Roll Ch. J. was of the ſame opinion, and ſo it was reverſed. Sty. 430. Hill. 1653. Bocking v. Symons.

Eight defendants in treſpaſs appear by attorney, whereof two are infants, and judgment was given for the plaintiff; but on error brought the judgment was reverſed againſt all. Lev. 294. Trin. 22 Car. 2. R. Grell v. Richards.

18. Error to reverſe a *judgment* given *in an inferior court* where an aſſumpſit was brought, and the *plaintiff declared upon three ſeveral promiſes*, and the *jury found two for him, and the other non aſſumpſit*; and *judgment was given for the two*, that he ſhould recover, *but no judgment for the third*, that he ſhould be amerced pro falſo

2 Keb. 506. pl. 80. Keeling Ch. J. ſaid, that the judgment is ſufficient, but Twiſden in-

clined e contra.—Ibid. 535. pl. 52. S. C. Judgment reverſed, niſi, &c.

falſo clamore, or that the defendant eat inde ſine die; and for this cauſe error was aſſigned. The Court ſaid, the judgment was altogether imperfect; and ſo were inclined to reverſe it, but gave further time. Vent. 39, 40. Trin. 21 Car. 2. Gregory v. Eades.

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Fol. 777.

(F. b) *What* Judgment ſhall be *reverſed by conſequence*, by the Reverſal of others.

* Br. Error, pl. 23. cites S. C.—— Br. Error, pl. 157. cites 4 E. 4. 29.

[1. AFTER a *recovery in rediſſeiſin, if the firſt judgment be reverſed*, the judgment upon the rediſſeiſin ſhall be reverſed alſo. *43 E. 3. 3. Co. 8. Doctor Drury, 143. 11 H. 6. 17.]

† Br. Error, pl. 23. cites S. C.—— Per Doderidge, the reverſal of the firſt does not reverſe the ſecond, but defeats it ſo, that the plaintiff ſhall not have any fruit by it, but it ought to be intended upon both in the ſame court; but if in divers courts, the ſecond judgment ought to be avoided by plea, or audita querela. Palm. 187, 188. Trin. 19 Jac. B. R. in caſe of Apſley v. Geve.——And by Chamberlain J. if one has judgment in C. B. for debt, and brings debt upon this judgment, as he may in B. R. and has judgment here; yet if the firſt judgment be reverſed, it has been adjudged, that the ſecond judgment ſhall be reverſed alſo. Palm. 303. Mich. 20 Jac. B. R. in caſe of Apſley v. Geve, in an audita querela brought by the plaintiff.——Sid. 253. pl. 2. Paſch. 17 Car. 2. in Cam. Scacc. it was doubted that it could not be remedied in Cam. Scacc. but that the party ought to move in B. R. for an audita querela, and ſo to be relieved. But they took time to adviſe whether the judgment in B. R. be not by the firſt reverſal ipſo facto void.

[2. *So* if a man recovers *in debt upon a judgment*, if the firſt judgment be reverſed, the ſecond judgment ſhall alſo. † 43 E. 3. 3. 11 H. 6. 17. b.]

‡ Fitzh. Error, pl. 64. cites S. C.—— ‖ Fitzh. Error, pl. 13. cites S. C.——Br. Error, pl. 70. cites S. C.

[3. *So* by reverſal of the original judgment, the *outlawry* depending thereupon ſhall alſo be reverſed. ‡ 11 H. 4. 6. b. ‖ 7 H. 6. 44.]

Br. Error, pl. 70. cites S. C.

[4. *But by* the *reverſal of the outlawry* the *original judgment ſhall not be reverſed.* 7 H. 6. 44. b.]

Br. Error, pl. 46. cites 11 H. 4. 47. S. C. —Fitzh. Error, pl. 63. cites 11 H. 4. [and the caſe is continued at fol. 47. b. 48. a. pl. 22.]——Jenk. 73, 74. pl. 40. S. C. For the principal judgment in the annuity being reverſed, all that depends upon it falls to the ground. Sublato fundamento cadit opus. The judges in B. R. by reverſing this judgment ex obliquo reverſe the ſaid judgment in C. B. upon the ſcire facias, and alſo their own judgment in error upon the ſaid ſcire facias.——S. P. Br. Error, pl. 170. cites 13 E. 4. 4.

[5. If a man *recovers in an annuity and in a ſcire facias thereupon* afterwards, and *the judgment upon the ſcire facias is after affirmed in a writ of error*, yet if the firſt judgment of the annuity be reverſed, the other ſhall be alſo. 11 H. 4. 48.]

[6. If a man *recovers upon an original, and* hath another judgment *in a ſcire facias*, if the firſt judgment be reverſed, the other ſhall be alſo reverſed. Co. 8. Doctor Drury, 143.]

[7. If a man *recovers in a quare impedit, and hath a writ to the biſhop in a quare non admiſit*, and after *the judgment in the quare impedit is reverſed*, the judgment in the quare non admiſit ſhall be

alſo reverſed by this, though this was for the contempt to the king. 26 E. 3. 75. b.]

[8. If a *judgment* be given *in an inferior court againſt A. and* after *another judgment againſt B. his pledge there*, and *B.* upon this *is taken in execution* upon the judgment; *and after the principal judgment is reverſed* in a writ of error, a ſpecial writ may be awarded to deliver him, becauſe it appears by the record that he was pledge. 1 H. 7. 12. b. adjudged.] Br. Error, pl. 134. cites S. C. [586]

[9. If the *demandant recovers againſt the tenant, and the tenant againſt the vouchee*, if the *heir of the vouchee reverſes the judgment of the value, becauſe the vouchee was dead at the judgment rendered*, this ſhall reverſe the judgment againſt the tenant alſo. Quære, 18 E. 3. 38.]

[10. If the *principal* be *outlawed of felony*, and the *acceſſory attainted and executed*; and after the *principal reverſes the outlawry*, and is *indicted and found not guilty* of the felony; by this reverſal and acquittal the *attainder againſt the acceſſory is annihilated*, for his heir may have a mortdanceſtor it ſeems, becauſe he hath no remedy by writ of error or otherwiſe to reverſe it, for this depends upon the principal. Tempore E. 1. Mortdanceſtor, 46. Co. 9. Lord Sanchar, 119. b.]

11. A man may defeat two records by one and the ſame writ of error, for if a man *recovers in aſſiſe, and after* recovers *by reciſſeiſin*, and brings writ of error of the judgment in the aſſiſe, and reverſes it, by this the other recovery is reverſed alſo. Br. Error, pl. 23. cites 43 E. 3. 3. per Finch.

12. *So* where a man recovers *damages in waſte or other action*, and *brings debt of the damages recovered*, and recovers, *and after the firſt judgment is reverſed by error*, there by this the laſt judgment is reverſed alſo, though it be upon two originals; for the one depends upon the other. Ibid. Per Finch. quod non negatur.

13. B. brought writ of *error againſt E. who vouched to warranty T.* and the *voucher counter-pleaded*, and *paſſed for the demandant*, and he recovered, and the *vouchee brought writ of error, and had ſcire facias returnable now, at which day the tenant brought another writ of error of the ſame judgment*, and aſſigned error, and prayed ſcire facias and had it; notwithſtanding that the vouchee had brought writ of error, and this for doubt that the vouchee was faintly proſecuted, and yet by the reverſal by the one, the other ſhall be reſtored; and it was held there that the vouchee ſhall aſſign error between the demandant and the tenant, and ſo may the ſecond vouchee do. Br. Error, pl. 39. cites 8 H. 4. 3. Br. Attaint, pl. 125. cites S. C. ——Br. Voucher, pl. 43. cites S. C.

14. *And* that if he in *reverſion reverſes judgment by error*, the tenant for life ſhall be reſtored. Ibid.

15. *And if tenant by reſceit* reverſes judgment by error, the tenant for life ſhall be reſtored. Ibid.

16. If *error* be *in the original*, then *as well the proceſs* of outlawry *as the original* ſhall be reverſed. Br. Error, pl. 47. cites 11 H. 4. 6. Per Gaſcoine and Huls.

S. P. Br. Error, pl. 193. cites 6 E. 4. 9, 10. *And* that by the reverſal *of aſſiſe* the *rediſſeiſin and the execution upon it is alſo reverſed.*

17. If the firſt judgment be reverſed the *execution depending upon it* is defeated eo facto. Br. Error, pl. 70. cites 7 H. 6. 44. Per Haſl. Weſtburie, and Paſton.

18. If the outlawry be reverſed by writ of error, yet *the firſt judgment remains for the party;* per Cheiney, which Brooke ſays ſeems to be law. Br. Error, pl. 70. cites 7 H. 6. 44.

19. In audita querela it was agreed, that by *reverſing of the firſt judgment* by error, *the execution* upon it is alſo reverſed. Br. Error, pl. 193. cites 6 E. 4. 9, 10.

20. *And* by the reverſal *of aſſiſe* the *rediſſeiſin and the execution upon it is alſo reverſed.* Ibid.

21. In deceit it was admitted clearly, that in writ of error the plaintiff ſhall recover *the land and the iſſues and profits incurred in the meſne time*, quod nota, and it was doubted if ſo in deceit. [587] Br. Error, pl. 174. cites 18 E. 4 11.

22. Where *error* is *in the judgment in* writ of debt, and *another error* is *in the outlawry upon capias ad ſatisfaciendum* and exigent upon it, *a writ of error* ſhall not ſerve to reverſe both judgments; per Huſſey; but Fairfax contra; and that 11 H. 4. 4. *in rediſſeiſin* a man was *outlawed for the damages*, and both judgments were reverſed by one and the ſame writ of error, and the principal caſe was that the writ of error was brought *de redditione judicii in* writ of *debt, and in promulgation of the outlawry in it;* and ſo ſee that writ of error lies as well of error in the outlawry as in the execution upon it; for this outlawry was upon the capias ad ſatisfaciendum, and exigent for the execution after the judgment. Br. Error, pl. 150. cites 8 H. 7. 9, 10.

23. A *quod ei deforceat* is brought in Wales, and proſecuted in the nature of a writ of right, according to the courſe there; by force of the ſtatute of 12 E. 1. The *tenant joins the miſe upon the mere right*, and afterwards *makes default;* and *without a petit cape* awarded, *judgment final is given againſt him;* the *tenant brings a writ of right* againſt the *demandant*, who had judgment ut ſupra and execution; he *pleads the firſt judgment* in bar; and *judgment is given that it is a good bar;* the *plaintiff*, who was the tenant *againſt whom the firſt judgment was given, brings a writ of error upon this laſt judgment;* and *aſſigns for error, that a petit cape was not awarded before the firſt judgment;* non allocatur; the firſt *judgment was affirmed;* for although it be erroneous, yet it is in force until it be reverſed; and this writ of error is not to reverſe the firſt judgment, but the ſecond judgment; the ſecond judgment was affirmed in error. A writ of error ſhould have been brought to reverſe the firſt judgment, and if it had been reverſed, yet it had not reverſed the ſecond judgment; for the *ſecond judgment was collateral and independant*, and it is executed. Jenk. 259. pl. 56. cites 5 Rep. 85. b. 38 Eliz. Penryn's caſe.

24. A *plaintiff in debt recovers and has execution*, and the *ſheriff ſuffers the defendant to eſcape.* The *plaintiff recovers againſt the ſheriff*,

riff, and afterwards the *judgment for the original debt is reverſed*, yet the judgment againſt the ſheriff is not reverſed. Jenk. 259. pl. 56.

25. *So where a defendant is taken in execution on a judgment* upon a recognizance, and the ſheriff ſuffers him to eſcape. Jenk. 259. pl. 56.

26. *But where the latter judgment depends upon the former*, as diſſeiſin upon an aſſiſe or a ſci. fac. to execute a judgment in debt, it is otherwiſe. Jenk. 259. pl. 56.

27. A *judgment* was given *in dower for the demandant*, and *another judgment that ſhe ſhall recover her damages*, and this *ſecond judgment* for the damages *was reverſed* by a writ of error, *becauſe ſhe did not aver that her huſband died ſeiſed*, in which caſe ſhe is to have no damages; yet the firſt judgment for the dower ſtood unreverſed. Sty. 290. Trin. 1651. Spittlehouſe v. Farmery.

(G. b) In what Caſes *collateral Things* ſhall be *reverſed by Reverſal of others*. [588]

Things *executed*.

[1. IF the *conuſee of a ſtatute recovers in detinue* by erroneous judgment *againſt the garniſhee, and ſues execution*; if the *garniſhee* in a writ of error *reverſes the judgment* given in the detinue, yet the *execution is not reverſed* (*) by this, becauſe it is a collateral thing executed. 7 H. 6. 42. Co. 8. Doctor Drury, 142. b.]

Br. Error, pl. 66. cites S. C.—— * Fol. 778. S. C. cited 5 Rep. 90. b. in Hoe's caſe, per Curiam.——8 Rep. 142. b. 143. b. cites S. C.

2. A. in execution for debt on erroneous judgment eſcapes, *debt is brought againſt the ſheriff on the eſcape*, and *plaintiff has judgment and execution*; afterwards the *firſt judgment is reverſed*, yet the *judgment againſt the ſheriff*, upon this collateral matter being executed, *ſtands good*. 8 Rep. 142. b. Paſch. 8 Jac. in Drury's caſe, cites 7 H. 6. 42. a.

S.P. 3 Mod. 325. Mich. 2 W. & M. B. R. per Curiam, Gold v. Strode.

3. If *a man is tried frank in treſpaſs to the damage of* 10 *l.* and the *defendant brings a writ of error* or attaint, and *pending this the plaintiff brings debt on the recovery of the* 10 *l. and recovers, no proteſtation being taken of the villeinage*, the *firſt judgment is reverſed* by error or attaint, the defendant ſhall not be eſtopped of the villeinage by the recovery in the action of debt; for *by the reverſal of the firſt action all that depended upon it is reverſed*. Br. Eſtoppel, pl. 197. cites 18 E. 4. 6.

4. If one to whom another is indebted be *outlawed*, and the *debtor pays the money to the queen*, and afterwards the *outlawry is reverſed*; now the creditor ſhall recover the debt againſt him. 5 Rep. 90. b. cites 7 E. 4. 2.

5. So if the *goods of an outlawed perſon are ſold by the ſheriff* upon a capias utlagatum, &c. and after the *outlawry is reverſed by writ of error*, the defendant ſhall have reſtitution of his goods. *But* if

the ſheriff by force of a *fieri fac.* ſells goods, and after the judgment is reverſed in writ of error, the defendant ſhall not have reſtitution of his goods, but the value of them that they were ſold for. And there are two *reaſons of this diverſity*, 1ſt, That if the ſale of the ſheriff by force of a fi. fa. ſhall be avoided by the ſubſequent reverſal of the judgment, no one will buy, and conſequently no execution will be made. 2dly, In the caſe of fi. fa. the ſheriff is compellable to levy the debt of the goods of the defendant, and therefore there is great reaſon that it ſhall ſtand; but in the caſe of cap. utlag. the ſheriff or eſcheator is not compellable to ſell them, but may keep them to the king's uſe. 5 Rep. 90. b. Trin. 42 Eliz. in Scacc. in Hoe's caſe.

6. *Recompence in value upon voucher once lawfully executed* ſhall not be diveſted, though the *title of the demandant to the land*, which he recovers, be *afterwards diſaffirmed and evicted.* 5 Rep. 90. b. 91. a. cites 3 E. 3. 51.

[589] See (R) pl. 2 in the notes.

(H. b) Judgment. Reſtitution.

[1 IN an *aſſiſe* if the *tenant loſes by verdict*, he ſhall be *reſtored to the lands*, if it be reverſed in a writ of error. 8 H. 6. 2.]

[2 So if the tenant in an aſſiſe loſes by verdict, he ſhall be reſtored *to the meſne iſſues*, if it be reverſed in a writ of error. 8 H. 6. 2.]

[3. So if the tenant loſes *in* a writ of *entry*, *ſur diſſeiſin*, and after it is reverſed for error, he ſhall be reſtored to the mean iſſues. Contra 1 E. 3. 22. but quære.]

4. Where an *erroneous recovery* is had *againſt tenant for life*, he in reverſion and the tenant ſhall have ſeveral writs of error, and judgment for one of them, and execution ſhall reveſt their eſtates. Jenk. 69. pl. 31. cites 9 R. 2. Error.

Br. Error, pl. 39. cites S. C.

5. By reverſal of the judgment *by the vouchee*, him in *reverſion*, *tenant by reſceipt*, &c. *by error, or attaint*, the *tertenant ſhall be reſtored.* Br. Reſtitution, pl. 6. cites 8 H. 4. 3.

S. P. reſolved accordingly 8 Rep. 96. b. Trin. 7 Jac. C. B. the third reſolution in Matthew Manning's caſe.—D. 363. Marg. pl. 24. cites it as adjudged accordingly 26 Eliz. But if the term be *extended upon an elegit*, and judgment reverſed for error, the termor ſhall be reſtored to the ſame term, and not to the value of it. Paſch. 17 Jac. B. R. Bathurſt's caſe.

6. Upon a *fi. fa.* the *ſheriff ſold a term* for years, by virtue of the writ venditioni exponas, and paid the money in court to the plaintiff; afterwards the judgment was reverſed for error. The queſtion was, if the term ſhould be reſtored or only the money? Manwood, Dyer, and Wray, thought the defendant ſhould not be reſtored to the term (it being lawfully ſold in default of the party), but that he ſhould have only the money for which it was ſold. D. 363. pl. 24. Trin. 20 Eliz. Anon.

7. If an erroneous judgment be reverſed, *as to the mean profits, it ſhall have relation until the time of the firſt judgment given*, for it is to favour juſtice, and to advance the right of him who hath wrong by the erroneous judgment; but if any *ſtranger hath done a treſ-*

a treſpaſs upon the land in the mean time, he who recovereth, after the reverſal, ſhall have an action of treſpaſs, and if the defendant pleads that there is no ſuch record, the plaintiff ſhall ſhew the ſpecial matter, and ſhall maintain his action, for as he is to anſwer the mean profits to the perſon who hath judgment of reſtitution, ſo the law gives him a remedy againſt all treſpaſſes in the interim. 13 Rep. 2. Hill. 27 Eliz. in Canc. Anon.

8. An *attaint* was brought *in C. B. of a verdict in B. R. if execution had been awarded in C. B. and the verdict had been afterwards diſaffirmed*, the court of C. B. might have awarded a writ of reſtitution, though if the verdict had been affirmed they could not have awarded execution, becauſe they had only tenorem recordi. Cro. Eliz. 371, 372. pl. 10. Hill. 37 Eliz. B. R. York v. Allen.

*[590]

9. A term of years appraiſed by a jury upon an *elegit* to an 100l. and *delivered in execution to the plaintiff himſelf* at the ſame value, was denied per tot. Cur. to be reſtored, though the ſurmiſe of the ſci. fa. was that the plaintiff had levied the 100l. of the profits of the land demiſed; *but* if *at the time of appraiſement* and *before the delivery*, he had tendered the 100l. en pais, or *after in court*, he ſhould have *audita querela. Mo. 873. pl. 1216. Hill. 11 Jac. C. B. Comyn v. Brandlyn.

A term ſold to J. S. in truſt for the plaintiff, was decreed to be reconveyed, the term being alleged to be of much

greater value. N. Ch. R. 143. Gaſcoign v. Sturt. ——— Where the ſale was to the party himſelf, reſtitution was granted, but otherwiſe in caſe of a *ſtranger*. Yelv. 180. Goodier v. Ince, cites Robotham's caſe and Worrel's caſe.

It is no more than a bare delivery *in ſpecie*, and ſo ought to attend the fate of the execution, and if that be reverſed to be reſtored in ſpecie again. Yelv. 180. S. C. ——— The *difference* is between the ſale and delivery upon *elegit to the party himſelf*, and a *ſale to a ſtranger upon a fi. fa.* For the fi. fa. gives authority to the ſheriff to ſell, and bring the money into court, and ſo ſhall not be reſtored on reverſal of the execution, becauſe the ſtranger comes to it duly by act in law. But the ſale and delivery of the leaſe to the party himſelf upon an elegit is no ſale by force of the writ delivered in extent, which being reverſed the party ſhall be reſtored to the term itſelf. Cro. J. 246. Goodyer v. Ince. S. C.

10. Debt was brought by A. *as adminiſtrator where he was executor*, and 82l. recovered; if the *money is levied*, A. may well retain it; per Doderidge. Cro. J. 394. pl. 6. Hill. 13 Jac. B. R. Slingſby v. Lambert.

11. A judgment was reverſed, and a *writ of reſtitution awarded to inquire what were the profits of the land a tempore judicii prædicti*, which was wrong, for *it ought to be what profits*, &c. *the plaintiff had taken colore judicii*, and thereupon a new writ of reſtitution was awarded, and upon the return thereof an exception was taken to the writ, that it ought to be what profits he had taken after the execution ſued, but adjudged that the writ was good, becauſe upon the reverſal of the judgment the *defendant is to be reſtored to all that he had loſt*, and what the plaintiff in the judgment had taken by colour thereof after the judgment. Cro. J. 698. pl. 5. Mich. 22 Jac. B. R. Sympſon v. Juxon.

Palm. 324. S. C. the defendant ought not to be anſwered for profits from the time of the firſt judgment, becauſe no execution was had againſt him till a year after, but

he ought to have a ſpecial ſci. fac. in ſuch caſe, and the former writ was quaſhed, and a ſpecial writ awarded. ——— If writ of reſtitution upon erroneous judgment reverſed be of profits taken 4 Auguſt (the day when the firſt judgment was given), it is ill, but it ought to be *virtute*, or *occaſione judicii*; for if he received the profits by any other way, thoſe ſhall not be reſtored. 2 Roll. Rep. 475. Mich. 22 Jac. B. R. Simmonds's caſe, and ſeems to be S. C.

12. *Reſtitution is of duty*, but *re-reſtitution is of grace*; per Twiſden and Kelyng juſtices. Raym. 85. Mich. 15 Car. B. R. The King v. Burgeſs, on judgment of forcible entry.

13. In caſe *judgment* be *reverſed* on a writ of *error*, a ſci. fa. lies on ſuggeſtion of a payment of the *money condemned* by the firſt judgment, and upon 2 nihils returned then reſtitution lies, and a writ of execution, though the party plaintiff in the firſt action knows nothing of the matter, and the caſe of WEEKS v. LONG in the Court was agreed to be ſo. 2 Show. 210. pl. 217. Trin. 34 Car. 2. B. R. Pigg v. Gardiner.

Show. 261. S.C. & S.P. by Holt Ch. J. and that if it did it muſt be by ſcire facias, and that ſo it was in 1 Cro. 328.

14. Writ of reſtitution lies not againſt any that are *not parties* to the record. 2 Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

15. Writ of reſtitution will not lie againſt *diſſeiſor* or *feoffee of recoveror in ejectment* after reverſal of the judgment, becauſe they are *ſtrangers* to the record; per Holt Ch. J. Pemberton aſſenting. 2 Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

16. If a *feme* recovers damages and then marries, and the *judgment is reverſed*, reſtitution lies againſt her and her huſband; per Holt Ch. J. 2 Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

[591] 17. By virtue of a *fi. fa.* on a judgment in debt *ſheriff ſold cattle*, it was moved on reverſal of the judgment to bring the money for which the cattle were ſold into court, for the benefit of the defendant, who was then a priſoner, but it was diſallowed; then it was moved to pay defendant as much money as the cattle were ſold for, but that was denied likewiſe, becauſe they might be *ſold for leſs than the real value*; and if the defendant brings *treſpaſs*, he will *recover the full value*, and therefore the plaintiff muſt agree with him to prevent ſuch action. 4 Mod. 161. Hill. 4 & 5 W. & M. in B. R. Weſtern v. Creſwick.

(I. b) *To what* Thing he ſhall be *reſtored* after Reverſal.

To a *collateral Thing executed.*

There is a *diverſity between mean acts done in execution of juſtice, which are compulſary, and voluntary acts*, and therefore if an erroneous judgment is given in debt, and the ſheriff by force of a fieri facias ſells a term of the defendant's, and

[1. IF a man *recovers damages, and hath execution by fieri facias*, and upon the fieri facias, the *ſheriff ſells to a ſtranger a term for years* of land of the party, and after the judgment is reverſed, he ſhall be *reſtored only to the money* for which the term was ſold, and not to the term itſelf, becauſe the ſheriff had ſold it by the command of the writ of fieri facias. Co. 8. DOCTOR DRURY, 143. MATTHEW MANNING, 19. b. Co. 5. HOE, 90. b. Dyer, 20 El. 363. 24.]

and the judgment is afterwards reverſed by writ of error, the party ſhall never be reſtored to the term, but to the money for which they were ſold; but where a man is outlawed, and a capias is directed to the ſheriff to take the body & bona, & catalla, quæ per inquiſitionem venerint in manus noſtras; if in ſuch caſe the ſheriff ſells the goods, and the outlawry is afterwards reverſed, the party ſhall be reſtored to his goods, becauſe the ſheriff was not commanded by the writ to ſell them; per Curiam. 8 Rep. 143. a. Paſch. 8 Jac. in Dr. Drury's caſe. —— 5 Rep. 90. b. Trin. 42 Eliz. in the Exchequer in Hoe's caſe. S. P. ——Goldſb. 130. pl. 9. Gawdy Serjeant cited the caſe of Hanmer v. Luddington, 20 Eliz. in which caſe he was of counſel, and that S. P. was adjudged therein accordingly. ——But if the term be extended on elegit, and judgment reverſed for error, the term itſelf ſhall be reſtored. Dy. 363. Marg. pl. 24. cites Paſch. 17 Jac. B. R. Bathurſt's caſe.

[2. If the *goods of an outlawed man are ſold by the ſheriff upon a capias utlagatum*, and after the *outlawry is reverſed* by writ of error, he ſhall be *reſtored to the goods* themſelves; becauſe the *ſheriff was not compellable to ſell* theſe goods, but only to keep them to the uſe of the king. Co. 5. Hoe's caſe, 90. b.] 2 Vern. 313. S. C. cited.

[3. If a man *recovers damages in* a writ of *covenant*, as the particular caſe was againſt B. *and hath an elegit of his chattels, and of the moiety of the lands*, and the *ſheriff* upon this writ *delivers a leaſe for years* of land which B. had *to the value of* 50l. *to him that recovered, per rationabile pretium & extentum* (as the words were) *to have as his own term in full ſatisfaction of* 50l. *part of the ſum recovered*; and after B. reverſes the ſaid judgment, he ſhall be *reſtored to the ſame term*, and not to the value; for though the ſheriff might have ſold the term upon this writ, yet here is no ſale to a ſtranger, but a delivery of the term to the party that recovered by way of extent, without any ſale, and therefore the owner ſhall be reſtored. Paſch. 16 Jac. B. R. between Buckhurst and Mayo, adjudged per Curiam; for the *ſheriff is not bound by this writ to ſell the land*, as he is in a fieri facias; *quære* this caſe, for this is a ſale, the whole term being delivered to the party according to the value in groſs, not yearly.] [592]

[4. The law would be the *ſame, if perſonal goods were delivered to the party per rationabile pretium & extentum*, upon the reverſal of the judgment he ſhould be reſtored to the goods themſelves, for the cauſe aforeſaid. Paſch. 16 Jac. in the caſe between Buckhurst and Mayo, agreed per Cur.]

5. If a man recovers by erroneous judgments, and *preſents to a benefice, or enters into the perquiſite of his villein*, and after the judgment is reverſed by writ of error, theſe being collateral things ſhall not be deveſted. 8 Rep. 142. b. cites it as ſo held in 4 H. 7. 11.

6. If an *advowſon comes to the king by forfeiture upon an outlawry*, and the *church becoming void the king preſents*, and then the *outlawry is reverſed for error*, yet the king ſhall enjoy that preſentment, becauſe there it came to the king as a profit of the advowſon; per Cur. Mo. 269. pl. 421. Mich. 30 & 31 Eliz. Beverley v. Cornwall.

7. *But if* a church be *void at the time of the outlawry*, and the preſentation is thereby forfeited as a chattel principally and diſtinct of itſelf, and then *the outlawry is reverſed; the party ſhall have reſtitution of the preſentation*; per Cur. Mo. 269. pl. 421. in S. C.

8. M. the *huſband ſeiſed in fee levied a fine*, and *afterwards*, 1 Mariæ, *was outlawed of treaſon*; the *conuſee conveyed the land to the crown*, and afterwards the daughter and *heir of the huſband reverſed the outlawry. The wife of M. ſued to have dower* within the five years after the outlawry reverſed, but long time after the five years after the fine levied. In this caſe it was reſolved, that ſhe was not barred by the five years after the fine, but *ſhe might have five years after the outlawry reverſed.* Mo. 639. pl. 879. 27 Eliz. in Canc. Menvil's caſe.

9. A. ſeiſed of land in fee was *attainted of high treaſon*, and the *king granted the land to B.* and afterwards *A. committed treſpaſs upon the land*, and afterwards *by parliament A. was reſtored, and the attainder made void, as if no act had been*, and ſhall be as available and ample to A. as if no attainder had been; and afterwards *B. brings treſpaſs* for the treſpaſs meſne; and it was adjudged in 10 H. 7. fol. 22. b. that the action of treſpaſs was not maintainable, becauſe that the attainder was diſaffirmed and annulled ab initio. 13 Rep. 20. Hill. 27 Eliz. in Canc. Menvil's caſe.

10. *And* in 4 H. 7. 10. it was holden, that *after judgment reverſed in a writ of error, he who recovered* the land by erroneous judgment *ſhall not have* an action of *treſpaſs for a treſpaſs mean.* 13 Rep. 20. in S. C.

11. When *a man recovers* any poſſeſſion or ſeiſin of land in any action *by erroneous judgment*, and afterwards *the judgment is reverſed*, the plaintiff in the writ of error ſhall have a writ of reſtitution, and that writ recites the firſt recovery; and the reverſal of it in the writ of error is, that *the plaintiff in the writ of error ſhall be reſtored to his poſſeſſion and ſeiſin una cum exitibus thereof from the time of the judgment*, &c. per Curiam. 13 Rep. 21. Hill. 27 Eliz. in Canc. in Menvill's caſe.

12. The *ſheriff ſells a term upon a ſcire facias*, and afterwards the *judgment is reverſed*; reſolved the party ſhall not be reſtored to the term, but to the money for which it was ſold, if the ſale be without fraud. Mo. 573. pl. 788. Mich. 41 & 42 Eliz. B. R. Anon.

[593] 13. When an erroneous judgment is given, and the judgment is afterwards reverſed by writ of error, *collateral acts executory are barred* by it; but *otherwiſe it is of things executed*; per Curiam. 8 Rep. 142. b. Paſch. 8 Jac. in Drury's caſe.

14. *As* if an action of *eſcape* be brought *againſt the ſheriff*, and the judgment is reverſed by writ of error, the action is gone, and *he may plead nul tiel record. But if* judgment and *execution be had* againſt the ſheriff before the reverſal, the ſame remains in force. Ibid. cites 34 H. 6. 2. b. and 21 E. 4. 23. b.

15. But there is a *diverſity between a recovery by prior title, and a reverſal of a judgment by writ of error*; as if a woman has judgment and execution in dower in ancient demeſne, and it is after reverſed in a writ of falſe judgment; and becauſe ſhe had held the lands for two years between the firſt judgment and reverſal, the value of the land is inquired, and taxed at 20 marks in a ſcire facias againſt her, ſhe cannot plead a recovery in a writ of right cloſe

cloſe in nature of a cui in vita. 8 Rep. 143. a. b. per Curiam, cites 20 E. 3. Scire Facias, 123. in Herbert's caſe.

16. No reſtitution of goods taken on an erroneous execution *for which damages had been* already *recovered in an action of treſpaſs.* Raym. 74. Paſch. 15 Car. 2. B. R. Sumer v. Felgate. 2 Sid. 125. S. C. but S. P. does not appear. —Lev. 95. S. C. related by Twiſden J. but S. P. does not appear.

17. The defendant in error recovered 100l. damages in debt in C. B. and there *had an elegit into the county of W. reciting that another elegit iſſued into London,* and was *returned nihil.* And *upon a teſtatum eſt, it was commanded to extend all the goods and lands;* whereupon the *ſheriff returned, that he took a leaſe for years of tithes, which he delivered to him, ut bona & catalla ſua, for the ſaid debt.* The writ being with a teſtatum, whereas there was not any writ before awarded into London, was held to be error; and it was reſolved, that *the ſale and delivery of the leaſe to the plaintiff himſelf upon an elegit was no ſale,* by force of the writ delivered in extent, which being reverſed, the party ſhall be reſtored to the term itſelf. Cro. J. 246. pl. 4. Trin. 8 Jac. B. R. Goodyere v. Ince. Brownl. 107. Goodier v. Jounce, S. C. accordingly. But it had been *otherwiſe if the ſale had been to an ſtranger* by the ſheriff of the term for an 100l. according to the opinion of 28 Eliz. Dy. for it is the party's folly that he does not pay the judgment; and if ſuch ſales ſhould be made void, none ſhould buy goods of the ſheriff, by reaſon whereof many executions would remain undone; and this by the opinion of the whole Court.

(K. b) In Judgments and Executions.

Fol. 779.

[1. IF A. *recovers in a baſe court within the county palatine* of Cheſter, and upon this a writ of *error is brought there before the chief juſtice,* and upon this the *firſt judgment was reverſed;* and *by the cuſtom in ſuch caſes, he at whoſe ſuit it is reverſed ought to have coſts;* and there *upon the reverſal judgment is given that the party ſhall be reſtored to all that he had loſt, but no judgment is given upon the roll certified in the writ of error in B. R. that any judgment was given for the coſts, and yet a ſcire facias is certified for levying the coſts, adjudged* this is error. Trin. 9 Car. B. R. between FODEN AND MADDOCK, per Cur. Intratur Paſch. 8 Car. Rot. 397. But at another day upon examination of the record it appeared to be well.] [594]

[2. If *judgment* be given *againſt the bail,* and after a *ſcire facias is brought againſt the bail, and a judgment againſt them, and alſo* judgment given againſt them *for coſts de incremento,* this is erroneous; becauſe no coſts ought to be given in a ſcire facias. Hill. 11 Car. B. R. between HARDY AND BROWNE, adjudged per Curiam in a writ of error upon ſuch judgment in Rippon court. Intratur Trin. 10 Car. Rot. 979.]

[3. In a *formedon* in diſcender, if the demandant *demands one meſſuage, one garden, ten acres of meadow, and ten acres of paſture;* and the *tenant as to the meſſuage, garden, two acres prati & paſturæ, parcel of the ten acres prati, and ten acres paſturæ, pleads a feoffment of the father of the demandant with warranty and aſſets,* and *as to the* Cro. C. 471. pl. 3. Goodier v. Platt, S. C. but not exactly S. P. —See tit.

Judgment (X) pl. 8. S. C.

the reſidue, he traverſes the gift, &c. to which the *demandant as to the firſt plea takes iſſue upon the aſſets, and* this is *found for the demandant*, upon which *judgment is given, that the demandant ſhall recover ſeiſin of the ſaid meſſuage, garden, and two acres prati & paſturæ; and as to the reſidue the demandant relinquiſhes his iſſue.* This judgment is erroneous, becauſe it does *not appear how much of the two acres was meadow, and how much paſture;* ſo that the ſheriff knew not of what thing to give the demandant ſeiſin. Paſch. 13 Car. B. R. between PRAT AND GOODIER, adjudged in a writ of error upon ſuch judgment in Banco, and this reverſed accordingly. Intratur Hill. 11 Car. Rot. 349.]

Cro. C. 481. pl. 4. South v. Griffith, S. C. all the juſtices præter Hobart held, that both in C. B. and B. R. a capias againſt

[4. *In* an *action in Banco*, if *judgment* be *given againſt the principal, and after a ſcire facias is brought againſt the bail, and* upon this *judgment is given againſt the bail;* yet if there be *not any capias of record ſued againſt the principal before the ſcire facias* brought, this is erroneous. Paſch. 14 Car. B. R. between GRIFFITH AND SOUTH, adjudged in a writ of error upon ſuch judgment, and judgment againſt the bail was reverſed accordingly. Intratur, Hill. 13 Car. Rot. 559.]

the principal ought to be taken forth and returned non eſt inventus, otherwiſe no ſcire facias ought to be againſt the bail. ——— Jo. 396. pl. 4. S. C. but S. P. does not appear. ——— Error *by the bail, for that judgment was given againſt him upon a ſcire facias where no capias was awarded againſt the principal* before the ſcire facias awarded againſt him. And it was held, that the writ of error well lay in this caſe for the bail. And *the judgment in the ſcire facias was reverſed*; and the like writ was allowed between COLES AND BABINGTON, Cro. E. 733. pl. 65. Mich. 41 & 42 Eliz. in Cam. Scacc. Price v. Price. ——— Cro. E. 730. pl. 69. in Cam. Scacc. Cockeyn v. Lady Hawkins. S. P. held that the writ well lay, for that the ſuit againſt the bail is within the intent of the ſtatute of 27 Eliz. and is in the nature of an action of debt, and judgment was affirmed. ——— Same caſes of Cro. E. cited Comb. 325. Paſch. 7 W. 3. B. R. but Holt Ch. J. ſaid, he did not approve thoſe caſes, but preferred the latter authority of BARCOCK v. THOMPSON, which ſee at (G. a) ſupra, pl. 2. ——— See tit. Bail (B) pl. 1. S. C. and the notes there.

5. If the *ſheriff makes execution in the franchiſe*, this is good; for he is officer immediate to this court. Br. Error, pl. 153. cites 11 H. 4. 9. per Hill.

6. *But* per Norton, if *bailiff of the franchiſe makes execution in the guildable*, this is error, quod non negatur. Ibid.

7. After *recovery* in debt *of* 400 *l. a fi. fa. iſſued, upon which* 100 *l. was levied and returned*, afterwards a *ca. ſa. iſſued for the whole* 400 *l.* and thereupon the defendant was outlawed. It was aſſigned for error that the ca. ſa. *ought to have been only for* 300 *l.* and the judgment of execution was reverſed, becauſe the levying of the 100 l. was returned of record upon the ſi. fa. Mo. 598. pl. 819. Mich. 34 & 35 Eliz. Wells v. Denny.

(L. b.) *What* Act will *aid an Error.*

Appearance.

[1. IF a *ſummons* be *not well made*, if *he appears of record*, this takes away the error, for the ſummons is affirmed. 42 E. 3. 30.] Br. Error, pl. 25. cites S. C. —— Br. Faux Judgment, pl. 4. cites S. C.

[2. If a man was *never ſummoned*, yet if he appears it is not error. 46 E. 3. 30.] Br. Error, pl. 25. cites S. C. —— Br. Faux Judgment, pl. 4. cites S. C.

[3. If an *omiſſion* be made *of any writ or proceſs, or one writ awarded in lieu of another*; yet if the judgment be not given thereupon, but after the *party appears and pleads to iſſue, and judgment is given upon the verdict*; this is not (*) erroneous, becauſe he had not taken advantage of this before pleading to iſſue. 3 H. 6. 9. for he had day by the roll, and ſo no diſcontinuance. 29 E. 3. 31. b.] (*) Fol. 780.

[4. If a man in Banco brings a *bill upon* his *privilege, but hath no writ of attachment of privilege*, yet if the defendant after appears and pleads, this ſhall be helped by the appearance. Trin. 13 Jac. B. R. between HAVERT AND GIBBONS.] Roll. Rep. 205. pl. 7. S. C. & S. P. accordingly, per Coke Ch. J. quod fuit conceſſum, per Haughton J. ——— 3 Bulſt. 61. S. C. but as to this error Curia adviſare vult.

[5. If a man be *indicted, and no addition is given to him* as ought, yet if the defendant appears and pleads to iſſue, and this is found againſt him; this is helped, for the addition is ordained by the ſtatute, for that the party which is to be outlawed ought to have notice of it, and here he hath notice, & conſtat de perſona by the appearance. Hill. 18 Jac. B. R. JOHNSON'S CASE adjudged, this being moved in arreſt of judgment.] Cro. J. 609. pl. 5. S. C. adjudged. — 2 Roll. Rep. 225. S. C. adjudged per totam Curiam. — See tit. Additions, (P) per totum.

[6. *In debt if a capias be the firſt proceſs, and not a ſummons*, as ought to be by the law, though the defendant appears and pleads to iſſue, and this is found againſt him, upon which judgment is given, yet this miſawarding of the proceſs is erroneous and not helped by the appearance. Paſch. 3 Jac. B. R. between BANKS AND PEMBLETON adjudged in a writ of error. Paſch. 5 Jac. B. R. between COOK AND BALLARD adjudged, which intratur Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between MOILE AND CATCHNUD adjudged, which intratur Trin. 4 Jac. Rot. 1609. Contra Paſch. 11 Jac. B. R. between INCH AND GOODFIELD adjudged.] See infra, (G. c) pl. 4. — See tit. Cuſtoms, (I. 2.) pl. 11. and tit. Proceſs, (D) pl. 1, 2. and the notes there.

[7. If a man be *ſummoned to appear in an inferior court, and* the defendant *does not* appear, and notwithſtanding the *plaintiff puts in a declaration* and declares againſt him, and after the *defendant appears*,

appears, and after makes default, by which *judgment is given againſt him by default*, the appearance hath helped the putting the declaration before appearance, and ſo it is not erroneous. Trin.
[596] 15 Jac. B. R. between HARRIS AND GOODALE in a writ of error upon a judgment in Ipſwich adjudged, and the judgment affirmed per Curiam. But Houghton ſaid, that this was neither a miſcontinuance nor diſcontinuance; but Montague and Doderidge ſaid, that this was a miſcontinuance.]

[8. If in *treſpaſs for an aſſault and battery in an inferior court*, if there be a *plaint entered, and a declaration* before any appearance of the defendant, *and after the defendant appears without proceſs* and *pleads to iſſue*, and this is *found for the plaintiff, and judgment accordingly*, this is erroneous, and not helped by the appearance or pleading, inaſmuch as there was a declaration againſt nobody, the defendant not being then in court. Mich. 14 Car. B. R. between BROWN AND CLAGG adjudged in a writ of error upon ſuch judgment in the court of Marſhalſea; and the judgment reverſed accordingly. Intratur Paſch. 14 Car. Rot. 325.]

(G. c) pl. 23. S. C. [9. If an *action* be brought *in an inferior court againſt* J. S. if the *plaintiff declares againſt him in cuſtodia of the ſerjeant* and miniſter of the Court, and it *does not appear that the ſerjeant had any proceſs or precept* to arreſt him, and the *defendant appears and demurs for this cauſe upon the declaration*, and upon this, *judgment is given againſt the defendant*, this is erroneous, for upon his appearance he pleaded this matter. Trin. 1649. between LAWE AND DODDESWORTH adjudged in a writ of error upon a judgment in York (as it ſeems), and the judgment reverſed accordingly.]

Br. Faux Judgment, pl. 4. cites S. C. 10. He who appears *at the ſummons, or is eſſoined upon the ſummons*, ſhall not ſay after that the ſummons wanted form, or that there is falſe Latin, or that he was not ſummoned, &c. Br. Error, pl. 25. cites 46 E. 3. 30.

4 Le. 28. pl. 145. Savage v. Knight, S. C. in totidem verbis; but adds that it was ſaid, that after the defendant appeared, a plaint was entered; but it was anſwered, that this did not help the matter; for there ought to be a plaint out of which proceſs ſhall iſſue, as in the ſovereign courts, out of original writs. 11. Error was brought of a *judgment* given *in an inferior court, becauſe there was no plaint entered, and upon the record nothing was entered but that the defendant ſummonitus fuit*, &c. where *the firſt entry ought to be, A. B. queritur verſus C. D.* &c. and the ſummons ſo entered is not any plaint; and for that cauſe judgment was reverſed. Le. 185. pl. 260. and 302. pl. 415. Mich 29 & 30 Eliz. Knight v. Savage.

12. In error on a *judgment in account* it was aſſigned (amongſt others) that *the writ* of account *was brought in Norfolk*, and the *cap' ad computandem was awarded to London*; whereas it ought to have been to the ſheriff of the county where the action was brought. Coke ſaid it was helped by the ſtatute of jeofails, and he appeared upon this proceſs, and ſo had made it good; and error in proceſs cannot be alleged after in nullo eſt erratum pleaded; for if it had been alleged, the other party might have alleged diminution; the judgment was affirmed. Cro. E. 83. Hill. 30 Eliz. B. R. in caſe of Robſert v. Andrews.

13. A

13. A *capias* was directed *to the ſheriff of B.* and it was *returned by one who was not ſheriff*, and this was held a manifeſt error; but becauſe the defendant had appeared after, and pleaded, it was held not material, and that his *appearance had made it good.* Cro. E. 582. pl. 6. Mich. 39 & 40 Eliz. B. R. Thoroughgood v. Scroggs.

14. Error of a *judgment in debt*, becauſe the *original writ had not the ſheriff's name to the return* thereof; but in regard the defendant had appeared, and pleaded nul tiel record, it was holden not material, although the writ had not been returned, and after appearance he ſhall never take advantage of the *miſawarding of the mean proceſs*; the judgment was affirmed. Cro. E. 767. pl. 6. Trin. 42 Eliz. B. R. Dabſton v. Thorp. [597]

15. The appearance of the defendant *will help* and ſalve *a miſcontinuance of proceſs*, *but* there is no caſe in the law to prove that any appearance will help and ſalve a diſcontinuance of proceſs; per Williams J. and the whole Court agreed clearly in this, *that no appearance will help* and ſalve *a diſcontinuance* of proceſs. Bulſt. 143. Trin. 9 Jac. in caſe of Bradley v. Banks.

The appearance of the party will help miſcontinuance of proceſs; per Roll Ch. J. Sty. 237. Mich. 1650.

16. Error aſſigned was, that the *writ was in debt for* 40 *l.* and *the capias and all the proceſs to the return of the pluries capias accordingly*; and *then the entry was, that querens obtulit ſe in placito debiti*, 40*s.* and upon default of the defendant an *exigent was awarded*, and the *defendant after appeared and pleaded and confeſſed the action*; and this was held no error, being helped by the appearance; for as an appearance ſaves defaults in mean proceſs, ſo it ſaves the default of the continuance by an obtulit ſe; the judgment was affirmed. Cro. J. 311. pl. 10. Mich. 10 Jac. B. R. Lovelace v. Jeniper. Jenk. 341. pl. 99. S. C.

17. A *judgment in a ſecond deliverance* given in C. B. was reverſed, becauſe there *was not any writ of ſecond deliverance certified*, although it was awarded upon the roll, and the parties appeared and pleaded to it. Cro. J. 424. pl. 8. Paſch. 15 Jac. B. R. Newman v. More.

18. In error of a *judgment in dower* it was aſſigned, that there *was not any original writ nor warrant of attorney for the defendant.* But upon diminution alleged *the writ was certified*; but for the *warrant of attorney, becauſe it was not aſſigned of record that diminution might be alleged, it was held that it was now aſſignable.* Cro. C. 351. pl. 16. Hill. 9 Car. B. R. Wickham v. Enfield.

19. *Audita querela was brought, and a ſcire facias thereupon bearing date before the audita querela*, and the *defendant appears*, and for this cauſe demurs. The Court held that this fault is cured by the appearance; for audita querela is more properly a commiſſion than a writ, and *if the party be in court, the matter ought to be examined without inquiring into the nature of the proceſs* by which he was brought in, for it might be that he appeared without proceſs. Sid. 406. Hill. 20 & 21 Car. 2. B. R. Vaughan v. Loyd.

Vent. 7. S. C. and the demurrer diſallowed. But it was ſaid, that if an *original bears date on a Sunday*, or the like, the appearance of the party would not help it.

20. *But*

Vent. 7. S.C. & S.P. agreed per Cur. for there the

20. *But* it was agreed that a *ſcire facias upon a judgment differs*, and that a fault therein will not be cured by appearance, becauſe the ſci. fac. *is in nature of a declaration.* Sid. 406. in S. C.

ſci. fac. is the foundation, and quaſi an original, and the judgment is given upon it; but here the ſci. fac. is only to bring in the party to anſwer, and in the nature of a meſne proceſs, and the judgment is given upon the aud. quer.

Vent. 249. Mich. 25 Car. 2. B.R. Anon. S. P. ruled accordingly. —S. P.

21. If an *inferior court awards a capias where no ſummons was firſt returned*, as there ought to have been, yet this fault in the proceſs is aided by appearance, and is not aſſignable on a writ of error; per Hale Ch. J. Vent. 220. Trin. 24 Car. 2. B. R. in caſe of Read v. Wilmot.

per Cur. for by appearance all defaults are ſaved, though it be in an inferior court, and ſo Wylde ſaid it had been of late conſtantly ruled, contrary to Cro. J. 108. Pratt v. Dixon. Freem. Rep. 468. pl. 642. Trin. 1678. Wheeler's caſe.

[598]

22. In error of a judgment out of an inferior court an exception was taken, that the *firſt proceſs was a capias*; ſed non allocatur; becauſe it was cured by appearance. 2 Lutw. 953. Mich. 3 Jac. 2. Buſzard v. Bull.

23. In error to reverſe a *judgment in an inferior court*, it was aſſigned, *that the proceſs of attachment was returned* thus, *nihil habet ubi ſummon' poteſt, &c. and thereupon a capias awarded*, which was irregular, for an alias attachment ſhould have been awarded, and there was *not any cuſtom returned to warrant the uſage of a capias in proceſs*, for that is given by ſtatute, which extends not to inferior courts; but the Court held both theſe errors to be cured by the appearance of the defendant. Carth. 206. Hill. 3 W. & M. Boſon v. Phyler.

24. Appearance helps only when the party comes and *pleads to iſſue*, not when the party comes in and *challenges the proceſs* upon the account of its defect; per Eyre J. 1 Salk. 59. pl. 2. Trin. 6 W. & M. in B. R. in caſe of Wilſon v. Laws.

25. A *ſummons* in treſpaſs out of the court of *Ely* was *returnable generally the ſame day*, and a return the ſame day of a ſummoneri, and an attachment and return the ſame day of a nil, and then a *capias returnable the ſame day*, and thereupon brought in in cuſtody, declaration, plea, demurrer, and judgment, and writ of inquiry executed and returned, and judgment final, all in one day; reſolved, that the *bare appearance upon the capias* being compulſory, did not help this error, becauſe it was what the defendant *could not avoid.* 12 Mod. 523. Trin. 13 W. 3. Biddolph v. Veal.

26. A *writ of error was executed the ſame day with the return of the pone*, and ſo might be before any pone iſſued out, and judgment was reverſed for this error; for no appearance and pleading can help that. 12 Mod. 524. Trin. 13 W. 3. Biddolph v. Veal.

What defects are aided by appearance, ſee tit. **Default**, (E. 2).

(L. b. 2) Aided by Intendment.

1. SHeriff returned upon a capias *cepi corpus*, and the *record is that he always appeared by attorney*, and per Cur. this is not error; for it ſhall be now intended that it was by aſſent of the parties, and then no error; quod nota. Br. Error, pl. 184. cites 21 E. 4. 77.

2. Error upon outlawry *of felony upon indictment*, which was, *that preſentation was before A. B. and C. D. juſtices of peace, that J. S.* &c. *ſuch a day*, &c. and *did not ſpeak of commiſſion of oyer and terminer of felonies*; and per Huſſey and Jenny the omiſſion of it is error; but Fairfax contra; for it ſhall be *intended by theſe words, juſtices of peace*, that they have commiſſion; but Huſſey ſaid, No; for where *mayor, ſteward*, or the like, *is coroner, indictment taken before A. B. mayor* or ſteward ſuper viſum corporis, *is not good without this word (coroner)*. Br. Error, pl. 186. cites 22 E. 4. 12.

(M. b) Pleading *abateable*. [599]

What Act *will help* an Error.

[1. IF in *treſpaſs of charters* taken, the plaintiff does *not count of the quantity of the land compriſed* in the charters, (admitting that he ought,) yet if the *defendant does not take advantage* thereof, *but pleads*, and judgment is given againſt him, this helps the error, and he ſhall not aſſign it for this. 20 Aſſ. 3.] Br. Error, pl. 119. cites S. C. but S. P. does not appear.—F.N.B. 21. (E) S. P. accordingly, but adds, tamen quære.——See (P. b.) pl. 12.

[2. If a *feme ſole* brings treſpaſs, and *recovers*, and a writ of *inquiry of damages is awarded*, and *before the return* thereof the *plaintiff takes huſband*, and after the *writ is returned*, and *judgment given thereupon without any exceptions* taken by the defendant, he ſhall not have advantage of this in a writ of error, becauſe the writ was only abateable by plea. Mich. 40, 41 Eliz. B. R. between SMITH AND ODYHAM adjudged.]

[3. If an *action* be brought *againſt Sir Francis Forteſcue militem & baronettum*, and *he appears and pleads to iſſue*, and a *verdict and judgment* is given *for the plaintiff*, the defendant in a writ of error ſhall not have advantage to *ſay, that he was a knight of the Bath, not ſo named*, inaſmuch as he had *appeared to the other name and pleaded*, and ſo had concluded himſelf. Paſch. 16 Jac. B. R. between MARKHAM AND SIR FRANCIS FORTESCUE adjudged.] Cro. J. 482. pl. 15. Forteſcue v. Markham. S. C. adjudged.——Roll. Rep. 450. pl. 12. S. C. & S. P. adjudged accordingly.——See (F. c) infra, pl. 5. S. C.——And ſee tit. Eſtoppel (L) pl. 12. S. C.

[4. Upon a *trial between a peer* of the realm *and another*, the *ſheriff does not return any knight* as he ought; if the *peer does not challenge the array*, but the jury gave a verdict, he ſhall not have

advantage thereof afterwards. Paſch. 9 Car. between the LORD POWIS AND KIRTMAN, adjudged in a writ of error upon a judgment in Banco, for *he may waive his privilege and the trial be without any knight.*]

5. It is a good rule that *where any matter may be pleaded in abatement it ſhall never be aſſigned for error.* Per Holt Ch. J. Carth. 123. cites 2 Saund. 212. and 48 E. 3. 10. b. 3 H. 4. 6.

[600] (N. b) What Act will *help* an Error, *where the Error appears of Record.*

[1. IF a man be *indicted for a conſpiracy*, and *no year or place alleged* of the conſpiracy, though the defendant did not take exception to it, but *pleaded not guilty*, and judgment is given againſt him, this pleading ſhall not help the error. 24 E. 3. 35. b. 36. adjudged.]

[2. *So if* a man be *indicted as of a conſpiracy, where the matter ſhewed it was extortion and not conſpiracy*, though the defendant pleaded not guilty, and a judgment is given againſt him, yet this ſhall not help the error, for this appears upon the record. 24 E. 3. 36. adjudged.]

END OF THE NINTH VOLUME.